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42 Cal.2d 443

THOMPSON v. LACEY.

L. A. 22890.

Supreme Court of California.
In Bank.
March 5, 1954.

Action for death of plaintiff's husband while riding in automobile driven by defendant's decedent. The Superior Court, San Diego County, C. M. Monroe, J., rendered judgment of nonsuit, and plaintiff appealed. The Supreme Court, Carter, J., held that either mileage allowance received by branch manager from employer for transporting sales supervisors under his supervision to series of regular monthly meetings held by employer or the mutual economic benefit derived both by employer and employees from attendance at such meetings afforded sufficient basis for holding that sales supervisor was a passenger for compensation and not a guest of branch manager within meaning of Vehicle Code, § 403.

Judgment reversed.

Prior opinion 258 P.2d 550.

1. Automobiles 🔑181(1)

Driver of automobile is not liable for damages sustained by guest unless such damages were caused by intoxication or wilful misconduct of driver. Vehicle Code, § 403.

2. Automobiles 🔑181(2)

One who has given compensation for transportation within meaning of automobile guest statute is designated as a "passenger" for purpose of distinguishing between him and a "guest" who is carried gratuitously. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Guest" and "Passenger".

3. Workmen's Compensation 🔑2168

An employee, injured in course of employment by negligence of his employer's agent, may recover damages from the agent in a civil action, since agent is considered a third person or a person other than employer under Workmen's Compensation Law. Labor Code, § 3852 et seq.

4. Automobiles 🔑181(2)

Transportation may be for compensation within meaning of automobile guest statute, even though the compensation is paid by someone other than the person transported. Vehicle Code, § 403.

5. Automobiles 🔑181(2)

Either mileage allowance received by branch manager from employer for transporting sales supervisors under his supervision to series of regular monthly meetings held by employer or the mutual economic benefit derived by both employer and employees from attendance at such meetings afforded sufficient basis for holding that sales supervisor was a "passenger" for compensation and not "guest" of branch manager within meaning of automobile guest statute. Vehicle Code, § 403.

6. Automobiles 🔑181(2)

Where automobile driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing transportation, rider is a "passenger" for compensation within meaning of automobile guest statute and driver is liable to him for ordinary negligence. Vehicle Code, § 403.

◆

Luce, Forward, Kunzel & Scripps and Edgar A. Luce, Jr., San Diego, for appellant.

Gray, Cary, Ames & Frye, Ward W. Waddell, Jr., and Alfred S. Wilkins, San Diego, for respondent.

CARTER, Justice.

A judgment of nonsuit, the subject of this appeal, was entered in plaintiff's action for the death of her husband, Virgil T. Thompson, allegedly caused by the negligence or wilful misconduct of Donald Kerns in operating a car in which Thompson was riding. The administrator of the Kerns estate is defendant, plaintiff having dismissed the action as to defendants Kelley-Moyer Transportation Company and Charles Fogle.

The sole issues are whether Thompson was a guest or passenger in the car being driven by Kerns when Thompson, riding therein, met his death, and, if the former, whether Kerns was guilty of wilful misconduct thus being liable although Thompson was a guest.

[1, 2] No person who as a guest accepts a ride in a vehicle without giving compensation has a right of action for damages against the driver unless he establishes that the damages were caused by the intoxication or wilful misconduct of the driver. Vehicle Code, § 403. "The designations 'passenger' and 'guest' have been adopted for the purpose of distinguishing a person who has given compensation within the meaning of section 403 of the Vehicle Code from one carried gratuitously." Whitmore v. French, 37 Cal.2d 744, 746, 235 P.2d 3, 5. No question concerning Kerns' negligence is presented.

[3] At the time of the accident Kerns was driving his car with Thompson riding in the front seat with him and Mr. Dreis in the back seat. In endeavoring to pass a car ahead of him in foggy weather, Kerns' car collided head on with an oncoming truck. Kerns, Thompson and Dreis were employees of Arrowhead and Puritas Water Company and were en route from San Diego to Los Angeles.[1] Kerns was manager for the company in the San Diego area. Under his supervision were Dreis and Thompson, each of whom was a sales supervisor for a portion of that area; their duty was to supervise the selling and delivery activities of salesmen selling and delivering bottled water, the company's product. Before the day of the accident, Kerns, Thompson and Dreis received notice from the company requesting that they attend a company meeting in Los Angeles of all the branch managers and sales supervisors. The meeting was one of a series of regular monthly meetings inaugurated in 1950 (prior to that time the meetings had been irregular) and it was necessary that all three attend because the matter to be considered was important to them and to the company in their work and its business. While there was no "set" policy for transportation of the employees to the meetings, that is, they could come by private car or public transportation, as they chose, the company knew Thompson and Dreis had ridden with Kerns in the latter's car to attend several meetings and did not object. The company reimbursed the employees for expenses incurred in coming to the meetings, including an allowance of 7 cents a mile for the first 500 miles when a private car was used. The employee driving his car to the meeting would get the mileage, and those riding with him would not, which was "more economic" for the company as expressed by Swanburg, the company's manager of all branches, and is plainly inferable from the evidence.

[4, 5] We have a situation then in which several employees of a company, in the course of their employment, are riding in the car of one of the employees for the purpose of attending a meeting called by the company in connection with its business. The employee owning the car re-

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[1] The company is not a party to the action and it may be noted that an employee injured in the course of his employment by the negligence of his employer's agent may recover damages from the agent in a civil action, as the agent is considered a third person or a person other than the employer under the workmen's compensation laws. Wallace v. Pacific Electric R. Co., 105 Cal.App. 664, 288 P. 834; see Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043; Labor Code, § 3852 et seq.

ceives mileage for its use in the employer's business from the employer. Although it may be small, clearly the owner of the car receives a tangible benefit from the employer. While he would have received the same amount whether or not he carried other employees with him, the fact remains that he did receive it under conditions in which he was transporting other employees on the employer's business and his employer knew he engaged in that practice. It may be inferred that Thompson and Dreis went to the meeting with Kerns because they considered a suggestion by him that they do so as a command inasmuch as he was their supervisor. The company thereby received an economic benefit because it would pay less traveling expenses to its employees attending the meeting by reason of the arrangement whereby only one employee (Kerns, the owner of the car) would receive mileage, since the employer, in effect, was paying the one employee to bring the others to the meeting. This means that the one driving the car would receive a benefit for supplying transportation to a fellow employee, not from the fellow employee but from his employer. We know of no authority, however, which holds that compensation for the transportation must be paid by the one transported in order to make it transportation for compensation under section 403 of the Vehicle Code. The compensation may be paid by someone other than the rider. Malloy v. Fong, 37 Cal.2d 356, 232 P.2d 241; Whitechat v. Guyette, 19 Cal.2d 428, 122 P.2d 47.

Even if Kerns had not received mileage there is a sound basis for holding Thompson to be his passenger rather than a guest. It was for the mutual economic benefit of all, Thompson, Kerns, Dreis, and the company, that the three go to the meeting because of the relationship between them and the nature and purpose of the meetings and the regular occurrence thereof. In Malloy v. Fong, supra, 37 Cal.2d 356, 232 P.2d 241, defendant Fong was transporting a child to a defendant church playground, performing the duties of defendant Antisdale, the pastor of the church, when plaintiff was injured as the result of Fong's negligence. We there said, 37 Cal.2d at page 376, 232 P.2d at page 253: "It is immaterial that Fong performed the services gratuitously; he performed those services as the agent of the Presbytery in discharging Antisdale's duty to transport the children to the playground for their recreation period. It is sufficient therefore if Antisdale, the Church, or the Presbytery received a benefit from the transportation of plaintiff to the playground.

"The transportation of plaintiff to the playground for the recreation period was not an isolated transaction; it was an integral part of the conduct of the Bible school as one of the normal activities of the San Mateo Presbyterian Church. It is undisputed that the attendance of the children at the Bible school was at least of mutual benefit to the children and the Church. The conduct of such schools was authorized by the Church laws, and it was to the interest of the Church and the Presbytery that parents send their children to the school. Antisdale had a large number of handbills printed urging attendance at the school. The children had recently been released from secular schools for their summer vacation, and many parents wanted their children to spend the time in the open air. It is not an unreasonable inference that the daily open-air recreation periods were designed to induce these parents to send their children to the school and did induce them to do so. Such an inference negatives the theory that no compensation was given for the transportation to such recreation periods. '(B)enefits or considerations other than cash or its equivalent may be "compensation," * * *'" Similarly here it may be inferred that Kerns was acting for the company in transporting Thompson and Dreis to the meeting and that the transportation was for the mutual economic benefit of all concerned. See Whitechat v. Guyette, supra, 19 Cal.2d 428, 122 P.2d 47.

[6] It may reasonably be inferred that while the benefits received by Kerns, the driver, may not have been the sole motivating influence, they were motivating influences of a substantial character. "Where, * * * the driver receives a tangible bene-

fit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. See Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704; Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53; Whitechat v. Guyette, 19 Cal.2d 428, 122 P.2d 47; Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914; Kertstetter v. Elfman, 327 Pa. 17, 192 A. 663, 664–666." Whitmore v. French, supra, 37 Cal.2d 744, 746, 235 P.2d 3, 5; see, also, Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704; Humphreys v. San Francisco Area Council, Boy Scouts of America, 22 Cal.2d 436, 139 P.2d 941.

The instant case has factors not present in Druzanich v. Criley, supra, 19 Cal. 2d 439, 122 P.2d 53, which support plaintiff's position here.

Inasmuch as we have concluded that there was sufficient evidence to show that Thompson was a passenger it is not necessary to consider plaintiff's contention that the evidence is sufficient to show wilful misconduct on the part of Kerns.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

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42 Cal.2d 352

HARLESS v. CARTER.

L. A. 22469

Supreme Court of California.
In Bank.
March 1, 1954.

Action by owner of unforeclosed street improvement bond for partition of realty allegedly subject to lien of such bond. The Superior Court, San Diego County, William A. Glen, J., entered judgment for defendant, and plaintiff appealed. The Supreme Court, Edmonds, J., held that statute making presumption that liens of street improvement bonds are extinguished at expiration of four years after due date of bonds or of last installment thereof, or on January 1, 1947, whichever is later, conclusive in favor of bona fide purchasers thereafter, operated to extinguish plaintiff's lien rights under bond issued prior to 1930, notwithstanding fact that during period between effective date of statute and January 1, 1947, property in question was held by state for tax delinquencies, where plaintiff had remedy of sale by city treasurer during such period but took no steps to pursue such remedy.

Judgment affirmed.

Prior opinion 254 P.2d 172.

1. Municipal Corporations 🔑408(2)

The 1945 enactment establishing a presumption as to extinguishment of any lien upon real property to secure payment of bonds representing a public improvement assessment at expiration of four years after due date of such bonds or of last installment thereof or of last principal coupon attached thereto, or on January 1, 1947, whichever is later, may be constitutionally applied to liens of bonds issued prior to its effective date. Civ.Code, § 2911.

2. Municipal Corporations 🔑564

Statute dealing with demand upon city treasurer to sell property to satisfy bond delinquencies, which provides that if act or law establishing power of public sale fails to prescribe time within which such official may act, official may sell at any time prior to expiration of four years after due date of bond or of last installment thereof or of last principal coupon attached thereto, or prior to January 1, 1947, whichever is later, but not thereafter, removed limitation upon remedy afforded by public sale from government of general statute of limitations. Code Civ.Proc. §§ 330, 1839.

3. Statutes 🔑227

Words permissive in form, when a public duty is involved, are considered as mandatory, and where persons or the public have an interest in having an act done by a public body, the word "may" in a statute means "must".

See publication Words and Phrases, for other judicial constructions and definitions of "May".

4. Municipal Corporations ⚷519(5)

Statute making presumption that liens of street improvement bonds are extinguished at expiration of four years after due date of bonds or of last installment thereof, or on January 1, 1947, whichever is later, conclusive in favor of bona fide purchasers for value thereafter, operated to extinguish lien rights of holder of unforeclosed bond issued prior to 1930, notwithstanding fact that during period between effective date of statute and January 1, 1947, property in question was held by state for tax delinquencies, where bondholder had remedy of sale by city treasurer during such period, but took no steps to pursue such remedy. Code Civ.Proc. § 330; Civ.Code, § 2911; Streets and Highways Code, § 6500.

◆

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for appellant.

Solon S. Kipp and W. E. Starke, San Diego, for respondent.

EDMONDS, Justice.

Betty Harless, the holder of an unforeclosed street improvement bond, sued to partition certain real property owned by Armistead B. Carter, whom the trial court found to be a bona fide purchaser for value of the land under a tax deed from the state. The appeal is from a judgment which declares that the lien of the bond has been extinguished and directs its cancellation.

The bond was issued in 1928 pursuant to the Improvement Act of 1911, Stats.1911, p. 730, Sts. & Hy.Code, div. 7, §§ 5000–6794, the last installment being due in 1938. In 1934, the land was deeded to the state for delinquent taxes. Title remained with the state until August, 1947, when it sold the property to Carter and issued the tax deed upon which he relies. The present action for partition was commenced in 1950, pursuant to section 752 of the Code of Civil Procedure.

Section 2911 of the Civil Code was amended in 1945, Stats.1945, ch. 361, § 1, to establish a presumption as to the extinguishment of any lien upon real property to secure the payment of bonds representing a public improvement assessment "at the expiration of four years after the due date of said bonds or of the last installment thereof or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later." The presumption is conclusive in favor of a bona fide purchaser for value of the property after those dates.

[1] This statute may be constitutionally applied to the liens of bonds issued prior to its effective date. Rombotis v. Fink, 89 Cal.App.2d 378, 201 P.2d 588. Later decisions of this court are based upon the same reasoning. Scheas v. Robertson, 38 Cal.2d 119, 125–127, 238 P.2d 982; Anger v. Borden, 38 Cal.2d 136, 138, 238 P.2d 976; Sipe v. Correa, 38 Cal.2d 131, 134–136, 238 P.2d 989. In the Rombotis case, quoted with approval in the Scheas opinion, the court observed that "the Legislature did not *ipso facto* extinguish any substantial right. The remedy of foreclosure in court or through sale by a city or county treasurer or other official was preserved by granting what the Legislature deemed a reasonable time after the effective date of the legislation for the bondholder or lienholder to take action. The authorities are legion upholding the constitutionality of statutes of limitation applicable to existing contract rights under which the parties are given a reasonable time after the statute becomes effective within which to enforce their rights." 89 Cal.App.2d at page 386, 201 P.2d at page 592. It was concluded that the minimum period of 15½ months between the effective date of the sections, September 15, 1945, and January 1, 1947, was a reasonable time to allow the holders of bonds to foreclose them.

In the present case, during that 15½ months period, the property in question was held by the state for tax delinquencies. The bond owner argues that, because of such state ownership, she was deprived of all opportunity to enforce her lien. To permit the conclusive presumption of extinguishment to operate under such circumstances, the argument continues, is to deprive her of her property without due process of law.

Very similar factual situations were presented in the Rombotis case and in Sipe

v. Correa, supra. It was held that the statute of limitations was not tolled during the period of state ownership. Rombotis v. Fink, supra, 89 Cal.App.2d at page 393, 201 P.2d 588. Discussing the various remedies available to a lienholder, the court in the Sipe case concluded that a suit for partition would not be appropriate during such period because of the sovereign immunity rule, but, since that remedy was created by a statute enacted after the contract rights were established, and which conferred no substantive rights, the Legislature might abolish it without infringement of constitutional guaranties. An action to foreclose the lien or a demand upon an officer of the city for a public sale was held to be adequate. It was pointed out that, although the owner of the fee is an indispensable party to a proceeding which would determine his interest, a valid judgment could be had against other interested persons without joining the fee owner. A foreclosure of the former owner's right of redemption would permit the bondholder to have his lien satisfied, or step into the shoes of the former owner with the right to redeem the property from the state.

The contention now made is that neither of the remedies suggested in Sipe v. Correa was available to the bondholder here. A judicial foreclosure could not be had, it is said, because such an action was barred by the statute of limitations, and there was no way to compel the city treasurer to comply with a demand for a public sale.

Section 6610 of the Streets and Highways Code requires that the bondholder's action for a judicial foreclosure of the lien be commenced within four years after the due date of the last installment upon a bond. In the present case, the statute of limitations barred that remedy in 1942.

However, a different period of limitation is prescribed for a demand upon the city treasurer to sell property to satisfy bond delinquencies. Section 330 of the Code of Civil Procedure, which was enacted at the same time as the amendment to section 2911 of the Civil Code, Stats.1945, ch. 360, § 1, provides that if "the act or law establishing * * * [a power of public sale] fails to prescribe the time within which such official may act, said official may sell at any time prior to the expiration of four years after the due date of said bond or of the last installment thereof or of the last principal coupon attached thereto, or prior to January 1, 1947, whichever is later, but not thereafter." The Improvement Act of 1911, as in force at the time the appellant's bond was issued, prescribed no limitation concerning the time during which a city treasurer could conduct a sale. Thus, such a demand could have been made at any time during the period of 15½ months before January 1, 1947.

This section is said to have afforded no remedy in the present case, however, because the city treasurer has refused to sell property upon which there is a bond which matured more than four years before the demand upon him to do so. Relying upon Woods v. Hyde, 64 Cal.App. 433, 222 P. 168, the appellant asserts that mandate was not available to compel him to act, nor was there any other way to enforce a public sale of the land.

In the Woods case, a demand was made upon a city treasurer to compel him to conduct a treasurer's sale more than six years after the maturity of a street improvement bond. As in the present case, the statute under which the bond was issued fixed no limitation upon the time during which a demand could be made upon the treasurer to conduct the sale. After the treasurer refused to do so, the bondholder sought a writ of mandate. The court denied the writ. Recognizing the continuing nature of the lien *right* under the bond, the court nevertheless concluded that all legal *remedies* were barred by the provisions of the general statute of limitations applicable to a liability created by statute. Code Civ. Proc. § 338(1). Mandate was held to be a legal remedy within the meaning of that section.

[2] But with the enactment of section 330 of the Code of Civil Procedure, the limitation upon the remedy afforded by a public sale no longer is governed by the general statute of limitations, but by one specifying the time during which the owner of a bond of a particular kind may have a

certain remedy. "When a general and (a) particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." Code Civ. Proc. § 1859.

[3] Under section 330 of the Code of Civil Procedure, the city treasurer was authorized to sell property for a bond delinquency either before January 1, 1947, or four years after the maturity of the bond, *whichever is later*. The statute clearly shows a legislative intent to allow the remedy of a sale by the treasurer until the later of the prescribed dates. Certainly, he might not have refused to act upon the ground that the statute states that he "may" sell upon the demand of a bondholder "where persons or the public have an interest in having an act done by a public body *'may'* in a statute means *'must.'* (Citation.) Words permissive in form, when a public duty is involved, are considered as mandatory." Uhl v. Badaracco, 199 Cal. 270, 282, 248 P. 917, 921. "'Where the purpose of the law is to clothe public officers with power to be exercised for the benefit of third persons, or for the public at large—that is, where the public interest or private right requires that the thing should be done—then the language, though permissive in form, is peremptory.'" County of Los Angeles v. State, 64 Cal.App. 290, 295, 222 P. 153, 156.

[4] To say that the treasurer might act in some cases and refuse to do so upon the demand of a bondholder similarly situated would be to construe the statute as vesting authority with no ascertainable standard for official duty. Moreover, in view of the clear mandatory language of section 6500 of the Streets and Highways Code, that "Whenever * * * the holder of the bond demands in writing that the treasurer proceed to advertise and sell the * * * land * * * the treasurer *shall* proceed to advertise and sell the lot or parcel of land as provided in this chapter", there is no justification for his refusal to do so, and mandate would lie to compel the performance of his statutory duty

There is no evidence that the city treasurer refused to comply with any demand that he sell the property to enforce the lien. On the contrary, although he testified that he would have refused to do so, it has been stipulated that no demand that he sell the land was ever made. The trial court so found. Accordingly it is unnecessary to determine whether such a demand made upon the city treasurer would prevent the grantee in a tax deed from the state from qualifying as a bona fide purchaser for value. Cf. Rombotis v. Fink, supra, at 89 Cal.App.2d page 389, 201 P.2d 588; see Sipe v. Correa, supra, at 38 Cal.2d page 135, 238 P.2d 989.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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42 Cal.2d 873

LUBERCO, Limited, a Corporation, Plaintiff and Appellant, v. Mae Ann MILLS et al., Defendants and Respondents.

L. A. 22470.

Supreme Court of California.
In Bank.
March 1, 1954.

Appeal from Superior Court, San Diego County; William A. Glen, Judge.

Prior opinion 254 P.2d 172.

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for appellant.

Solon S. Kipp and W. E. Starke, San Diego, for respondents.

EDMONDS, Justice.

It has been stipulated by the parties that the record upon this appeal presents the same question of law as that brought to the court in Harless v. Carter, Cal.Sup., 267 P. 2d 4. For the reasons which have been stated in the decision of the Harless case, the judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

42 Cal.2d 335

PEOPLE v. FRANCIS.

Cr. 5549.

Supreme Court of California.
In Bank.
Feb. 25, 1954.

Defendant was convicted for passing a check without sufficient funds and with intent to defraud. The Superior Court, Los Angeles County, Kurtz Kauffman, J., rendered judgment, and defendant appealed. The Supreme Court, Carter, J., held that Superior Court did not, under the circumstances, abuse its discretion in denying, without hearing evidence, defendant's motion to withdraw plea of guilty.

Judgment affirmed.

Prior opinion, 262 P.2d 589.

1. Criminal Law ⚿1023(3)

Order denying a defendant's application to withdraw plea of guilty is not appealable.

2. Criminal Law ⚿274, 1149

Granting of permission to withdraw plea of guilty rests in the sound discretion of the trial court and a denial of such permission may not be disturbed unless trial court has abused its discretion. Pen.Code, § 1018.

3. Criminal Law ⚿274

Where plea of guilty to charge of passing check without sufficient funds with intent to defraud was entered April 25, trial court was within its discretion in denying as untimely, without hearing evidence, a motion, made October 10, to withdraw plea, where evidence relied on to support motion was already before court in a probation report. Pen.Code, § 1018.

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William W. Larsen, Ray L. Smith, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendant was charged by information in two counts with passing two checks without sufficient funds with the intent to defraud; both checks (one in each count) were passed on the same day, in the same place, Bennie's Clubhouse, to different employees in that place and drawn on the same bank; one (count one) was for $60, the other (count two) for $25. He was also charged with a prior conviction and imprisonment for conspiracy to commit pandering.

Defendant with his counsel, Mr. Testa, pleaded not guilty to both counts on his arraignment on April 25, 1952, and trial was set for June 19, 1952. On June 3rd, defendant substituted Mr. Larsen as his attorney in place of Mr. Higgins. (What happened to Testa does not appear.) On the day set for trial (June 19th) defendant and his counsel Larsen requested and were granted a continuance to July 30th. On that date defendant and his counsel asked and were permitted to withdraw his plea of not guilty to count one, and pleaded guilty to that count; he admitted the prior conviction; he waived time for sentence on that count and was granted leave to apply for probation. The hearing for probation, sentencing for count one, and disposition of count two were set for September 12, 1952. The probation officer's report, recommending denial, was filed September 11th. On the 12th, defendant and counsel appeared and the matters to be considered at that time were continued at defendant's request to October 3, 1952. On that date at defendant's request the hearing was continued to October 10th. On the 10th, defendant with his counsel moved to withdraw his plea of guilty to count one. That motion and the application for probation were denied and sentence was pronounced. Defendant thereupon gave notice of appeal. Thereafter defendant's motion to vacate the judgment and for permission to withdraw the appeal was denied. After probation was denied and judgment given, the second count was dismissed by the court on the motion of the prosecuting attorney in the "interest of justice."

[1] Defendant appeals from the judgment and the denial of his motion to withdraw his plea. Inasmuch as an order denying the application to withdraw the plea of guilty by the defendant is not appeala-

ble, People v. Shaffer, 130 Cal.App. 749, 20 P.2d 345; People v. Block, 134 Cal.App. 217, 25 P.2d 242; People v. Brickert, 3 Cal.App.2d 474, 39 P.2d 450; People v. Ramey, 135 Cal.App. 573, 27 P.2d 941; People v. Griffin, 100 Cal.App.2d 546, 224 P.2d 47; People v. Tidwell, 108 Cal.App. 2d 60, 238 P.2d 21; Pen.Code, § 1237, the appeal therefrom is dismissed.

By way of amplification, the reporter's transcript of the events on September 12, 1952, when the continuance was granted, shows that defendant's counsel had read the probation report and wanted the continuance because of some derogatory remarks stated therein to have been made by his wife. No suggestion of withdrawal of the guilty plea was made then or on October 3rd when a continuance was requested.

The same transcript shows that at the hearing on October 10th when defendant moved to withdraw his not guilty plea the motion was made under section 1018 of the Penal Code.[1] His counsel stated that it had not "occurred" to him until he read the probation report (which would have been September 12th) and talked to defendant that the latter had given the probation officer a "complete denial and a full defense to the charge" to which he had pleaded guilty. He offered to prove that if defendant could be sworn he would testify as he stated to the probation officer, that is, he thought he had made arrangements to cover any possible overdraft and had no intention to issue a check without sufficient funds; that he would show mistake and inadvertence in making the guilty plea by affidavit or oral testimony. The probation report was offered. Counsel further stated that defendant had no intent to defraud; that the guilty plea was entered by inadvertence and ignorance in that defendant did not know there had to be an intent to defraud—that if he had made arrangements to cover the check there would not be such intent. The district attorney opposed the motion.

The probation report shows defendant to have stated that "in explanation" of the charge of insufficient funds he found it "difficult to explain." He was "reasonably certain" "the shortage would be taken care of at that time, however, through domestic problems I [he] failed to cover the shortage." He had no intent to defraud. In the past, Bennie's had held checks for a few days. He did not ask them to do so on the instant occasion but "hoped" they would. When he presented the checks he did not know for sure whether he had sufficient funds but had asked his wife to deposit to his account sufficient to cover them and thought she had done so.

The court refused defendant's offer to support his motion and also the probation report. The report, however, had been filed in the court and the latter must have been familiar with its contents for it also considered at the September 12th hearing the question of probation. The basis of the refusal was that defendant was delinquent in making his application to change his plea; that he had full opportunity to make it some time before it was made and he offered no justifiable excuse for the delay.

[2] As indicated by section 1018 of the Penal Code, supra, it must be liberally construed, that is, liberality in permitting a withdrawal of a plea of guilty before judgment is expressly enjoined upon the court. People v. Griggs, 17 Cal.2d 621, 110 P.2d 1031; People v. Miller, 114 Cal. 10, 45 P. 986; In re Hough, 24 Cal.2d 522, 150 P. 2d 448; People v. Schwarz, 201 Cal. 309, 315, 257 P. 71. Also as stated in the above cited section the withdrawal of such a plea rests in the sound discretion of the trial court and a denial may not be disturbed unless the trial court has abused its discretion. People v. Griggs, supra, 17 Cal.

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[1] "On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted."

"This section shall be liberally construed to effect these objects and to promote justice." Pen.Code, § 1018.

2d 621, 110 P.2d 1031; cases collected 4 Cal.Jur. 10 Yr.Supp., p. 599 et seq.

[3] While it would have been better practice for the court to have heard the evidence offered by defendant in support of his motion to withdraw his plea of guilty, the fact that this evidence was in the probation report which was before the court, and considerable time had expired since the entry of the guilty plea, we cannot say that the court abused its discretion in denying the motion.

Judgment affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

* * *

42 Cal.2d 235

UNION TRANSP. CO. et al.
v.
SACRAMENTO COUNTY et al.

Sac. 6419.

Supreme Court of California.
In Bank.
Feb. 19, 1954.

Actions by trucking company and by owners of cattle for damages to truck and cargo of cattle resulting from collapse of bridge located in one of two defendant counties. The Superior Court, El Dorado County, Thomas Maul, J., granted motions for nonsuits in favor of both counties, and plaintiffs appealed. The Supreme Court, Edmonds, J., held that action of county superintendent of roads in dispatching road equipment to road with instructions to operator of equipment to make repairs thereon supported inference that county had impliedly accepted dedication of such road, and bridge which was part thereof, even though repairs were not shown to have been made.

Judgment as to one county reversed and to other county affirmed.

Prior opinion, 255 P.2d 831.

1. Evidence 🔑48

Courts will take judicial notice of topographical map of United States Geological Survey.

2. Dedication 🔑1

Essential to a common-law dedication are an offer by owner of land, clearly and unequivocally indicated by his words or acts to dedicate the land to a public use and an acceptance of such offer by the public.

3. Dedication 🔑20(2)

An offer to dedicate land may be inferred from owner's long acquiescence in public use of the land under circumstances which negative idea that use was under a license.

4. Dedication 🔑41

When public, or such portion thereof as has had occasion to use road, has traveled over such road for period of more than five years with full knowledge of owner and without asking or receiving permission to do so or without objection being made by any one, conclusive presumption of dedication to public arises.

5. Dedication 🔑20(2)

Where dedication of highway is sought to be established by user, it must be shown that user was adverse, continuous, and with knowledge of owner for the required period.

6. Dedication 🔑45

Question whether user upon which dedication of highway is sought to be established was adverse is one of fact to be determined from all circumstances of the case.

7. Dedication 🔑20(3), 41

Where dedication of highway is sought to be established by use which has not continued long enough to perfect rights of public under rules of prescription, actual consent or acquiescence of owner is an essential matter, but, if such actual consent and acquiescence can be proved, then length of time of public use becomes unimportant, but, if claim of public rests upon long continued adverse use, such use establishes against owner conclusive presumption of consent and, therefore, of dedication and negatives the idea of a mere license.

8. Dedication ⚷44

In actions by trucking company and by owners of cattle for damages to truck and cargo of cattle resulting from collapse of bridge located in one of the two defendant counties, evidence was sufficient to establish that road and bridge had been used by public for period of at least twelve years and that such use had been known by the landowners. Government Code, §§ 53050–53056.

9. Dedication ⚷44

Facts that road and bridge had been used by public for at least twelve years with knowledge of landowners, that maintenance and repair work had been performed upon road and bridge by some one other than owners, and that owners had not objected or interfered with such user, together with general appearance, location, and evident purpose of road and bridge, raised inference either that landowners intended, by acquiescing in such user, to dedicate road and bridge to public or that user was adverse and continued for period greater than five years.

10. Dedication ⚷20(1)

To permit fact of public user to support determination that road has been dedicated to the public is not contrary to statute providing that no route of travel used by one or more persons over another's land shall become a county highway by use. Streets and Highways Code, § 904.

11. Dedication ⚷35(3)

Action of county superintendent of roads in dispatching road equipment to road with instructions to operator of equipment to make repairs thereon supported inference that county had impliedly accepted dedication of such road, and bridge which was part thereof, even though repairs were not shown to have been made.

12. Dedication ⚷11

It is not any defense to a claim of dedication to a county that road purportedly dedicated does not meet specifications generally required for county highways. Streets and Highways Code, § 941.

13. Automobiles ⚷308(7)

In actions by trucking company and by owners of cattle for damages to truck and cargo of cattle resulting from collapse of bridge located in one of the two defendant counties, question whether defective condition of bridge could have been discovered by reasonable inspection was for jury.

14. Bridges ⚷46(10)

Generally, question whether defective condition in bridge is one which imparts constructive notice is one of fact.

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Horace E. Dunning, Sacramento, for appellants.

Gerald M. Desmond, Jerome M. McLaughlin, Johnson, Davies and Greve and Claire H. Greve, Sacramento, for respondents.

EDMONDS, Justice.

A bridge located near the boundary line between the counties of El Dorado and Sacramento collapsed when a truck owned by Union Transportation Company, a corporation, was driven over it. The truck was loaded with cattle belonging to George and Ray Smith, doing business as copartners under the name of Smith Brothers. The trucking company and the cattle owners jointly sued both counties under the Public Liability Act of 1923, Stats.1923, p. 675; Gov.Code, §§ 53050–53056.

The appeal from a judgment which followed an order granting the counties' motions for a nonsuit presents the question as to the sufficiency of the evidence to require the submission of the issue of liability to the jury. Rulings upon the admissibility of certain evidence are also challenged.

The record, viewed most favorably to the appellants, shows the following facts:

A dirt road originating at White Rock in Sacramento County roughly parallels the county line across several privately owned ranches. About two miles from White Rock it crosses into El Dorado County, but after a short distance returns to Sacramento County where it terminates near the ranch owned by Smith Brothers. At a point on the short loop of the road within El Dorado County, it crosses Carson Creek on the Smith Brothers' property over a bridge, which at the time of the accident was made of wood. The bridge had been erected about 30 years before, but the record does not show who constructed it or the road.

For many years, the road had been used by the ranchers in the vicinity and their friends to provide access to U. S. Highway 50 at White Rock. Also, various members of the public traveled over it, generally about once each week, but occasionally as frequently as 20 times in a single day. About twice each year, the road was graded. The record does not show at whose instance this work was done, but there is testimony that the equipment used was county owned. On one occasion, the machinery was identified as belonging to Sacramento County, and it was shown that the operator was a Sacramento County employee. The bridge was repaired extensively in 1937, but by whom is not disclosed.

The record includes ample evidence of a dangerous and defective condition of the bridge when it collapsed. Several witnesses who examined the wreckage testified as to extensive rotting of the supporting timbers. Expert witnesses stated that the load carried by the truck was not excessive and, had the bridge been in a proper condition, it could have supported the loaded truck with safety.

In support of the judgment, Sacramento County contends that there is no proof that the bridge is within that county; instead, all of the evidence tends to show that it is within El Dorado's boundaries. Accordingly it is argued, there is no basis for an action against Sacramento County for failing to maintain the bridge.

El Dorado takes the position that the evidence is insufficient to show in which of the two counties the bridge is located. But even if it may be shown to be within El Dorado County, the argument continues, there was no duty upon that county to maintain it. Another contention is that any defect must be deemed to have been a latent one, imparting no constructive notice to the governing authority of its dangerous character.

The county surveyor of El Dorado County testified that the monuments described in section 23134 of the Government Code as marking the boundary between the two counties are no longer available. However, based upon the monuments mentioned in certain unofficial maps of the area, his calculations showed that the bridge is located within El Dorado County about 200 feet from the boundary line.

[1] According to his testimony, he could not be certain as to the true location of the boundary, and he did not know whether the line drawn by him was correct. El Dorado argues that these statements compel the conclusion that the testimony was based upon speculation and entitled to no weight. Cf. McKellar v. Pendergast, 68 Cal.App.2d 485, 489, 156 P.2d 950. But the witness stated that no exact line could be drawn and, in making his survey, he followed the same procedure as would be used by any competent surveyor. Furthermore, his line and the monuments used to locate it correspond to those shown in the official topographical map of the United States Geological Survey, which is one of which courts take judicial notice. Code Civ. Proc. § 1875(3); Rogers v. Cady, 104 Cal. 288, 290, 38 P. 81; Varcoe v. Lee, 180 Cal. 338, 343, 181 P. 223.

The theory of the Smiths and the trucking company is that the road of which the bridge is a part, although originally a private one, has become a public highway by implied dedication arising from long acquiescence on the part of the adjacent landowners in its use by members of the public. El Dorado's position is that certain statutory provisions as well as public policy prevent public user alone from casting upon a county the duty to maintain and repair what otherwise would be a private road. It argues that no such duty arises until the road is recognized as a county highway and taken into the county's road system "by a very definite act of acceptance".

[2] A common law dedication has been described as "a voluntary transfer of an interest in land [which] partakes both of a

nature of a grant and of a gift, and is governed by the fundamental principles which control, such transactions." County of Inyo v. Given, 183 Cal. 415, 418, 191 P. 688, 690; People ex rel. Howland v. Dreher, 101 Cal. 271, 273, 35 P. 867. Essential to such a dedication are an offer by the owner of the land, clearly and unequivocally indicated by his words or acts, to dedicate the land to a public use and an acceptance by the public of the offer. City of Manhattan Beach v. Cortelyou, 10 Cal.2d 653, 660, 76 P.2d 483; People ex rel. Howland v. Dreher, supra, 101 Cal. at page 273, 35 P. at page 868; Cerf v. Pfleging, 94 Cal. 131, 135, 29 P. 417; City of San Francisco v. Canavan, 42 Cal. 541, 552–553.

[3] Many cases hold that an offer to dedicate land may be inferred from the owner's long acquiescence in a public use of the property under circumstances which negative the idea that the use was under a license. Hargro v. Hodgdon, 89 Cal. 623, 630, 26 P. 1106; Niles v. City of Los Angeles, 125 Cal. 572, 577, 58 P. 190; see City of San Diego v. Hall, 180 Cal. 165, 168, 179 P. 889; F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 448, 150 P. 62.

[4–6] In another line of decision, by analogy to the doctrine of prescription, it is held that "[w]hen the public or such portion of the public as had occasion to use a road has traveled over it for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by any one, a conclusive presumption of dedication to the public arises." Hare v. Craig, 206 Cal. 753, 757, 276 P. 336, 338; People v. Myring, 144 Cal. 351, 354, 77 P. 975; Hartley v. Vermillion, 141 Cal. 339, 349, 74 P. 987; Arnold v. City of San Diego, 120 Cal.App.2d 353, 261 P.2d 33. "Of course, where the dedication of a highway is sought to be established by user, it must be shown that the user was adverse, continuous, and with the knowledge of the owner, for the required period of time." Diamond Match Co. v. Savercool, 218 Cal. 665, 669, 24 P.2d 783, 785. Whether the user was adverse is a question of fact to be determined from all of the circumstances of a case. O'Banion v. Borba, 32 Cal.2d 145, 149–150, 195 P.2d 10.

[7] The distinction between the two theories is well expressed in Schwerdtle v. County of Placer, 108 Cal. 589, 41 P. 448, where it is said: "If a dedication is sought to be established by a use which has continued a short time,—not long enough to perfect the rights of the public under the rules of prescription,—then, truly, the actual consent or acquiescence of the owner is an essential matter, since without it no dedication could be proved, and none would be presumed; but where this actual consent and acquiescence can be proved, then the length of time of the public use ceases to be of any importance, because, the offer to dedicate and the acceptance by use both being shown, the rights of the public have immediately vested. But where the claim of the public rests upon long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license." 108 Cal. at page 593, 41 P. at page 449. Dedication by adverse user has been characterized as dedication implied by law, while a dedication inferred from the acts of the owner or from his acquiescence in public user may be termed a dedication implied in fact. Diamond Match Co. v. Savercool, supra, 218 Cal. at page 669, 24 P.2d at pages 784, 785; City of Laguna Beach v. Consolidated Mfg. Co., 68 Cal.App.2d 38, 43, 155 P.2d 844.

[8, 9] In the present case, the evidence clearly supports the determination that the road and bridge had been used by the public for a period of at least 12 years and that such use was known by the owners of the land. There is further testimony to the effect that maintenance and repair work was performed on the road and the bridge by someone other than the owners, and there is no evidence that they at any time objected or interfered with this user. From these facts, as well as the general appearance, location and evident purpose of the road and bridge it could be inferred

either that the landowners intended by acquiescing in their user to dedicate them to the public or that the user was adverse and that it continued so for a period greater than five years. Cf. Hargro v. Hodgdon, supra; Niles v. City of Los Angeles, supra; Bolger v. Foss, 65 Cal. 250, 251, 3 P. 871; Harding v. Jasper, 14 Cal. 642, 647–648.

[10] El Dorado takes the position, however, that to permit the fact of public user to support a determination that the road has been dedicated to the public is contrary to section 904 of the Streets and Highways Code, which provides: "No route of travel used by one or more persons over another's land shall become a county highway by use." This section is based upon former section 2621 of the Political Code, Stats. 1883, p. 6, which provided in part: "[N]o route of travel used by one or more persons over another's land, shall hereafter become a public road or by-way by use, or until so declared by the board of supervisors or by dedication by the owner of the land affected."

This legislation was intended to rectify the somewhat confused statutory situation which existed prior to its adoption. Before the enactment of the Political Code in 1872, there were in force various statutes, applicable to certain counties designated by name, making all roads used by the public for a specified period of time public highways. The new code continued in force all such prior statutes [relating to roads and highways applying to particular counties by name]. § 2757. At the same time, it provided in another section that "[r]oads laid out and recorded as highways * * * and all roads used as such for a period of five years, are highways." § 2619. As a result, in some counties both section 2619 and a specific statute provided for the establishment of public highways by use.

In 1874, section 2619 was amended by deleting reference to establishment of public highways by use; but the amendatory legislation was part of an act naming only certain counties. Amendments to the Codes, 1873–1874, p. 116 et seq. Thereafter, confusion arose in regard to the result of public user of a road in the counties not specified in the amendatory statute. Section 2621 was then enacted for the purpose of making certain the legislative intention that in all counties the former provision concerning user for five years was no longer effective. See Huffman v. Hall, 102 Cal. 26, 29, 36 P. 417.

The elimination of that provision, however, does not mean that general use of a private road may not evidence the owner's intention to dedicate it to a public use. As stated in Lantz v. City of Los Angeles, 185 Cal. 262, 196 P. 481, "[t]here can be no question but that since the enactment of * * * section [2621] of the Political Code in its present form the mere user of a route of travel by the public for a period of five years or more did not, of itself, suffice to constitute the strip of land used by said route of travel a public highway. It was essential, in order to do so under said section of the code, that such strip of land must have either been so declared to be by the board of supervisors of the county * * * in which the same was located, or must have become so by dedication by the owner of the tract; but it does not follow from this that the user of such strip of land by the public may not constitute some evidence of its dedication, which, taken with other evidence showing expressly or by implication and intent on the part of the owner of the land to dedicate the same to public uses, may amount to sufficient proof of such dedication thereof as would satisfy the provisions of the foregoing section of the Political Code." 185 Cal. at page 268, 196 P. at page 483; see also Leverone v. Weakley, 155 Cal. 395, 401, 101 P. 304.

Even if an offer to dedicate the road may be inferred, El Dorado argues, there is not sufficient evidence showing that such offer was accepted by the county. The appellants rely upon several cases which hold that a public user alone is sufficient to show acceptance of such a road. People v. Myring, supra, 144 Cal. at page 354, 77 P. at page 976; City of Venice v. Short Line Beach Land Co., 180 Cal. 447, at page 450, 181 P. 658; Diamond Match Co. v. Savercool, supra, 218 Cal. at page 670, 24 P.2d at page 785; Sanger v. South-worth, 87 Cal.App.2d 16, 19, 195 P.2d 482; accord, City of San Francisco v. Canavan, 42 Cal. 541, 554; Smith v. City of San Luis Obispo, 95 Cal. 463, 471, 30 P. 591; Hall v. Kauffman, 106 Cal. 451, 452, 39 P. 756; Helm v. McClure, 107 Cal. 199, 204, 40 P. 437. In none of these cases was the cause of action based upon the asserted liability of a political subdivision for failure to maintain a way so dedicated, and no California decision has been found which settles that question.

The courts in other jurisdictions are not in accord concerning whether a governmental body may be held liable for failure to maintain a road when its only acceptance is from public user. In some cases liability is imposed upon the theory that it would be inconsistent to permit public user to establish a right against the landowner without an official acceptance of such a dedication, but not to permit members of the public to claim a right against the governmental body. They hold that the general public, being principals, may accept the dedication without action by the elected officials, who are merely their agents. City of Hammond v. Maher, 30 Ind.App. 286, 65 N.E. 1055; Green v. Town of Canaan, 29 Conn. 157; Manderschid v. City of Dubuque, 29 Iowa 73; Benton v. City of St. Louis, 217 Mo. 687, 118 S.W. 418; see cases cited in footnotes to §§ 170–171 of 1 Elliott, Roads and Streets (4th Ed. 1926) pp. 198–202.

The ground of decisions to the contrary is that, although elected officials are merely agents of the public, they are the only means by which the public may act, and to permit a small segment of the public by use of a private way to impose the burden of maintaining it upon the general public would be in dereliction of the powers of the elected officials, and permit the establishment of public roads in undesirable places. These cases generally require that there be some official action consistent with an acceptance of the dedication. Hillside Cotton Mills v. Ellis, 23 Ga.App. 45, 97 S.E. 459; Harrington v. City of Manchester, 76 N.H. 347, 82 A. 716; Johnson v. City of Niagara Falls, 230 N.Y. 77, 129 N.E. 213; People ex rel. Shurtz v. Commissioners of Highways, 52 Ill. 498; see cases cited in 4 Tiffany, Real Property (3d Ed. 1939) §§ 1107, 1217, pp. 354–358, 609–610; 26 C.J.S., Dedication, § 37(c), pages 101–102; 16 Am.Jur., Dedication, § 35, pp. 383–384. Considerations of public policy compel the conclusion that the latter principle is preferable.

[11] Under this rule, however, no formal act of acceptance is necessary. Any action of the responsible public officials showing an assumption of control over the road is a sufficient recognition of the road as a public highway. See 4 Tiffany, Real Property, § 1107, p. 354. In the present case, there is evidence that El Dorado's superintendent of roads dispatched road equipment to that section of the road with instructions to the operator to make repairs on it. Although the record shows that no repairs in fact were made, the action of the superintendent in assuming control of the road reasonably supports an inference that the county impliedly had accepted the dedication.

[12] El Dorado further contends that it has no statutory authority for making repairs upon the road. However, the boards of supervisors of the counties are expressly enjoined, under section 941 of the Streets and Highways Code, by proper order to "cause those highways which are necessary to public convenience to be established, recorded, constructed, and maintained in the manner provided in this division." And it is no defense to a claim of dedication to a county that the road does not meet the specifications generally required for county highways. Mulch v. Nagle, 51 Cal.App. 559, 568, 197 P. 421.

[13, 14] There is no merit in the contention that the evidence would not support a finding that the defective condition of the bridge could have been discovered by a reasonable inspection. Several persons who examined the debris stated that the rotted condition of the supporting timbers was visible and apparent. Generally, the question of whether a defective condition is one which imparts constructive notice is one of fact. Sheldon v. City of Los Angeles, 55 Cal.App.2d 690, 693, 131 P.2d 874. It reasonably could be found that a

proper inspection would have disclosed the condition.

In their briefs, the appellants apparently have abandoned any contention that Sacramento County may be held liable for the damages suffered. All of the evidence relied upon by them is presented for the purpose of showing that the bridge is located within El Dorado County, and no authority has been cited which would permit holding a governmental body liable, on any theory of dedication, for injuries sustained on a highway without its boundaries.

The judgment as to El Dorado County is reversed. As to Sacramento County, it is affirmed. The costs of Sacramento County will be borne by the appellants; the appellants' costs will be borne by El Dorado County.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

42 Cal.2d 284

COCKERELL et al.
v.
TITLE INSURANCE & TRUST CO. et al.
L. A. 22764.

Supreme Court of California.
In Bank.
Feb. 24, 1954.

Rehearing Denied March 25, 1954.

Action by alleged assignees of beneficiary of third deed of trust against owners of unrecorded deed to property involved, for declaration as to who was entitled to surplus yield from foreclosure sale under second deed of trust. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment against plaintiffs, and they appealed. The Supreme Court, Carter, J., held that evidence sustained finding that plaintiffs were not owners, by assignment, of the third trust deed and note, and hence were not entitled, as assignees, to surplus yield, and that plaintiffs, having failed to prove valid assignment to them of note secured by third deed of trust, had no standing to complain of judgment awarding surplus yield to defendants, who were the only other claimants therefor.

Judgment affirmed.

Schauer, J., dissented.

Prior opinion, 260 P.2d 801.

1. Appeal and Error ⚷194(2)

Generally, where, notwithstanding fact that denials in answer are not as broad as allegations of complaint or are otherwise insufficient to put allegations of complaint in issue, the answer is treated as putting material facts in issue, plaintiff cannot for first time on appeal object that such denials were insufficient for any purpose.

2. Appeal and Error ⚷194(2)

On appeal from judgment for defendants, plaintiffs could not successfully contend that denial of their motion for judgment on the pleadings was error because denials in answer were insufficient to raise issue of fact, where any objection to sufficiency of denial could have been obviated had proper objection thereto been made in court below, but all parties and court, upon trial below, treated allegedly defective answer as sufficient.

3. Appeal and Error ⚷192(1)

A party cannot permit an issue to be litigated and on appeal escape the consequences by claiming that such issue was not pleaded.

4. Mortgages ⚷235

If assignment of note, secured by trust deed, was valid, no further assignment of deed of trust was necessary. Civ.Code, § 1084.

5. Assignments ⚷31

No particular form of assignment is necessary, but assignment, to be effectual, must be a manifestation to another person by owner of the right indicating his intention to transfer, without further action or manifestation of intention, the right to such other person, or to a third person.

6. Assignments ⚷134

Burden of proving an assignment falls upon party asserting rights thereunder.

7. Assignments ⚷137

In an action by an assignee to enforce an assigned right, evidence must not only be sufficient to establish fact of assignment, when that fact is in issue, but measure of sufficiency requires that evidence of assignment be clear and positive to protect an obligor from any further claim by the primary obligee.

8. Mortgages ⚷376

Plaintiffs claiming, as assignees of company which was beneficiary of third deed of trust, the surplus yield from foreclosure sale under second deed of trust, had burden of proving the existence and membership of their alleged assignor in order to support their claim of ownership of note and third trust deed.

9. Mortgages ⚷270, 376

Evidence sustained finding that plaintiffs were not owners, by assignment, of third trust deed and note, and hence were not entitled, as assignees, to surplus yield from foreclosure sale under second deed of trust. Civ.Code, § 2924.

10. Mortgages ⚷376

In action to recover surplus yield from foreclosure sale under second deed of trust, plaintiffs, who claimed as assignees of beneficiary of third deed of trust, stood in same position as their assignor, and were required to prove their chain of title to note in question.

11. Mortgages ⚷376

In action by alleged assignees of beneficiary of third deed of trust, against owners of unrecorded deed to property involved, for declaration as to who was entitled to surplus yield from foreclosure sale under second deed of trust, plaintiffs, who failed to prove a valid assignment to them of note secured by third deed of trust, could not complain of judgment awarding surplus yield to defendants, who were the only other claimants therefor.

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N. S. Crowley, Bellflower, for appellants.

No appearance for defendants and respondents.

Morris Lavine, Los Angeles, for cross-complainants and respondents.

CARTER, Justice.

Plaintiffs and cross-defendants, Rowena F. Cockerell and Jeannie A. Hinds, appeal from a judgment entered against them in an action for declaratory relief.

On August 28, 1951, Ernest A. Coe and Helen Jean Coe, husband and wife, were the record owners of the real property here involved. This property was subject to a first deed of trust dated May 5, 1947, executed by Metropole Holding Co., Inc., a corporation, to Lawyers Title Co., trustee, to secure an indebtedness of $63,000. It was also subject to a second trust deed dated October 16, 1947, executed by Omart Investment Co., Ltd., to Title Insurance and Trust Co., trustee, to secure an indebtedness of $27,500. It was subject to a third trust deed, dated September 23, 1948, executed by Russ Green and Ethyl Green to Security First National Bank of Los Angeles, trustee, to secure an indebtedness of $10,983.80 in favor of Crestmore Company. Plaintiffs' claim is by virtue of an alleged assignment from the Crestmore Company.

Defendants and cross-complainants, T. E. Denny and Edna Denny, on August 28, 1951, held an unrecorded deed to the property which they had received from Ernest A. Coe and Helen Jean Coe.

On April 26, 1951, foreclosure proceedings in accordance with the provisions of section 2924 of the Civil Code were instituted by the Title Insurance and Trust Company, as trustee, under the second deed of trust. These proceedings culminated in a sale which was held on August 28, 1951. At this sale, the trustee Title Insurance and Trust Company received the sum of $25,950. The balance due, under the deed of trust so foreclosed, including the expenses of sale, amounted to $19,023.98 leaving a surplus yield of $6,926.02. This surplus yield is the subject matter of the controversy between plaintiffs and defendants. Plaintiffs claim as the owners of the third trust deed by virtue of assignment from the beneficiary, Crestmore Company; defendants claim as the owners of the unrecorded deed to the property. Both parties made demands for the surplus yield upon defendant trustee, Title Insurance Company. Defendant trustee answered and cross-complained, and was permitted to deposit with the clerk of the court the surplus funds amounting to the sum of $6,926.02 and the action was ordered dismissed as to it.

The trial court found that defendants, T. E. and Edna Denny, were the owners of the property involved; that there was a surplus yield of $6,926.02 after the foreclosure sale under the second deed of trust; that at the time of the trustee's sale, there was on record a purported third trust deed, executed by Russ Green and Ethyl Green, to Security-First National Bank of Los Angeles, trustee, in favor of Crestmore Company, as well as a purported fourth trust deed executed by T. E. and Edna Denny to Liberty Escrow Company, trustee, in favor of Ernest A. and Helen Jean Coe. It found that the liens, if any, of the third and fourth trust deeds, were extinguished by the foreclosure of the second deed of trust; that it was not true that plaintiffs were the owners of the note and third deed of trust by means of assignment by the Crestmore Company; that it was not true that there was an unpaid balance due plaintiffs on their alleged third deed of trust and note in the sum of $7,049.35. It was also found that Ernest A. and Helen Jean Coe had no right, title, or interest in or to the real property involved, or to the surplus yield; that plaintiffs had no right, title or interest in the surplus yield or the real property; that T. E. and Edna Denny, as joint tenants, were entitled to a judgment for the surplus yield.

[1, 2] Plaintiffs' first contention is that the court erred in denying their motion for judgment on the pleadings. It was argued that the only issues raised in the pleadings were issues of law. In the complaint, plaintiffs alleged their ownership of the note secured by the third deed of trust by virtue of an assignment from the Crestmore Company. This was denied, upon lack of information by the defendants. Plaintiffs contend that a judgment may be rendered on the pleadings if the answer consists of denials on information and belief or for want of information or belief *of matters which the defendant is presumed to know,* 21 Cal.Jur. 237; Wickersham v. Comerford, 104 Cal. 494, 38 P. 101 and Overton v. White, 18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99. No contention is made that the denial contained in defendants' answer "* * * these defendants do not have sufficient information as to the allegation contained therein [as to the fact of assignment] and basing their denial upon that ground, generally and specifically deny the same" is insufficient to raise an issue as to the fact of assignment because it does not follow the wording of the statute, Code Civ.Proc. § 437, which provides for a denial upon *lack of information or belief.* This type of denial has been held insufficient to raise an issue of ownership. May v. Board of Directors, 34 Cal.2d 125, 208 P.2d 661. However, at the trial plaintiffs treated the question of assignment as an issue, and at the commencement of the trial, introduced in evidence the note bearing on its back the assignment thereof to them. The only evidence as to the assignment was introduced by plaintiff Hinds as will hereafter appear. It is a general rule that where, notwithstanding the fact that the denials in an answer are not as broad as the allegations of the complaint or are otherwise insufficient to put the allegations of the complaint in issue, but the answer is treated as putting the material facts in issue, the plaintiff cannot for the first time on appeal object that such denials were insufficient for any purpose. 3 Cal.Jur.2d, § 149; Adams v. Bell, 5 Cal.2d 697, 56 P.2d 208; Hernandez v. Hernandez, 109 Cal.App.2d 903, 242 P.2d 59. In Aronson & Co. v. Pearson, 199 Cal. 295, 298–299, 249 P. 191, 193, it was said: "Such a denial will not be held fatally defective upon appeal if it was treated by the parties at the trial as creating an issue, but, since in this case neither party offered any evidence bearing upon the question, there is no ground for holding that it was so treated." Any objection to the sufficiency of the de-

nial in defendants' answer could have been obviated had proper objection thereto been made in the court below. To hold now that the defective answer raised no issue of fact when it was so treated by all the parties and the court upon the trial below would be "clearly unjust."

[3] The situation here is somewhat similar to those cases where issues not raised by the pleadings are litigated at the trial without objection. As stated by Mr. Justice Schauer in Vaughn v. Jonas, 31 Cal.2d 586, at page 605, 191 P.2d 432, at page 444: "The evidence hereinabove reviewed is consistent with the view that the case was tried on the theory that malice was at issue and that punitive damages were claimed. A party cannot permit an issue to be litigated and on appeal escape the consequences by claiming that such issue was not pleaded. (Slaughter v. Goldberg, Bowen & Co. (1915), 26 Cal.App. 318, 325, 147 P. 90; Boyle v. Coast Improvement Co. (1915), 27 Cal.App. 714, 720–721, 151 P. 25; Hirsch v. James S. Remick Co. (1918), 38 Cal.App. 764, 767, 177 P. 876; Pioneer Truck Co. v. Hawley (1920), 47 Cal.App. 594, 595, 190 P. 1037; McCord v. Martin (1920), 47 Cal.App. 717, 723, 191 P. 89; Avakian v. Noble (1898), 121 Cal. 216, 219, 53 P. 559; 8 Cal.Jur. 893.)"

Moreover it is apparent from the phraseology used in plaintiffs' brief on appeal that they considered the denial technically sufficient. Plaintiffs argue (P. 10) "Defendants Denny admitted all the facts alleged, *except that they denied for lack of information or belief* the alleged assignment of the third trust deed to plaintiffs and the balance which said defendants assumed when they purchased the property from defendants Coe.

"Plaintiffs moved for judgment on the pleadings on the rule that denials on information and belief *of facts presumptively within the knowledge of the defendants raised no issue.* * * *" It was also stated that "The defendants, T. E. Denny and Edna Denny, admitted all the allegations of the complaint *except that for lack of information or belief* they denied the allegations of ownership of the third trust deed in the plaintiffs and for the same reason denied the alleged balance due thereunder." (Emphasis added.)

It appears here that defendants did not, presumably, have knowledge as to how plaintiffs' alleged assignor derived title since there is no allegation to that effect in the complaint; nor did they know how plaintiffs themselves derived title since the only allegation concerning it is the statement that they claim by virtue of an assignment from the Crestmore Company which, in turn, claimed under a trust deed executed by Russ and Ethyl Green who were, apparently, strangers to the title. It follows that under the circumstances here prevailing plaintiffs cannot now predicate error on the ruling of the trial court in denying their motion for judgment on the pleadings.

It is next contended that the court erred in finding that plaintiffs were not the owners of the third trust deed and note by virtue of assignment. This is, essentially, a contention that the evidence is insufficient to support the findings of the court in this respect. Mrs. Jeannie A. Hinds, the only one of the two plaintiffs to testify, said that she received the note late in the evening on the day before the foreclosure sale. The note was received in evidence. The note, for $10,983.80, secured by a deed of trust, was made payable to "Crestmore Co., a Limited Partnership, P. O. Box 365, Fontana" and was signed by Russ Green and Ethyl Green. On the reverse side was endorsed "The undersigned does hereby assign this note to the account of Rowena F. Cockerell and Jeannie A. Hinds, as of the 27th day of August, 1951. [Signed] The Crestmore Co. P. H. Wierman." Plaintiff Hinds testified that "a party" had told her about the Crestmore Company and that she knew there were three members: "Paul and Bob Wierman, brothers, and one other woman. I don't know her name just at this minute, but they were checked on as to the company and being in their name." Plaintiffs were unable to produce the articles of partnership. There was no other evidence as to either the Crestmore Company or the P. H. Wierman who purportedly signed the endorsement other than plaintiff Hinds' testimony that she knew it was his signature. On August 27, 1951, on a plain sheet of paper entitled "To whom it may concern" there was a statement signed by "P. H. Wierman, Crestmore Company" that "Rowena F. Cockerell and Jeannie A. Hinds are the beneficiaries of an escrow in which the assignment of a third trust deed, document No. 1205 recorded at request of Title Insurance & Trust Co., Oct. 1, 1949, at 8 A.M., Book 28401, Page 55, in the Official Records, County of Los Angeles California, to their account * * * in progress and they have full right and title to said third trust deed and all benefits from such from this day on." It was admitted by plaintiffs that this paper was the only assignment which they had relating to the trust deed. Plaintiff Hinds testified that an escrow was opened on August 29, 1951, for the sale of the note to plaintiffs; that she gave her note for $6,300 which was to be returned to her in the event that certain other documents and notes were turned over to the escrow holder in completion of the escrow. The escrow instructions, dated August 28, 1951, read, in part, that "Receipt is hereby acknowledged by Rowena F. Cockerell and Jeannie A. Hinds for trust deed in the amount of ten thousand nine hundred eighty three dollars and eighty cents ($10,983.80) balance due approximately sixty eight hundred dollars ($6,800.00), *delivered outside of escrow and not the concern of this escrow* * * *" (Emphasis added.)

Plaintiff Hinds' testimony with respect to the Crestmore Company and P. H. Wierman was received over objection that no foundation had been laid, that the answer called for a conclusion of the witness, and that her answers were hearsay. She testified that the signature on the reverse side of the note was that of a Mr. Paul Wierman who was a member of the Crestmore Company; that the Crestmore Company was a "limited company"; that "a party in San Bernardino" had told her. Defendants objected and moved to strike her testimony on the ground that it was not the best evidence of the partnership and that her answers were "conclusions." The third trust deed was admitted in evidence over the objection that there had been no showing that it had been assigned, or any record of its assignment to the plaintiffs.

[4] Assuming for the moment that the assignment of the note, secured by the third trust deed, was a valid assignment, no further assignment of the deed of trust was necessary. Section 1084 of the Civil Code provides that "The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself." See, also, Hurt v. Wilson, 38 Cal. 263; Lewis v. Booth, 3 Cal.2d 345, 44 P.2d 560; Marx v. McKinney, 23 Cal.2d 439, 443, 144 P.2d 353; Union Supply Co. v. Morris, 220 Cal. 331, 30 P.2d 394. In Lewis v. Booth, supra, 3 Cal.2d 345, 44 P.2d 560, it was held that an acknowledgment was not necessary to effect an assignment of the trust deed and that the endorsement of the note by the payee was sufficient to transfer the deed of trust without other assignment. In Santens v. Los Angeles Finance Co., 91 Cal.App.2d 197, 204 P.2d 619, it was held that the note carries with it the security and the trust deed was merely an incident of the debt and could only be foreclosed by the owner of the note.

[5] Plaintiff Hinds' testimony and the endorsement on the note secured by the third deed of trust showed that it was given on August 27, 1951, the night before the foreclosure sale under the second deed of trust. If the assignment were otherwise sufficient, it would have been given prior to the foreclosure sale because the time of transfer of the deed of trust is immaterial under the authorities above cited. While no particular form of assignment is necessary, the assignment, to be effectual, must be a manifestation to another person by the owner of the right indicating his intention to transfer, without further action or manifestation of intention, the right to such other person, or to a third person, Rest. Contracts, § 149(1); Anglo California Nat. Bank v. Kidd, 58 Cal.App.2d 651, 137 P.2d 460. The note here was made payable to

"Crestmore Co., a Limited Partnership P. O. Box 365, Fontana." The note shows no connection between the Crestmore Company and the P. H. Wierman who purported to assign it on behalf of that company. The only evidence in the record linking the two is that of plaintiff Hinds who testified she knew a Mr. Paul Wierman who was a member of the firm and that it was his signature. She had been told by a "party" that it was a "limited company." The record is devoid of any evidence showing a compliance with section 2468 of the Civil Code which provides, in part, that "No person doing business under a fictitious name, *or his assignee or assignees, nor any persons doing business as partners* contrary to the provisions of this article, or their assignee or assignees, shall maintain any action upon or on account of any contract or contracts made, or transactions had under such fictitious name, or their partnership name, in any court of this state until the certificate has been filed and the publication has been made as herein required." (Emphasis added.)

[6-8] The burden of proving an assignment falls upon the party asserting rights thereunder, Read v. Buffum, supra, 79 Cal. 77, 21 P. 555; Ford v. Bushard, 116 Cal. 273, 48 P. 119; Bovard v. Dickenson, 131 Cal. 162, 63 P. 162; Nakagawa v. Okamoto, 164 Cal. 718, 130 P. 707. In an action by an assignee to enforce an assigned right, the evidence must not only be sufficient to establish the fact of assignment when that fact is in issue, Quan Wye v. Chin Lin Hee, 123 Cal. 185, 55 P. 783, but the measure of sufficiency requires that the evidence of assignment be clear and positive to protect an obligor from any further claim by the primary obligee. Gustafson v. Stockton etc. R. R. Co., 132 Cal. 619, 64 P. 995. Here there was an assignment on the back of the note secured by the third trust deed which was purportedly signed by P. H. Wierman for the Crestmore Company; there was no competent evidence with respect to the Crestmore Company, its membership, or P. H. Wierman's authority to bind that company. Plaintiffs, claiming as assignees of that company, had the burden of proving the existence and membership of the firm in order to support their claim of ownership of the note and third trust deed. Welch v. Alcott, 185 Cal. 731, 198 P. 626. In Bengel v. Kenney, 126 Cal.App. 735, 14 P.2d 1031, where the plaintiff claimed title under an assignment of a purported assignee of a corporation but the evidence failed to show that the assignment by the corporation was executed by a person having authority to do so, it was held that the evidence failed to show title in the plaintiff by reason of such an assignment. In Brown v. Ball, 123 Cal.App. 758, 12 P.2d 28, it was held that the evidence was insufficient to establish the execution of an assignment where there was no evidence to show that it was executed by the person whose name purported to be signed thereto or that the signer had authority as agent to execute the instrument.

[9, 10] For the above reasons it appears that plaintiffs failed to prove a valid assignment of the note and third trust deed to them. As assignees they stand in the same position as their assignor, the Crestmore Company, and must prove their chain of title to the note in question. As was said in Brown v. Ball, supra, 123 Cal.App. 758, 12 P.2d 28, 31, "* * * we think that it would be a dangerous innovation to hold that on such proof, without more, an assignment purporting to be executed by an agent, as each of these were, could be introduced into evidence. We are asked to presume not only that the persons whose names are subscribed actually executed the assignments, but also that they had authority to do so merely because they were received through the mail in their present form after having been mailed to the alleged assignors with a request that they be executed." In the present case, we would have to assume the position of Russ and Ethyl Green in the chain of title, that the Crestmore Company had complied with the statutory provisions relating to the use of a fictitious name, and that P. H. Wierman was a member of the firm with the authority to execute an assignment of the note made payable to that firm. Such assumptions would, indeed, constitute a "dangerous innovation."

[11] Plaintiffs contend that the trial court erred in finding that the balance allegedly due them under the third trust deed

was not as alleged; that the liens of the third and fourth trust deeds were extinguished by the foreclosure of the second trust deed; and that the defendants were entitled to the surplus funds as owners of an unrecorded deed to the property. Error is also claimed in the admission of testimony, over objection, of the consideration paid by plaintiff to the Crestmore Company. In view of our conclusion that plaintiffs failed to prove a valid assignment to them of the note secured by the third deed of trust, they have no standing to complain of the judgment awarding the surplus yield to the defendants who were the only other claimants therefor. The other errors complained of do not require discussion.

The findings of the trial court are amply sustained by the record, and the findings support the judgment.

The judgment is, therefore, affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, Justice.

I concur in the judgment solely upon the ground that the record does not show, as a matter of law, that the trust deed under which the appellants claim was executed by one who at that time was the owner of the property.

SCHAUER, Justice.

I dissent.

Justice CARTER's opinion holds that an issue as to the fact of assignment must be presumed to have been raised and that the evidence fails to prove an assignment of the note to the plaintiffs. Neither the record nor the law supports this holding.

The clerk's transcript shows that the answer of the defendants T. E. Denny and Edna Denny does not contain any denial sufficient to raise an issue as to the fact of assignment. The language of the answer is as follows: "Answering Paragraph IV of said complaint, these defendants do not have sufficient information as to the allegation contained therein, and basing their denial upon that ground, generally and specifically deny the same."

It has been the law of this state for the past ninety-five years that an attempted denial in the form and substance of the language above quoted raises no issue. (Aronson & Co. v. Pearson (1926), 199 Cal. 295, 297–298, 249 P. 191; May v. Board of Directors (1949), 34 Cal.2d 125, 127, 208 P.2d 661; North v. Evans (1931), 117 Cal.App. 317, 320, 3 P.2d 609.) As repeatedly pointed out in the cases section 437 of the Code of Civil Procedure provides that a defendant if he "has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint * * * may so state in his answer, and place his denial on that ground," but it is wholly insufficient to merely aver lack of information or knowledge as a basis for denial, and, as held in the May case, supra, "A denial in that form is insufficient to present an issue on the subject of ownership."

However, even if we assume that the fact of plaintiffs' title to the note (and accompanying security) was placed in issue the ultimate result must be the same. The evidence as to plaintiffs' ownership is uncontradicted. The opinion seeks to avoid its effect on two theories: 1. That the evidence of ownership is not competent or sufficient; 2. That the plaintiffs' title must fail because they did not prove that the payee of the note, the "Crestmore Co., a Limited Partnership," had complied with section 2468 of the Civil Code.

As to the first contention, the evidence shows without dispute that plaintiffs had possession of the note, that they produced it, and that on the reverse side it was endorsed "The undersigned does hereby assign this note to the account of [plaintiffs] * * *, as of the 27th day of August, 1951. [Signed] The Crestmore Co. P. H. Wierman." The note was purchased through an escrow for a consideration purporting to amount to a value of at least $6,300. The production of the note, without more, was sufficient evidence of ownership. It is presumed that "things which a person possesses are owned by him," (Code Civ.Proc. § 1963, subd. 11) and when a note purporting to bear the endorsement of the payee is produced by the transferee it is presumed that the transferee has acquired it for value and is the owner thereof (Waldrip v. Black (1887), 74 Cal. 409, 411-412, 16 P. 226; Ramboz v. Stansbury (1910), 13 Cal.App. 649, 652, 110 P. 472; Carver v. San Joaquin Cigar Co. (1911), 16 Cal.App. 761, 769, 118 P. 92). Under the circumstances shown the evidence does not support a finding that plaintiffs do not have title. (Reinert v. Proud (1935), 8 Cal.App. 2d 169, 171, 47 P.2d 491; see also Sipe v. W. I. Hollingsworth & Co. (1950), 99 Cal. App.2d 391, 392, 221 P.2d 991.

The second contention in the majority opinion—that plaintiffs must fail because they did not prove that their predecessor in interest, the Crestmore Company, had complied with section 2468 of the Civil Code—is wholly devoid of merit. This is not an action to recover on the note; it is a proceeding for declaratory relief. If the plaintiffs are the owners of the note but cannot maintain an action on it until their predecessors have complied with section 2468 the court should so declare. Section 2468 cannot work a forfeiture of the plaintiffs' title to the note or to the funds here involved; it could, at most, be availed of as a plea in abatement in an action on the note. (Kadota Fig Assn. v. Case-Swayne Co. (1946), 73 Cal.App.2d 796, 802, 167 P.2d 518.) Furthermore, the pleadings in this case are completely silent on this issue; there is no plea in abatement. A plaintiff is not required to allege or prove compliance with this section, since non-compliance is a matter of defense, and the issue cannot be raised for the first time on appeal. (Phillips v. Goldtree (1887), 74 Cal. 151, 154-155, 13 P. 313, 15 P. 451; see also Vance v. Gilbert (1918), 178 Cal. 574, 578, 174 P. 42.) "The rule is settled that it is not necessary that the plaintiffs have complied with the statute at the time of the commencement of the action; that it is sufficient if they have done so at the time at least when issue as to the matter of abatement is made." (Rudneck v. Southern California M. & R. Co. (1920), 184 Cal. 274, 282, 193 P. 775.) Here, that issue has never been made.

It follows that the judgment of the trial court should be reversed.

Rehearing denied; SCHAUER, J., dissenting.

WORTHLEY v. WORTHLEY.

L. A. 22889.

Supreme Court of California.
In Bank.
Feb. 25, 1954.

Rehearing Granted March 25, 1954.

Action to enforce a decree of New Jersey court for separate maintenance. The Superior Court, Los Angeles County, John Gee Clark, J., rendered judgment sustaining a plea in bar, and plaintiff appealed. The Supreme Court, Shenk, J., held that wife's rights under decree for separate maintenance obtained against husband in personam in New Jersey were not affected by divorce decree subsequently obtained by husband in Nevada upon service of copy of summons and complaint on wife in New Jersey.

Judgment reversed.

Schauer, J., dissented in part.

Prior opinion, 258 P.2d 588.

1. Divorce ⚷391

To determine effect of Nevada divorce decree obtained by husband upon decree of New Jersey court for separate maintenance previously obtained by wife, reference must be had to the law of New Jersey.

2. Courts ⚷95(2)

To determine the law of another state, court may look to the legislative acts of such state and to the interpretation placed thereon by the highest court of such state. Code Civ.Proc. § 1875, subd. 3.

3. Divorce ⚷352(3)
Judgment ⚷815

Under federal Constitution, both divorce decrees and decrees for separate maintenance, which are valid and enforceable in the state in which they were rendered, are entitled to full faith and credit in another state. U.S.C.A.Const. art. 4, § 1.

4. Divorce ⚷391

Under New Jersey Law, rights of wife under decree for separate maintenance obtained against husband in personam in chancery court of New Jersey, which was the matrimonial domicile of the parties, were not affected by divorce decree subsequently obtained by husband in another state upon service of copy of summons and complaint on wife in New Jersey.

5. Judgment ⚷823

Wife was entitled to judgment in California against husband for amount due and unpaid under New Jersey decree for separate maintenance. U.S.C.A.Const. art. 4, § 1.

6. Judgment ⚷823

While full faith and credit clause of federal Constitution does not obligate courts of one state to enforce a final decree of another state for separate maintenance with respect to future payments, under Uniform Reciprocal Enforcement of Support Act and general principles of comity, California superior court could in its discretion issue an order requiring husband to make weekly payments for support of wife in accordance with New Jersey separate maintenance decree until modification of such decree by court of competent jurisdiction. Code Civ.Proc. §§ 1650 et seq., 1653(6), 1654, 1670, 1685, N.J.S.A. 2A:4–30.1 et seq., 30.2(f), 30.7, 30.15, U.S.C.A.Const. art. 4, § 1.

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Kenny & Morris and Robert W. Kenny, Los Angeles, for appellant.

Slane, Mantalica & Davis and Frank Barclay, Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment which barred the plaintiff from proceeding in an action to enforce a New Jersey separate maintenance decree.

The plaintiff and the defendant were married in New Jersey on March 6, 1943. They separated in November of 1946. On May 19, 1947, the New Jersey Court of Chancery entered a decree which ordered the defendant to pay to the plaintiff as separate maintenance the sum of $9 a week, and that payments should continue until otherwise ordered by that court. The defendant appeared and was represented by counsel in the New Jersey proceeding. About ten months later the defendant left New Jersey. He arrived in Reno, Nevada, on March 18, 1948, and shortly thereafter commenced an action for a divorce against the plaintiff. The plaintiff was served in New Jersey with a copy of the summons and complaint in the Nevada action, but she did not answer the complaint or make any appearance in that proceeding. On June 7, 1948, the Nevada Second Judicial District Court entered a decree of divorce in favor of the defendant dissolving his marriage to the plaintiff. The Nevada decree contained no provision for alimony. Until the Nevada divorce decree was entered the defendant had complied with the New Jersey separate maintenance decree. After the Nevada decree was entered he ceased paying to the plaintiff $9 a week provided for in the New Jersey decree. After the Nevada decree was ordered the defendant unsuccessfully sought employment in his specialized occupation in that state and moved to Los Angeles where he has since resided.

On November 16, 1951, the plaintiff commenced an action in the Los Angeles Superior Court to enforce the New Jersey separate maintenance decree. In her complaint she alleged that the defendant had neglected to pay $1,089 which was due and payable under the New Jersey decree; that she and the defendant were husband and wife, and that he refused to provide for her in accordance with that decree or otherwise. She asked that the New Jersey decree be established as a foreign judgment; that the court adjudge that the defendant owed $1,089 to the plaintiff; that the defendant be ordered to pay $9 a week until further order of the court; and that the court grant her such other relief as would seem just and equitable.

The defendant answered the complaint. He admitted the existence of the New Jersey decree and that he had complied with its terms until June 7, 1948. He pleaded as an affirmative defense that the Nevada divorce decree of June 7, 1948, had terminated his obligations under the prior New Jersey decree.

At the trial the defendant moved that his special defense be tried first under section 597 of the Code of Civil Procedure. That section provides: "When the answer pleads that the action is barred by * * * a prior judgment * * * or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, upon the motion of either party, proceed to the trial of such special defense or defenses before the trial of any other issue in the case, and if the decision of the court, or the verdict of the jury upon any special defense so tried * * * is in favor of the defendant pleading the same, judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had unless such judgment shall be reversed on appeal or otherwise set aside or vacated * * *." The trial court granted the defendant's motion and heard his special defense first. Testimony was taken and arguments were made by counsel for both sides. The trial court ruled that the Nevada decree was valid and that it constituted a bar to an action on the New Jersey separate maintenance decree. The court ordered that the "plaintiff is barred from further prosecution * * * in this action * * *."

[1, 2] The question to be determined is the effect of the Nevada divorce decree upon the prior New Jersey decree for separate maintenance. Both parties rely primarily upon California law to answer the question. The disposition of this case requires reference to the law of New Jersey. Kurlan v. Columbia Broadcasting System, 40 Cal.2d 799, 806, 256 P.2d 962; Philbrook v. Randall, 195 Cal. 95, 105, 231 P. 739; Schubert v. Lowe, 193 Cal. 291, 294, 223 P. 550. To determine the law of New Jersey we may look to the acts of the legislature of that state and to the interpretation placed upon them by her highest court. Code Civ.Proc. § 1875, subd. 3.

[3] There is no doubt that the New Jersey separate maintenance decree was valid and enforceable up to June 7, 1948. It was entitled to full faith and credit in California. U.S.Const. art. IV, § 1. The trial court found that the Nevada decree was valid. It too is entitled to full faith and credit in California. To give full faith and credit to both of these decrees we resort to New Jersey law to determine what effect must be given to a valid ex parte divorce decree which is secured outside of New Jersey by a person subject to a valid separate maintenance decree rendered in New Jersey by a court having jurisdiction over that person. Sutton v. Leib, 342 U.S. 402, 72 S.Ct. 398, 96 L.Ed. 448; Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561; Meredith v. Meredith, D.C.Cir., 204 F.2d 64; Campbell v. Campbell, 107 Cal.App.2d 732, 736, 846, 238 P.2d 81.

[4] In a recent case the highest court of New Jersey has held that "a decree for maintenance [is not] superseded by a judgment of the foreign state where jurisdiction has only been obtained by publication entered in an *ex parte* proceeding in which *in personam* jurisdiction over the wife to whom the maintenance decree runs was not obtained. Estin v. Estin, 1948, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561." Isserman v. Isserman, 11 N.J. 106, 93 A.2d 571, 575. The Estin case does not demand the result reached by the New Jersey Supreme Court but that result is a permissible one. Sutton v. Leib, supra, 342 U.S. 402, 72 S.Ct. 398; Meredith v. Meredith, supra, 204 F.2d 64; Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351. The Isserman case clearly indicates that under the law of New Jersey the defendant's Nevada divorce decree did not end the rights conferred upon the plaintiff by the prior New Jersey separate maintenance decree. Since the New Jersey separate maintenance decree is entitled to full faith and credit in California the superior court erred in sustaining the defendant's special defense and refusing to permit the plaintiff to proceed with her case.

[5] The defendant's answer admitted that he had ceased making payments under the New Jersey decree on June 7, 1948. The plaintiff is therefore entitled to a judgment for $1,089 which is the amount due to her under the New Jersey decree between June 7, 1948, and the commencement of this action.

In her complaint the plaintiff asked that the defendant be ordered to pay $9 a week (the amount specified under the New Jersey decree) to her until further order of the superior court. Both New Jersey and California have adopted the Uniform Reciprocal Enforcement of Support Act. 9A U.L.A.Supp. p. 57 et seq.; Code Civ.Proc. § 1650 et seq.; N.J.S.A. 2A:4–30.1 et seq. Section 7 of that act provides: "Duties of support enforceable under this law are those imposed or imposable under the laws of any state where the alleged obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced, at the election of the obligee." Code Civ.Proc. § 1670; N.J.S.A. 2A:4–30.7. Section 2 of the Uniform Act defines "duty of support" as including "any duty of support imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial * * * separation, separate maintenance or otherwise." Code Civ.Proc. § 1653(6); N.J.S.A. 2A:4–30.2(f).

[6] The Uniform Act further provides: "In addition to the foregoing powers, the court of this State, when acting as the responding state has the power to subject the defendant * * * to such terms and conditions as the court may deem proper to assure compliance with its orders and in particular * * * (b) to require the defendant * * * to make payments at specified intervals to the * * * probation [officer of the county] * * * or the obligee * * *." 9A U.L.A.Supp. p. 78; Code Civ.Proc. § 1685; N.J.S.A. 2A:4–30.15. Under the Uniform Act the superior court may in its discretion issue an order requiring the defendant to pay to the plaintiff weekly the amount provided for in the New Jersey separate maintenance decree.

Section 1654 of the Code of Civil Procedure provides that the remedies established under the Uniform Reciprocal Enforcement of Support Act "are in addition to and not in substitution for any other remedies." In Biewend v. Biewend, 17 Cal.2d 108, at pages 112–13, 109 P.2d 701 at page 704, 132 A.L.R. 1264, this court stated: "The full faith and credit clause, however, does not obligate the courts of one state to enforce an alimony decree rendered in another state with regard to future payments * * *. Upon the basis of comity, however, as distinguished from the requirements of full faith and credit, the California courts have in numerous cases ordered that a foreign decree for future payments of alimony be established as the decree of the California court with the same force and effect as if it had been entered in this state, including punishment for contempt if the defendant fails to comply." See also Toohey v. Toohey, 97 Cal.App.2d 84, 217 P.2d 108; Tomkins v. Tomkins, 89 Cal.App.2d 243, 200 P.2d 821. The Biewend and other supporting cases refer to foreign decrees for future alimony, but the principles enunciated in those cases are also applicable to final foreign decrees for separate maintenance. Under the general law of California the trial court may in this action order that the defendant make payments in accordance with the New Jersey separate maintenance decree until that decree is changed or modified by a court of competent jurisdiction.

The plaintiff is therefore entitled to a judgment for $1,089, the amount past due under the New Jersey separate maintenance decree; and the trial court may order the defendant to make future payments in accordance with that decree until such time as it is duly modified.

The judgment is reversed.

We concur: GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR and SPENCE, JJ.

SCHAUER, Justice (concurring and dissenting).

Upon the theory enunciated in the concurring opinion in DeYoung v. DeYoung (1946), 27 Cal.2d 521, 527–528, 165 P.2d 457, I concur in the holding that plaintiff is entitled to a judgment for $1,089.

I dissent from the holding that the trial court may in this action order that "the defendant make payments in accordance with the New Jersey separate maintenance decree until that decree is changed or modified by a court of competent jurisdiction." Such holding is inconsistent with the law either as declared by the majority or suggested by the dissenters in the DeYoung case. (See also Biewend v. Biewend (1941), 17 Cal.2d 108, 109 P.2d 701, 132 A.L.R. 1264.)

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123 Cal.App.2d 673

PEOPLE v. WILSON.

Cr. 5121.

District Court of Appeal, Second District,
Division 2, California.
March 4, 1954.

Defendant was convicted of bookmaking. The Superior Court of Los Angeles County, Clement D. Nye, J., entered judgment denying application of defendant for continuance of hearing on application for probation, and defendant appealed. The District Court of Appeal, Fox, J., held that the Superior Court did not abuse its discretion.

Judgment affirmed.

1. Criminal Law ⚷322

Probation report filed by probation officer was presumably made in accordance with statutory provisions, and therefore officer would be deemed to have made an investigation of circumstances surrounding crime and prior record and history of defendant as required by statute, since it is presumed that the law has been obeyed and that official duty has been performed. Code Civ.Proc. § 1963, subds. 15, 33; Pen.Code, § 1203.

2. Criminal Law ⚷982

Probation officer could make a sufficiently comprehensive investigation and report to enable court to pass fairly on application of defendant for probation without officer discussing the offense, which defendant had committed, with the defendant. Pen.Code, § 1203.

3. Criminal Law ⚷1144(17)

On appeal by defendant from judgment denying request of defendant for continuance of hearing on his application for probation, District Court of Appeal was required to presume that trial judge believed that probation officer had made a report sufficient to enable trial judge to pass fairly on application of defendant for probation. Pen.Code, § 1203; Code Civ.Proc. § 1963, subd. 15.

4. Criminal Law ⚷982

Where defendant saw probation officer but refused to discuss offense, which defendant had committed, and thereafter defendant's attorney instructed defendant to tell probation officer everything, but defendant was unable to contact probation officer, and there was no evidence to overcome presumption that probation officer made an investigation of circumstances surrounding the offense and prior record of history of defendant, court did not abuse its discretion in denying defendant a continuance so that he might see probation officer. Pen. Code, § 1203; Code Civ.Proc. § 1963, subds. 15, 33.

◆

Walter L. Gordon, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOX, Justice.

The sole question on this appeal is: Did the trial court abuse its discretion in denying defendant's request for a continuance of the hearing on his application for probation?

Defendant was charged in count one with a violation of Penal Code section 337a, subdivision 1, and in count two with a violation of subdivision 3 of the same section. He entered a plea of guilty to count one. Proceedings were suspended and defendant was granted probation for a period of three years on condition, among others, that he serve the first ninety days of his probationary period in the county jail, with good time allowed if earned. Count two was dismissed. He appeals from the judgment.

When the hearing on defendant's application for probation was called he sought, through his counsel, a continuance in order that he might see the probation officer, whom he claimed he had gone to see twice but who was not in on either occasion, to give the officer the information he wanted. It developed that the defendant had seen the probation officer but "he refused to discuss the offense" with the officer. Defendant claimed he had told the probation officer he would talk to him if it was all right with his attorney and that after his attorney had told him to tell everything he had been unable to contact the probation officer since he worked split shifts, leaving home at 10:00 a. m. and not returning until midnight.

[1–4] A probation report was filed by the officer, and read and considered by the court. The presumption is that it was made in accordance with the provisions of Penal Code section 1203, and that therefore the officer made "an investigation of the circumstances surrounding the crime and the prior record and history of the defendant," as therein provided, since it is presumed the law has been obeyed and official duty has been properly performed. Code Civ.Proc. § 1963, subds. 15, 33. The report is not before us and there is no evidence to overcome this presumption. The officer did not necessarily have to discuss the circumstances surrounding the crime with the defendant in order to make a proper investigation thereof. There may have been others connected with this bookmaking venture who could and did supply the necessary information. The transcript at the preliminary hearing may have disclosed it. By his plea defendant had admitted he was guilty of the charge. The prior record of the defendant would be available to the probation officer, and in any event it does not appear that the defendant refused to discuss it, or his "history" or to provide other personal data, but rather only "refused to discuss the offense." Thus it was possible for the probation officer to make a sufficiently comprehensive investigation and report to enable the court to pass fairly on his application for probation without discussing "the offense" with the defendant. And we must presume the trial judge believed he had such a report. Code Civ.Proc. § 1963, subd. 15. We therefore find no abuse of discretion.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

123 Cal.App.2d 575

BROGDEX CO. v. WALCOTT et al.

Civ. 19760.

District Court of Appeal, Second District, Division 1, California.

March 1, 1954.

Rehearing Denied March 23, 1954.

Hearing Denied April 28, 1954.

Action by patentee of wax process for treatment of fruits and vegetables in preparation for market against individuals who, as individuals and co-partners, had been licensed to distribute such process, for injunctive and declaratory relief and an accounting. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Drapeau, J., held, inter alia, that since the license agreement provided that license rights were personal and non-assignable and that partners were required to devote their full time and best efforts to distribution of such process and were prohibited from engaging in any business which would compete with such process, law would imply that personal services of both partners were required so that one partner's acceptance of employment with competitor was breach of the agreement and justified its termination.

Affirmed.

1. Appeal and Error 🔑209(1)

Appellants' failure to question sufficiency of evidence to sustain certain findings was a concession that there was substantial evidence to support such findings.

2. Patents 🔑214

In action by company, which had licensed partnership to distribute patented wax process for treatment of fruits and vegetables in preparation for market by agreement which required partners to devote their full time and best efforts to such distribution and which prohibited them from engaging in any business which would compete with such process, for injunctive and declaratory relief and an accounting, evidence supported finding that certain partner had become salaried employee of competitor, thereby justifying plaintiff's termination of such agreement.

3. Patents ⚷214

Where patentee of wax process for treatment of fruits and vegetables in preparation for market entered into agreement with partners individually and as co-partners, which contract licensed partners to distribute such process and which provided that license rights were personal and non-assignable and that partners were required to devote their full time and best efforts to distribution of such process and were prohibited from engaging in any business which would compete with such process, law would imply that personal services of both partners were required so that one partner's acceptance of employment with competitor was breach of the agreement and justified its termination.

4. Appeal and Error ⚷1008(3)

Where construction given agreement by trial court appears to be consistent with true intent of parties, appellate court will not substitute another interpretation, though it seems equally tenable.

◆

Loeb & Loeb, Los Angeles, Nichols, Cooper, Hickson & Lamb, Pomona (Herman F. Selvin and Harry L. Gershon, Los Angeles, of counsel), for appellants.

Faries & McDowell and Ralph B. Hubbard, Los Angeles, for respondent.

DRAPEAU, Justice.

By the instant action, plaintiff sought injunctive and declaratory relief and also an accounting.

The complaint alleges that by a written agreement dated August 9, 1948, plaintiff licensed defendants to distribute a wax process for the treatment of fruits and vegetables in preparation for market. The patent for this process was owned by plaintiff. The license rights granted by the agreement were personal to and nonassignable by defendants and they were both required to "devote their full time and best efforts as said licensing representatives of plaintiff and not to engage in any business which would in any way compete with said licensed processes * * *."

Also, that on May 9, 1950, defendants began working for S. C. Johnson & Son, Inc., as its exclusive representatives in Arizona and California, selling and licensing products and processes which were in direct competition to the patented processes of the plaintiff.

On May 11, 1950, plaintiff gave notice to defendants that, because they were not devoting their full time and effort as required under the contract of August 9, 1948, and were engaged in work antagonistic to the performance thereof and in competition to the processes of plaintiff, they had violated the contract; hence, it was terminated as of May 11, 1950 in accordance with its terms.

The existence of an actual controversy between the parties was alleged in that plaintiff asserted and defendants denied that "by the terms of the contract and by reason of the fiduciary relationship of principal and agent between plaintiff and said defendants * * * plaintiff had the legal right to terminate said license agreement on May 11, 1950 * * *."

Among other things, the trial court found as follows:

Plaintiff and defendants, Walcott and Cunning, as individuals and copartners, entered into the agreement of August 9, 1948, granting to defendants an exclusive license to use and sublicense in California and Arizona, a patented process owned by plaintiff and known as the powdered wax process or "Snowax".

The process is one whereby wax is applied to various kinds of fresh fruits and vegetables, in preparation for market for the purpose of reducing shrinkage and decay, and to make them more attractive for marketing. Defendants did not use the process themselves, but sublicensed it to sublicensees in California and Arizona, who paid royalties to them, and they in turn paid royalties to plaintiff.

The rights granted to defendants by the contract were "personal to them and non-assignable by them". They were required to devote their best efforts in the performance of the agreement. This they failed to do after May 1, 1950.

Upon termination, all license rights were to cease immediately and any attempted assignment would result in automatic termination.

The services of defendants contracted for "were unique, specialized, personal, joint and several, and said services, as such, of said defendants were essential to the performance of the agreement."

Early in January of 1950, defendants, began negotiating with Johnson Wax Company of Racine, Wisconsin, for the exclusive right to sell and distribute the Johnson process in California and Arizona. This process had not been successfully marketed in California; was identical to Snowax and in direct competition to it.

In March of 1950, when defendants asked permission of plaintiff to sell and distribute the Johnson process, plaintiff denied such permission.

Prior to May 9, 1950, Walcott, Cunning and Johnson agreed that if Johnson would waive its age-limit requirement, Cunning would become a full-time employee of Johnson and would organize a company to be called "Packers Wax Service", separate and apart from R. M. Walcott Company, to distribute the Johnson process. The R. M. Walcott Company would manufacture the "foamer" for use in the Johnson process for any customer who ordered the same. This agreement was not conditioned upon the consent of plaintiff, nor was such approval or consent ever obtained from plaintiff by defendants.

"Prior to May 9, 1950, and after April 20, 1950, defendant Cunning became a full time, salaried employee of Johnson as its representative on the West Coast, including California and Arizona, to promote, sell and distribute for Johnson the Johnson process and * * * waxes."

"On May 9, 1950, defendant Walcott informed plaintiff that defendant Cunning had become a full time employee of Johnson as of May 1, 1950."

"On May 11, 1950, plaintiff gave defendants written notice of the termination of the agreement, which they received on May 12, 1950.

"On May 13, 1950, defendant Cunning solicited orders for the Johnson process. On May 15, 1950, R. M. Walcott Company commenced the manufacture of two of the Johnson 'foamers'."

Further findings pertain to (1) the sum of $17,000 received as royalties from sublicensees after termination of the agreement, which was placed in trust accounts under agreement of the parties; (2) stipulation that plaintiff have judgment for $1500 as an accounting under its second cause of action; and (3) termination of two minor agreements made in connection with the license agreement.

Thereafter judgment for plaintiff was entered to the effect that the written agreement of August 9, 1948, was lawfully and justifiably terminated by plaintiff on May 11, 1950. Defendants, as individuals and copartners, were permanently enjoined from licensing, sublicensing or practicing the wax process of plaintiff, or collecting any royalty or license fee therefor which became due after May 11, 1950; and from holding themselves out as agents of plaintiff under the agreement of August 9, 1948. Plaintiff to recover the sums of $17,234.14 and $1,533.27 and costs. Defendants and cross-complainants to take nothing by their fifth amended cross-complaint on file herein.

From this judgment defendants appeal.

Appellants state there are two basic issues determinative of this appeal, to-wit:

"(1) Was Cunning actually employed by S. C. Johnson & Son prior to the termination by Brogdex of the agreement of August 9, 1948?

"(2) If he was, did he thus violate any term or condition of that agreement?"

In connection with their first point, appellants assert that the evidence does not support Finding numbered XII that Cunning had actually become a Johnson employee prior to May 9, 1950, and therefore the purported termination of the agreement of August 9, 1948 was legally premature and without legal cause.

[1] Appellants attack but one finding. By failure to question the sufficiency of the evidence to sustain the other findings, they have conceded that there is substantial evidence to support them. Rosenberg v. Raskin, 80 Cal.App.2d 335, 338, 181 P.2d 897.

The evidence presented on the point at issue is briefly as follows:

Mr. W. J. Wallace, Jr., president of Brogdex, testified that he was present at a meeting held early in March with Messrs. Walcott, Cunning, Nichols (their attorney), LeBeau, general manager of Brogdex, and Baker Wallace, its vice president, when Mr. Walcott "asked for permission of Brogdex to acquiesce in his taking on the Johnson license of agricultural waxes for the states of California and Arizona." This consent was withheld by respondent. The same parties met again within a few days when respondent's decision was reaffirmed, because to take on the Johnson license "would be a violation of the contract."

The next discussion took place on May 9, 1950, when Mr. Walcott telephoned the office of Brogdex in Pomona and asked for an audience. At this meeting the witness, W. J. Wallace, Jr., Baker Wallace, Mr. LeBeau and Mr. Walcott were present.

"Mr. Walcott said that he would like to give us some information first hand rather than to hear it by rumor, and that was to the effect that Mr. Cunning had gone to the Johnson Wax Company, that their partnership had been dissolved and that Mr. Cunning had been on the payroll of Johnson Wax since May 1, 1950.

"Q. What else did Mr. Walcott say, if anything? A. He said that more than ever before we should work closer together, in view of the fact that we had another competitor in the field, and to do everything we could to meet that new competition."

The officers of Brogdex did nothing at that time. Very shortly thereafter they discussed the situation with their attorney and on May 11, 1950, mailed to Mr. Walcott the notice terminating the agreement of August 9, 1948. And on May 16, 1950, respondent notified each of the twenty-five or more sublicensees "that we had terminated the license agreement."

On cross-examination, this witness testified that at the May meeting, Mr. Walcott came in and told him that Mr. Cunning had gone on the Johnson payroll on May 1, 1950; that Cunning had severed his connection with the Walcott Company and was on the Johnson payroll.

This evidence was corroborated by Messrs. F. Baker Wallace and LeBeau, officers of respondent company.

Mr. Cunning was examined by respondent under section 2055, Code of Civil Procedure. He testified that he was employed by Johnson "about May 15", but did not do any soliciting for about a week; that he went on the Johnson payroll May 15th, but was paid from the first. "It was retroactive to the first." He also stated that the thought that he was to go to work for Johnson "was expressed back as far as the first of May."

Mr. Carse of the Johnson Company testified that the company "customarily made any employment retroactive to the first of the month irrespective of when a person comes to work for us for the record."

[2] This court is of the opinion that the above evidence and the inferences deducible from it, substantially support the finding that Mr. Cunning became a full-time salaried employee of respondent prior to May 9, 1950.

In connection with their second point, appellants urge that "the license agreement neither expressly nor by necessary implication requires the rendition of personal services by both Walcott and Cunning. It was therefore not violated by any alleged prospective failure of Cunning to render such services."

The agreement was made with appellants "as individuals and as copartners", and provided that "the license rights herein granted Licensee are personal and non-assignable by Licensee except with the written consent of Licensor and any attempted assignment of same otherwise, in whole or in part, shall automatically terminate this agreement in its entirety * * *."

The agreement permitted an assignment without consent of licensor, in the event that the *"Licensees and each of them"* shall form a corporation and assign thereto the assets and goodwill of the Walcott Company. It further provided: "If at any time after such assignment to such corporation the said Russell M. Walcott and T. George Cunning fail to have voting control of said corporation * * * *or one or the other of them* for any reason, does not devote his full time and best efforts to the business of said corporation, Licensor may, at its option, forthwith terminate this agreement."

As heretofore recited, the trial court found that "the services of defendants for which Brogdex contracted, pursuant to the agreement, were unique, specialized, personal, joint and several, and said services, as such, of said defendants were essential in the performance of the agreement." This finding was not attacked by appellants as being unsupported by the evidence, and is therefore binding on appeal. Rosenberg v. Raskin, supra, 80 Cal.App.2d 335, 338, 339, 181 P.2d 897.

And, as stated by this court in Brawley v. Crosby, etc., Foundation, Inc., 73 Cal. App.2d 103, 112, 166 P.2d 392, 397: "In this, as in every contract, there is the implied covenant of good faith and fair dealing; that neither party will do anything that would result in injuring or destroying the right of the other to enjoy the fruits of the agreement. (Citation of authorities.) The law will therefore imply that under its agreement appellant was obligated in good faith and by its reasonable and best efforts to develop, exploit, produce and make sales of the rotary pump in question." See, also, Matzen v. Horwitz, 102 Cal.App.2d 884, 892, 228 P.2d 841.

[3] The rights granted to appellants under the agreement in question were "personal to them and non-assignable by them." Appellants were obligated to devote their best efforts in performing their part of the contract. In the circumstances presented, the law will imply that the personal services of both appellants were required. Therefore, when appellant Cunning became an employee of Johnson in work antagonistic to and in competition with that of respondent, he breached the implied obligation of the agreement to deal fairly and in good faith with respondent, thereby justifying its termination.

[4] The construction given the agreement by the trial court "appears to be consistent with the true intent of the parties and where that is so, the appellate court will not substitute another interpretation though its seems equally tenable." Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, 772, 128 P.2d 665, 677.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

123 Cal.App.2d 517

CRANE et al. v. MIDDLETON et al.

Civ. 8352.

District Court of Appeal, Third District, California.

Feb. 25, 1954.

Action against the executrix of a decedent's estate and others to recover damages for alleged diversions of water from a water course flowing through the parties' lands. From an order of the Superior Court, San Joaquin County, Woodward, J., granting the executrix a new trial after a judgment against her personally, plaintiff's appealed on the judgment roll. The District Court of Appeal, Schottky, J., held that the Superior Court did not abuse its discretion in denying plaintiffs' motion to dismiss the executrix's motion for new trial or in granting the motion for new trial on the grounds that the evidence was insufficient as to the executrix to warrant the decision and that otherwise the decision was against law.

Order affirmed.

1. Executors and Administrators 🔑452
New Trial 🔑10

Where one of three defendants was designated in caption of complaint, judgment for plaintiffs and throughout proceedings by her name, followed by words "executrix of the estate of" named decedent, without word "as" before "executrix," and parties' stipulation that such defendant's motion for new trial after first judgment rendered should be granted named her "as executrix" of estate, trial court did not abuse its discretion in denying plaintiffs' motion to dismiss such defendant's motion for new trial after second judgment against her personally and granting motion for new trial on grounds that evidence was insufficient as to her to warrant decision and that otherwise decision was against law.

2. Pleading 🔑1

Technical rules of pleading should not be slavishly adhered to, but counsel and court should co-operate in shaping pleadings so that controversy between parties litigant may be fully and fairly determined on its merits and in accordance with substantial justice.

3. Appeal and Error 🔑979(2, 3)

Whether new trial should be granted on ground of insufficiency of evidence to warrant decision rests peculiarly within discretion of trial court, whose order granting or refusing new trial cannot be disturbed on appeal, in absence of showing of abuse of such discretion.

4. Appeal and Error 🔑948

The burden of showing trial court's abuse of discretion in order granting new trial on ground of insufficiency of evidence to warrant court's decision is on party appealing from such order.

5. Appeal and Error 🔑933(1)

On appeal from order granting new trial after judgment against party moving for new trial, all presumptions are in favor of order and against judgment.

Jones, Lane, Weaver & Daley, Stockton, for appellants.

Lafayette J. Smallpage & Harold J. Willis, Stockton, for respondents.

SCHOTTKY, Justice.

This is an appeal upon the judgment roll from an order granting a new trial to Artie Norgard Gordon, respondent herein.

Plaintiffs commenced an action against defendants for an injunction and for damages resulting from alleged diversions of water from a water course which flowed through the lands of the parties. One of the defendants named in the caption of the complaint was "Artie Norgard Gordon, Executrix of the Estate of Elmer Norgard, deceased." Artie Norgard Gordon was the daughter of Elmer Norgard, deceased, and the executrix of his estate. Prior to the trial of the action, plaintiffs, having conveyed their interest in their land, abandoned their prayer for an injunction. Following a trial before the court, sitting without a jury, findings were made and several judgments were entered in favor of plaintiffs, against defendant Middleton for $4,699.27, against defendant Ferschoni for $4,699.26, and against "Artie Norgard Gordon, Executrix of the Estate of Elmer Norgard, deceased," for $2,349.63. Defendants Middleton and Ferschoni are not parties to this appeal.

Respondent gave notice of intention to move for a new trial, naming herself in the notice as Artie Norgard Gordon, executrix, etc. The court's minutes for March 4, 1952, show that the motion for new trial came on for hearing that day and that counsel Smallpage moved that the case be reopened as to "defendant Norgard estate" only, for all purposes, to be stated in a written stipulation to be filed forthwith. The minutes further show that appellants' counsel stipulated that the motion should be granted and that thereupon counsel for "defendant Norgard estate" withdrew his motion for a new trial and the case was set for further hearing. The stipulation between appellants and respondent was executed by their respective counsel on the following day and was promptly filed. Respondent was named in the stipulation as defendant Artie Norgard Gordon, *as* executrix, etc., and counsel signed the stipulation, on her behalf, as attorneys for defendant estate of Norgard. The stipulation provided that the findings and conclusions and the judgment, as to respondent only, should be vacated as of March 5, 1952, the date of the stipulation, and be deemed to have been refiled as of the same day. The two following paragraphs of the stipulation are important to this appeal, and it should be noted that references therein to respondent as "defendant Artie Norgard Gordon, etc." obviously refer back to the opening paragraph of the stipulation where she is named "as executrix of the estate of Elmer Norgard, deceased":

> "(4) That in the event the Court should thereafter make and render Judgment against the said Defendant Artie Norgard Gordon, etc., the latter, if she be so advised to do, shall file her Notice of Appeal within five (5) days after service upon her or her Counsel of the written Notice of Entry of said Judgment; other than aforesaid, the said Defendant hereby waives the right of making a Motion for New Trial, or any other Motion whatsoever from and after the entry of said Judgment;
>
> "(5) That in the event Judgment should be entered against the aforesaid Defendant Artie Norgard Gordon, etc., that Execution of the same shall be stayed for a period of ten (10) days after the written Notice of Entry of Judgment has been given to the aforesaid Defendant, or her Counsel."

Respondent filed written objections to certain of the findings. She is named in the writing as Artie Norgard Gordon, executrix, etc. The court's order vacating the findings and conclusions and the judgment, pursuant to the stipulation, refers to her as Artie Norgard Gordon, *as* executrix, etc. Her objections to the findings came on for hearing on March 10, 1952, and the court's minutes relating to the hearing refer to her merely as defendant Artie Norgard Gordon, the words "executrix, etc." being omitted. A similar reference is contained in the court's minutes for March 25th, when the case was reopened and the court adopted the findings and judgment theretofore entered. Judgment was entered against respondent Artie Norgard Gordon on April 7th. The judgment was against her personally, there being no reference to her capacity as executrix. Findings and conclusions were filed the same day and they, too, refer to her only as an individual. Notice of reentry of judgment was given to respondent by appellants' counsel, and this notice is directed to her as Artie Norgard Gordon, executrix, etc.

On April 15, 1952, respondent filed notice of intention to move for a new trial. The notice was supported by her affidavit and by a memorandum of points and authorities. It was her position that she had never appeared in the action in her individual capacity and that a personal judgment against her was not warranted. Appellants then filed a notice of motion to strike respondent's notice of intention to move for a new trial, on the ground that respondent was precluded by the stipulation from moving for a new trial. The court's minutes show that appellants' motion for new trial was argued and submitted on April 30th, and that on May 6th the motion for new trial was granted on the grounds: (a) that the evidence was insufficient (as to this particular defendant) to warrant the decision; and (b) that otherwise the decision was against law. The order granting the motion was accordingly entered on May 9th.

[1] Appellants contend that the court erred in granting respondent's motion for a new trial. They argue that the addition of the words "executrix, etc." after the name of the respondent were mere words of description, that the action was brought and prosecuted against her personally, and that she is foreclosed by the stipulation from seeking a new trial. They point out that she is not named "as executrix" in the caption of the complaint, that there are no allegations setting up her capacity as executrix, and that there are no charging allegations against the estate. It appears that while the caption of the complaint includes as a defendant "Artie Norgard Gordon, Executrix of the Estate of Elmer Norgard, deceased," the body of the complaint alleges

wrongful construction of diversion works and wrongful diversion of water by "defendants." The record shows that appellants knew that the only land and pump here involved with which respondent had any connection belonged to the Norgard estate, as this appears from the affidavit of appellant C. E. Crane filed in support of appellants' application for a preliminary injunction wherein he refers to the lands and pump of "defendant Norgard."

The sheriff's return on summons shows that respondent was served "as executrix" of the estate. No service was made on her as an individual. Respondent's first appearance in the case was by way of demurrer, and she appeared as Artie Norgard Gordon, executrix, etc. The demurrer was overruled and she answered, again appearing as Artie Norgard Gordon, executrix, etc., and reciting in the verification that she was the executrix of the estate of Elmer Norgard, deceased, one of the defendants in the action. She filed an affidavit in opposition to a preliminary injunction, in which she recited her capacity as executrix (affidavit sent up with augmentation of record). It is obvious from its content that the affidavit was filed on behalf of the estate. Appellant C. E. Crane refers to this affidavit, in his affidavit mentioned above, and he adds to the confusion (if respondent was the defendant) by referring to the defendant as the defendant Norgard. Respondent points to numerous instances in the record where reference is made to defendant Norgard; for example, the court's minutes showing apportionment of the judgment among defendants Norgard, Ferschoni, and Middleton.

While it is true, as argued by appellant, that the designation in the caption of the complaint of respondent as "Artie Norgard Gordon, Executrix of the Estate of Elmer Norgard, deceased" might be considered, technically, as an action against her individually, it might well be inquired of appellants as to why she was so designated in the complaint and throughout the proceedings, until the entry of the second judgment, if a judgment was only sought against her as an individual. For there can be no doubt that if the first judgment which was against "Artie Norgard Gordon, executrix of the Estate of Elmer Norgard, deceased," were recorded in the office of the county recorder it would be regarded as a cloud upon the title of the estate of Elmer Norgard. The sheriff's office which made service of summons upon respondent evidently considered that she was being sued as executrix because the return of service states that summons was served upon her "as executrix of the Estate of Elmer Norgard, deceased." It may reasonably be inferred that such service was made in accordance with instructions from appellants' attorney. The transcript of the testimony is not before us, but it is apparent from the clerk's transcript, as hereinbefore set forth, that at least respondent and the court regarded the action as against the Norgard estate, for the court in its order for judgment ordered that "judgment be for plaintiff in the sum of $11,748.16, apportioned among the defendants as follows: Norgard $2,349.63, Ferschoni $4,699.26 and Middleton $4,699.27." And appellant C. E. Crane himself, in an affidavit filed in support of appellants' application for a preliminary injunction refers to "defendant Norgard." And the stipulation, upon which appellants rely so strongly, begins by reciting: "It is hereby stipulated between Plaintiffs, by and through their Counsel, and Defendant Artie Norgard Gordon, as Executrix of the Estate of Elmer Norgard, Deceased, through her Counsel, as follows:" There is nothing in the body of the stipulation to negative this recital, and the stipulation is signed by respondent's counsel, "Attorneys for Defendant Estate of Norgard."

It seems somewhat strange that after the first judgment was set aside in accordance with the stipulation, a new judgment should be entered which for the first time in all the proceedings does not add "Executrix of the Estate of Elmer Norgard, Deceased," after "defendant Artie Norgard Gordon." We are convinced that after the learned and experienced trial judge examined the record when he considered the motion to dismiss respondent's motion for a new trial, and when he considered the motion for a new trial itself, he realized that at least both he and respondent had regarded the action as one against the estate of Norgard and that the action was tried on that theory, and he was fully justified in reaching the conclusion:

> "(a) That the evidence was insufficient (as to this particular defendant) to warrant the decision;
>
> "(b) That otherwise the decision was against law."

[2] The law would indeed be lame if we were compelled to uphold appellants' contentions upon this appeal. As this court said in Feigin v. Kutchor, 105 Cal.App.2d 744, at page 748, 234 P.2d 264, at page 267:

> "The administration of justice is not improved by slavish adherence to technical rules of pleading, but counsel and court should cooperate in having the pleadings so shaped that the controversy between the parties litigant may be fully and fairly determined upon its merits and in accordance with substantial justice."

[3–5] As hereinbefore noted, the new trial was granted on the grounds that the evidence was insufficient *as to this particular defendant* and that otherwise the decision was against law. Insufficiency of the evidence is a ground resting peculiarly within the discretion of the trial court, and its order either granting or refusing a new trial cannot be disturbed on appeal in the absence of a showing of abuse. In re Estate of Wall, 183 Cal. 431, 432–433, 191 P. 687. The burden of showing such abuse of discretion is on the appellants, Brinkerhoff v. Ferguson, 107 Cal.App.2d 175, 176, 236 P.2d 588, and all presumptions are in favor of the order and against the judgment Norden v. Hartman, 111 Cal.App.2d 751, 759, 245 P.2d 3.

We are satisfied that upon the record here the court did not abuse its discretion either in denying appellants' motion to dismiss the respondent's motion for a new trial or in granting said motion for a new trial.

No other points raised require discussion.

The order granting a new trial is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

REISMAN et al.
v.
LOS ANGELES CITY SCHOOL DIST. et al.

Civ. 19468.

District Court of Appeal, Second District,
Division 3, California.

Feb. 25, 1954.

Rehearing Denied March 16, 1954.

Hearing Denied April 21, 1954.

Action was brought against school district, board of education, and superintendent of schools for death of child, who was fatally injured in fall on school playground, on ground that they were negligent in maintaining blacktop paving on playground. The Superior Court of Los Angeles County, Samuel R. Blake, J., entered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, Parker Wood, J., held that it was error to admit in evidence report, which was prepared by staff headed by director of physical education for city schools, which was made in justification of use of blacktop on playgrounds, which gave numerous opinions, arguments, and statements, of purported facts that would not have been admissible as oral testimony, and which stated that child was incorrectly using equipment reserved for older children, and that such error was prejudicial.

Judgment reversed.

1. Evidence ⟹333(6)

In action against school district, board of education, and superintendent of schools for death of child, who was fatally injured in fall on school playground, on ground that they were negligent in maintaining blacktop paving on playground, report, which was prepared by staff headed by director of physical education for city schools, which was made in justification of use of blacktop on playgrounds, which contained numerous opinions, arguments, and statements of purported facts that would not have been admissible as oral testimony, and which stated that child was incorrectly using equipment reserved for older children at time of accident, was not admissible under Uniform Business Records As Evidence Act. Code Civ.Proc. § 1953f.

2. Evidence 🔑333(6)

In action against school district, board of education, and superintendent of schools for death of child, who was fatally injured in fall on school playground, on ground that they were negligent in maintaining blacktop paving on playground, report, which was prepared by staff headed by director of physical education for city schools, which was made in justification of use of blacktop on playgrounds, which contained numerous opinions, arguments, and statements of purported facts that would not have been admissible as oral testimony, and which stated that child was incorrectly using equipment reserved for older children at time of accident, was not admissible under statutes providing that entries in public or other official books or records, made in performance of his duty by a public officer, are prima facie evidence of facts stated therein. Code Civ.Proc. § 1920.

3. Evidence 🔑333(6)

In action against school districts, board of education, and superintendent of schools for death of child, who was fatally injured in fall on school playground, on ground that they were negligent in maintaining blacktop paving on playground, report, which was prepared by staff headed by director of physical education for city schools, which was made in justification of use of blacktop on playgrounds, which contained numerous opinions, arguments, and statements of purported facts that would not have been admissible as oral testimony, and which stated that child was incorrectly using equipment reserved for older children at time of accident, was not admissible under statute providing that entry made by an officer or board of officers in course of official duty, is prima facie evidence of facts stated in such entry. Code Civ.Proc. § 1926.

4. Trial 🔑412

Where attorney for defendants used report indirectly in examination of witness for defendants, use of one page of report by attorney for plaintiffs in cross-examining that witness was not a waiver of objections to report when defendants sought to introduce report in evidence.

5. Appeal and Error 🔑233(2)

Where attorney for plaintiffs made certain objections to admission of certain report, and ruling on objection was not made until two days later, and attorney for plaintiffs did not repeat objections but stated that he insisted that it be understood that he had made all objections that might properly be made to introduction to report, and counsel for defendants agreed, objections would be deemed sufficient as basis for contention of plaintiffs on appeal that report was not admissible, on ground that no foundation for its introduction was laid.

6. Trial 🔑85

Where report was interwoven with hearsay and many opinions, testimonials and arguments in favor of parties who sought to introduce the report, and trial court was of opinion that it was impossible to segregate objectionable features without materially affecting usefulness of report and its relevancy, admission of entire report was not proper under rule that where part of a single report is admissible, an objection to the whole report is properly overruled.

7. Appeal and Error 🔑1050(1)
Evidence 🔑333(6)

In action against school district, board of education, and superintendent of schools for death of child, who was fatally injured in fall on school playground, on ground that they were negligent in maintaining blacktop paving on playground, it was prejudicial error to receive in evidence report, which was prepared by staff headed by director of physical education for city schools, which was made in justification of use of blacktop on playgrounds, which contained numerous opinions, arguments, and statements of purported facts that would not have been admissible as oral testimony, and which stated that child was incorrectly using equipment reserved for older children.

8. Appeal and Error 🔑1052(7)

In action against school district, board of education, and superintendent of schools for death of child, who was fatally injured in fall on school playground, on ground that they were negligent in maintaining blacktop paving on playground, wherein court erroneously admitted report, which was prepared by staff headed by director of physical education for city schools, which was made in justification of use of blacktop on playgrounds, which contained numerous opinions, arguments, and statements of purported facts that would not have been admissible as oral testimony, and which stated that child was incorrectly using equipment reserved for older children, jury's affirmative answer to special interrogatory inquiring whether child was contributorily negligent would not sustain judgment for school district, board of education, and superintendent of schools notwithstanding error in admission of report.

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Norman Pittluck, Los Angeles, for appellants.

Henry R. Thomas, Wayne Veatch, and Henry F. Walker, Los Angeles, for respondents.

PARKER WOOD, Justice.

Action by parents for damages for wrongful death of their minor son, allegedly resulting from negligence of a public school district, board of education, and superintendent of schools in maintaining blacktop paving under playground equipment, and in supervising the play of the son, on the school grounds. In a trial by jury there was a general verdict for defendants, and there were three special interrogatories which were answered in favor of defendants. Judgment was for defendants. Plaintiffs appeal from the judgment.

The accident occurred at the Wilshire Crest public school, which is at the northeast corner of Olympic Boulevard and Orange Drive in Los Angeles. The school building is in the southwest corner of the school grounds. The playground adjoins the north and east sides of the building and is in the shape of an "L." The part of the playground east of the building is for the use of primary or first grade pupils. It is about 50 feet wide (east-west) and about 175 feet long. The other part of the playground (which is north of the building and north of the primary playground) is for the use of second, third, and fourth grade pupils. This will be referred to as the larger playground. The boundary line between those two playgrounds (this is, the north line of the primary playground) is the prolongation of the north line of the building. There is no fence between those grounds.

On March 16, 1949, Ronald Reisman, the son of plaintiffs, was six years and eight months of age and was a first grade pupil in attendance at the school. At 1:30 p. m. of that day the teacher in the room where he was a pupil led the pupils who were in her room, including Ronald, to the primary playground for the physical education or play period. There were 33 pupils under her care and supervision at that time. Play equipment on that ground included swings, sand boxes, and a slide. On the larger playground, at a point 88 feet north of the building, there was a tether ball pole which was about 12 feet high. Attached to the top of the pole there was a chain which was about 5 feet long. Attached to the lower end of the chain there was a rope about 4 feet long. Attached to the lower end of the rope there was a tether ball which was about 12 inches in diameter. The tether ball was about 2 feet from the ground. The surface of the playgrounds, including the area around the pole, was asphaltic concrete commonly known as blacktop. Another teacher was supervising about 30 second grade pupils on the larger playground in an area thereon which was between the tether ball pole and the place where Ronald's teacher was supervising first grade pupils. About ten or fifteen minutes after the first grade pupils had been taken to the primary playground, the attention of the second grade teacher was directed to the tether ball pole by "a movement," which she later found was a child falling. She ran to the child who was flat on his back on the pavement near the bottom of the pole. The child was Ronald Reisman. She picked him up and walked with him to his teacher who was on the primary playground. His teacher testified that when he was brought to her he was "whimpering"; she examined him for bruises, took him into the building, bathed his face, and let him rest; she found no bruises or abrasions; the school bus, in which he usually went home, arrived about five minutes after he had been brought to her; she asked him if he felt like going home on the bus; he replied, "Yes,"; she let two little boys walk with him to the bus. The bus driver testified that when Ronald entered the bus he was whimpering and holding his head; she took him to his home—a distance of approximately one-half mile; when he left the bus he was still whimpering and holding his head; she saw him enter the front door of his home.

About 7:15 p. m. of that day a physician went to Ronald's home and examined him. At that time he was semi-conscious and could be aroused. When the physician saw him at 9:15 p. m. he seemed to be in a stupor, he could not be aroused as easily, and the pupil of one eye was larger than the pupil of the other eye. Then he was taken to a hospital where another physician examined him. It was found that he had a hemorrhage from the middle meningeal artery (an artery in the temporal region of the skull—on the inner surface of the skull and on the outside covering of the brain). About 5:00 p. m. of the next day an operation was performed upon his brain, and he died that night. The cause of death was a tear of his middle meningeal artery. A physician testified that the artery is in a little bony channel with edges that are sometimes sharp where it comes through the undersurface of the skull, and that when the head is struck and there is a movement of that bone, the bone might lacerate the artery and start a hemorrhage.

Ronald's teacher also testified that she usually stands near the center of the primary playground during the play period; she could not see the tether ball from that position; she did not know that Ronald had left that playground until the other teacher brought him to her; pupils who were upon that playground could enter the east side of the building, at any time, to go to the lavatory; pupils who were in the building could go upon the larger playground by going through the hallway and out the north exit; while she was on the playground she could not see pupils who were in the building.

A structural engineer, called as a witness by plaintiffs, testified that he tested the hardness of the surface of the asphaltic concrete (blacktop) at quite a few places on the playgrounds at said school, including the area around the tether ball pole; the result of the test was that the surface at those places was of the same hardness; he tested the hardness of surfaces of different kinds of materials at places other than said playgrounds in order to compare or illustrate the hardness of the surface on the playground; one of the places so tested was the rock and oil surface on the Vermont Avenue bridge over the new Hollywood Freeway; the surface of the playgrounds here involved was about one-third harder than the surface on that bridge.

Mr. Lackey, called as a witness by defendants, testified that he is an employee of the Asphalt Institute, an organization which promotes the proper use of asphalt and which checks specifications for the general public for all types of asphalt design and construction; as such employee, during the past six years, he checked asphalt specifications and designs for the Los Angeles City Board of Education; that, generally speaking, asphalt on highways is considerably harder than asphalt on school playgrounds. A general paving contractor, called as a witness by defendants, testified to the effect that asphalt on highways was harder than asphalt on school playgrounds.

The supervisor of safety for the Los Angeles City Schools testified that he did not know of any more suitable material to use under school equipment than the blacktop in use at the schools. Also the supervisor of physical education for the elementary schools of Los Angeles testified to that same effect.

Mr. Houston, the director of physical and health education for the Los Angeles City Schools, testified that he was of the opinion that asphaltic concrete is a proper substance to put under playground equipment where small children play; that a written report, which is referred to as defendants' Exhibit J for identification, was compiled on May 22, 1951, and it is a report covering certain studies made over a period of approximately 20 years, relative to playground safety; the report includes matters which occurred before the accident involved here and matters which occurred thereafter; the report includes, in the fatality listing, the fatality of Ronald Reisman; the report was prepared by the staff of which he (witness) is the head, and the report was made under his direction; the actual compilation was made after this accident occurred and after plaintiffs' claim (for damages) had been filed with the board of education, but certain studies in relation to the report had been carried on prior to the accident—the studies were carried on as a sort of continuous program; he was present at a meeting of the board of education on May 24, 1951, when the superintendent of schools read said report and presented it to the board. The report was filed with the board on said day.

The report, just referred to, was offered in evidence by defendants for the first time upon their second re-direct examination of the witness, and then the offer was deferred by defendants until the attorneys could discuss the offer with the judge out of the presence of the jury. Thereafter the defendants, upon their fourth re-direct examination, offered the report in evidence. Plaintiffs objected thereto upon the grounds that it was incompetent, irrelevant and immaterial, not the best or the complete evidence of the matters set forth therein, hearsay, arguments, and containing matter that occurred after the accident involved herein. Thereupon, the judge reserved his ruling upon the objection. (Reporter's transcript p. 836.) Two days later, after 14 other witnesses had testified and just before the parties rested, the judge asked the attorneys if they had anything further to say before he ruled upon the objection to the offer in evidence of "Exhibit J for identification." (Rep. Tr. 1053.) Mr. Shannon, the attorney for plaintiffs at the trial, said: "Now, is it understood, as far as objections are concerned, that I have made all the objections that might properly be made to the introduction of the document?" Mr. Thomas, the attorney for defendants, said: "Well, my recollection is that you did object, Mr. Shannon." Mr. Shannon said: "I did, I was hopeful—" The judge said: "The ones already made will be deemed made to it at this time, all of them, if that is what he has in mind." Mr. Thomas said: "Certainly. The three of us have argued quite at length and off the record. I see no useful purpose to be served by making Mr. Shannon repeat all his objections." Mr. Shannon said: "What I am getting at, as far as the objections made, I have made all the proper objections to the introduction of the document." Mr. Thomas said: "He has—I don't know about the proper objections, because obviously I don't think any of his objections are proper, but I do agree with Mr. Shannon that he has made the objections voluminously on various reasons. I assume the court is going to give a ruling and base his reasons on something that somebody said to him." The objection was then overruled, and Exhibit J for identification (the report) was received in evidence as Exhibit J.

Appellants contend that the court erred prejudicially in receiving the report, Exhibit J, in evidence. They argue that the report, which was compiled on May 22, 1951—more than two years after the accident herein (March 16, 1949), contained many matters which occurred after the date of the accident herein; that it is interwoven with, and is a conglomeration of, conclusions, testimonials, arguments in favor of the defense, charts and statistics; that it is, in many respects, irrelevant, incompetent and immaterial; and that it was probably prepared with an eye to the defense of this lawsuit.

The exhibit consists of: (1). A summary of said report—being a page of typewriting attached to the front of the report. (2). Another page of typewriting attached to the report which is a table of contents that lists 13 topical headings. (3). The report, consisting of 18 pages—16 pages being in typewriting and 2 pages being charts.

The summary of the report states (in the caption) that the report is "Relative to Playground Surfacing in Los Angeles Elementary Schools." It also states, in part, that: "The opinion of the principals, playground supervisors, and others using the apparatus is in overwhelming support of the blacktop hard-surfacing program now in effect."

Page 1 of the report is labeled "Introductory Statement," and it states, in part: "This Report has been prepared in response to requests that have been made for accurate information concerning the accident situation in the Los Angeles Elementary Schools during recent years." "However, it is obviously true that the Report supports a case for blacktop hard-surfacing because it is undoubtedly true that there is a substantial basis for the present program and also the present program does reflect the attitude of approximately all of the school principals, the physical education supervisors, superintendents, and members of the Board of Education."

Page 2 of the report contains statistics as to the kinds of surfaces that are under playground apparatus in school systems in 47 large cities of the United States. The statistics show that 27 of those cities have blacktop under the apparatus; 10 have no apparatus; 9 have surfaces other than blacktop, such as dirt, sand, grass or shavings.

Page 3 of the report contains statistics as to the kinds of surfaces that were under playground apparatus, in the spring of 1950, in 29 school systems (involving 73 schools) in the vicinity of Los Angeles, such as San Bernardino, Barstow and Glendale. The statistics show that 8 systems use only blacktop, that of the 52 schools which have part dirt and part blacktop for the whole playground surface 19 have only blacktop under the apparatus, 18 have blacktop under more than 50 per cent of the apparatus and 15 have blacktop under less than 50 per cent of the apparatus.

Page 4 is a chart purporting to show in terms of percentage the information stated on page 3. It shows, by use of diagrams or bars, that a greater percentage of blacktop is used under the play apparatus (except under horizontal ladders and bars).

Page 5 is labeled "Accident Rate at Elementary Schools of Los Angeles before and after Installation of Blacktop." It is stated thereon that the following page (p. 6) is a chart showing the number of major accidents on playground apparatus per 100,000 student-days of usage as compared with blacktop in millions of square feet. It also states that the blacktop program was begun about 1940–41 and the blacktop area was expanded extensively through the following years, and that the rate of apparatus accidents did not increase. It also states that the chart indicates that in 1931–32 (when there was no blacktop) there were about 1.4 apparatus accidents per 100,000 student-days, and in 1948–49 (when about 60% of the elementary playgrounds were surfaced with blacktop) the rate was 1.3.

Page 6 is a graph chart which is referred to on page 5.

Page 7 shows a comparison of the number of accidents in connection with playground apparatus in Los Angeles elementary schools during the period from 1931–32 to 1948–49. It is stated that there was a reduction in the accident rate from 1931–32, when sand or shavings were under all apparatus, to 1948–49, when blacktop was under 60 per cent of the apparatus. It is also stated that in 1931–32, when there were 1,885 pieces of apparatus and an average daily attendance of 162,474, there were 305 apparatus accidents; and that in 1948–49, when there were 2,976 pieces of apparatus and an average daily attendance of 190,185, there were 361 accidents. After setting forth other figures showing certain comparisons, it is stated that the decline in the rate represents "a *36% decrease*" in the rate in 1948–49 as compared with 1931–32. It is also stated therein that a table, upon which said comparisons were based, is on the following page (p. 8).

Page 8 is the table referred to on page 7. It shows the comparison of accident rates in each school year from 1931–32 to and including 1948–49.

Page 9 is a report on the number of fatalities in the Los Angeles elementary schools during the past 21 years (preceding May 22, 1951). It is stated that on the following page (p. 10) there is a detailed report of the fatalities "reported as possibly originating" during the past 21 years. It is also stated that during the 21 years there have been 11 fatalities, and the two most recent ones seem to have been related to the blacktop under playground apparatus; and that, although there was an increasing amount of blacktop under the apparatus from 1940 to 1948, there was no fatality during that period that was connected with the blacktop. It was also stated that "it must be realized that sometimes these tragic accidents will occur no matter how many precautions are taken to prevent them," and that "it must be remembered that during the past *21 years* there has been * * * a total of *777* million pupil-school-days of playground use," and that "it should be remembered that there have been only *11 fatalities* in our elementary schools during *777* million pupil-school-days in our playgrounds during this period of *21 years*."

Page 10 is the detailed report of the 11 fatalities referred to on page 9. As to each one it lists the year of the accident, the name of the school, age of the child, and cause of death. Opposite each listing there is a statement of "Related Circumstances." The listing of the 10th fatality was as follows: "1948–49 Wilshire Crest 6 [age of child] AC [asphaltic] cement under apparatus] Fall Tether Ball Concussion Fell from tether ball suspended from pole. Child was out of authorized play area, using incorrectly equipment reserved for older children." The 11th listing shows that in 1950–51 a 6-year-old child fell from a swing onto blacktop at the Vine Street School.

Page 11 is entitled "Severity of Accidents," and it is there stated that the severity of all accidents in elementary schools in Los Angeles for 1949–50 was 1.8 days lost per major accident as against the national elementary school rate of 2.9 days lost per major accident for the same year; it is interesting to note that our accident-severity-rate is less serious than the national average; the 11 fatalities that have occurred during the last 21 years contrast with the two to three hundred deaths of elementary-school-age children which have occurred during the same period as the result of *accidents in home areas.*

Page 12 is entitled "Statements by Experienced Los Angeles Elementary School Principals on Playground Surfacing." It is there stated that all evidence that has been received indicates that those principals "are overwhelmingly in favor" of blacktop under playground apparatus. It is also stated that "The following excerpts from statements made by Elementary School Principals are interesting and significant in consideration of this problem of playground surfacing." Those excerpts, 23 in number, are on pages 12, 13, 14 and 15 of the report. The excerpts are to the effect that blacktop is safer, more satisfactory, and more desirable than other kinds of playground surfacing. In 10 of the excerpts it is stated that there has been no increase in accidents since blacktop has been used. (In the other excerpts, there is no statement as to whether there has been an increase or decrease in accidents.)

Page 16 is entitled "Concluding Statement." (The statement is on pages 16, 17 and 18.) It is there stated that in 1936 the Grand Jury presented to representatives of the board of education "the matter of dust on the school playgrounds," and that the foreman of the jury felt that the board should study the situation looking toward some way of reducing the dust hazard. It is also stated that the change from dirt, sand and mud to blacktop came "in response to widespread community and school demand" and was "approved by parents, teachers, principals, and other school administrators"; that "The assumption must not be made that the present situation involving blacktop hard-surfacing on most of the playgrounds has resulted in an adverse change in the playground accident situation. The opposite is true, since there has actually been a reduction in the accident-rate over the periods before and after blacktop surfacing, as indicated elsewhere in this report." It is also stated that teachers and supervisors and principals have found that blacktop "actually promotes safety," and the "facts that have been given in this report bear out their experience." It is also stated: "It would be natural for a layman, who has not had extensive experience with actual playground conditions, to look at blacktop hard-surfacing and immediately draw the conclusion that it must be more dangerous because it is hard. But a more careful analysis of the situation necessitates a consideration of all the conditions that enter into the problem and leads to the conclusion that the answer involves much more than simply contrasting the hardness of surfaces." It is stated further: "We want to keep the number and severity of accidents at the very lowest minimum humanly possible. But common sense indicates that, in spite of all possible precautions that can be taken and are being taken, accidents will occur."

Respondents argue that the court did not err in receiving the report (Exhibit J) in evidence; that the exhibit is a public report and it was made in the course of business and is admissible under the Uniform Business Records as Evidence Act, Code Civ.Proc. § 1953f; that appellants' objections at the trial to the offer of the report did not include objections now asserted on appeal, namely, (1) that no foundation was laid for the introduction of the report, in that, there was no showing that conditions on other school grounds, referred to in the report, were similar to the conditions on the grounds herein, and (2) that a sufficient foundation was not laid for the introduction of the report under the Uniform Business Records as Evidence Act; that where a part of a single report is admissible an objection to the whole report is properly overruled.

Section 1953f of the Code of Civil Procedure (which is part of the Uniform Business Records as Evidence Act) provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." In Loper v. Morrison, 23 Cal.2d 600, at page 608, 145 P.2d 1, at page 5, the court, in referring to said section, said: "The purpose of this act is to enlarge the operation of the business records exception to the hearsay evidence rule. The common law exception is based on the assumption that records kept in the general course of business usually are accurate, and may be used, in case of necessity, as evidence of the matter recorded. * * * But the exception has been hedged about with so many burdensome restrictions that legislation has been necessary to secure widespread use of such records." The report herein (Exhibit J) was not made, as provided in said section 1953f, "at or near the time of the act, condition or event" involved here—it was made about two years and two months after the accident. Also, it is to be noted that it was made (by defendants) about one year and two months after this action for damages was commenced against them. The report was not made in the regular course of business in the sense that the words "regular course of business" are used in said section. In Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 480, 87 L.Ed. 645, 144 A.L.R. 719, which was an action for damages arising from a collision of an automobile and a railroad train, the engineer made a statement at an office of the railroad company where he was interviewed by an assistant superintendent of the company and by a representative of the public utilities commission. The engineer died before the trial, and the company offered his statement in evidence under an Act of Congress, 49 Stat. 1561, c. 640, 28 U.S.C.A. § 695 (now 28 U.S.C.A. § 1732), which was in substance the same as our said section 1953f of the Code of Civil Procedure. The Supreme Court held that the statement was not admissible, and said: "It [statement] is not a record made for the systematic conduct of the business as a business. An accident report may affect the business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act. * * * Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a 'business' or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. [Citation.] Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability [Citation] acquired from their source and origin and the nature of their compilation. * * * If the Act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. * * * The several hundred years of history behind the Act (Wigmore, supra, §§ 1517–1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But 'regular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."

In the present case, where the evidence as to how the accident happened was meager, the report included, under the heading "Related Circumstances" on page 10, a statement that the child (Ronald) was "using incorrectly equipment reserved for older children." The report, in addition to stating how the accident happened, included (1) purported information regarding playground surfaces at various other schools in Southern California and other parts of the United States; (2) statements to the effect that after the use of blacktop was begun at the elementary schools of Los Angeles the accident rate did not increase, but, under certain stated comparisons, the rate decreased; (3) statements that the accident-severity-rate in the elementary schools in Los Angeles is less serious than the national average, and that during the past 21 years there were more deaths of elementary-school-age children in home areas than there were at schools; (4) statements of several school principals to the effect that blacktop is safer than other kinds of surfacing; (5) statements to the effect that blacktop is used in response to community and school demand, and that teachers have found that blacktop actually promotes safety, and that in spite of all possible precautions accidents will occur; and (6) statements regarding conditions of playgrounds and the severity of accidents after the accident herein. (Such last mentioned statements relate to matters occurring in 1949, 1950, and 1951.)

[1] It does not appear that the purported information in the report was information which the board of education recorded according to a systematic or routine method of recording acts, conditions or events for the purpose of reflecting transactions with others or providing information for use in administering other affairs of the schools. The report indicates that it was made in justification of the use of blacktop on elementary school playgrounds. It states on page 1 that it was made in response to requests for accurate information concerning accidents during recent years; that it supports a case for blacktop hard-surfacing because there is a sub-

stantial basis for the program (blacktop) and the program reflects the attitude of approximately all the principals, superintendents, and members of the board; that it is hoped that the report will be helpful to the committee which would be appointed to study the matter of surfacing (referring to the committee of thirty citizens, the appointment of which was authorized by the board two days before the report was presented to the board); that the problem of surfacing is one on which there can be differences of opinion, otherwise the problem would not be receiving the attention it is now receiving. The report contains many opinions, arguments, and statements of purported facts which were highly prejudicial to plaintiff. The statements therein of the individual opinions of various principals to the effect that blacktop was more safe and satisfactory than other kinds of surfacing would not have been admissible if such opinions had been offered by way of oral testimony. Also, the statements therein to the effect that experienced principals are overwhelmingly in favor of blacktop, that blacktop was approved by parents, teachers, and school administrators, and that the change to blacktop came in response to widespread community demand, would not have been admissible as oral testimony. In McGowan v. City of Los Angeles, 100 Cal.App.2d 386, at page 392, 223 P.2d 862, at page 866, 21 A.L.R.2d 1206, the court, in referring to section 1953f, said: "The statute does not change the rules of competency or relevancy with respect to recorded facts. It does not make that proof which is not proof. It merely provides a method of proof of an *admissible* 'act, condition or event'. It does not make the record admissible when oral testimony of the same facts would be inadmissible." It was error to receive the report in evidence under the provisions of said section 1953f.

[2, 3] Respondents argue further that the report was admissible under sections 1920 and 1926 of the Code of Civil Procedure. Section 1920 provides: "Entries in public or other official books or records, made in the performance of his duty by a public officer * * * are prima facie evidence of the facts stated therein." Section 1926 provides: "An entry made by an officer, or board of officers * * * in the course of official duty, is prima facie evidence of the facts stated in such entry." As above shown, the report herein contained numerous opinions, arguments, and statements of purported facts which would not have been admissible as oral testimony. There was no official duty on the part of the board to make entries of such a report in official books or records. The statements in the McGowan case, above quoted, are applicable here. It was error to receive the report in evidence under said sections 1920 or 1926.

[4] Respondents also argue that the report was properly received in evidence because Mr. Shannon, the attorney for appellants at the trial, was the first one to use a portion of the report. Appellants reply that said portion was used first by Mr. Thomas, the attorney for respondents. Mr. Houston, on direct examination by Mr. Thomas, was asked when blacktop was first used on the Los Angeles school grounds. He replied that to the best of his recollection it was around 1933. Appellants assert that apparently at that time Mr. Houston used page 6 of the report (the graph chart) to refresh his recollection. When Mr. Shannon was cross-examining that witness, he asked him if the asphalt program began about 1933. He replied that it was around that time. Then Mr. Shannon asked if they started about 1938 with a rapid and thorough program. He replied that it was a little slow then, and that about 1947 the big increase occurred. Mr. Shannon then asked: "You say a very small program in 1938. Will you use this sketch I hand you for the purpose of refreshing your memory, if it does refresh your memory, and tell me from the year beginning with 1938, 1939, 1940 to 1941 and 1942 how many tons of asphalt concrete you laid on the school grounds?" Thereafter Mr. Thomas offered the chart in evidence. Mr. Shannon said: "I have permitted him to use it as a memorandum and I have no objection to it going into evidence." The judge said: "The only one who can offer it is you." Mr. Thomas

said: "Yes, sir. A burned child fears fire, so I am offering it into evidence right now." The judge said: "That is agreeable. He used it to refresh his recollection. *You are the one who used it on direct examination.* There is no objection to offering it now?" (Italics added.) Mr. Shannon said: "No objection." In view of the statement of the judge to the effect that the witness used said page 6 on *direct* examination, it appears that said exhibit was not used first by appellants. Appellants did not waive objections to the report (Exhibit J) by their references on cross-examination to said page 6.

[5] Respondents argue further, as above stated, to the effect that appellants did not object to the report on the ground that there was no foundation for its introduction in evidence and therefore they should not be permitted on appeal to contend that there was no showing by respondents that conditions on other school grounds, referred to in the report, were similar to the conditions on the grounds herein. When the report was offered in evidence appellants objected on various grounds as hereinabove set forth. Also, as above shown, the ruling on the objection was not made until two days later—after several other witnesses had testified. It is apparent, from the proceedings had just preceding the ruling, that Mr. Shannon was endeavoring to conserve the time of all concerned by avoiding a restatement of his objections, but, at the same time, he was insistent upon it being understood that he had "made all the objections that might properly be made to the introduction of the document." Under the circumstances, it should be concluded that appellants' objections were sufficient as a basis for their contentions on appeal.

[6] Respondents also argue, as above stated, that where part of a single report is admissible an objection to the whole report is properly overruled. The report is interwoven with hearsay, many opinions, testimonials and arguments in favor of the respondents. The trial judge, in ruling upon the objections to the report, said: "Then, also, as to the opinions therein concluded, I looked through to see if I could cut out the opinions and conclusions and better make the record reflect as to what its relevancy appears. As to the opinions and conclusions of the Superintendent as to the use of blacktop at the time and place, to wit, in 1951, there has been a serious consideration." He also said: "As to the record, itself, I would have liked to have segregated it and made its objectionable features less pointed up without materially affecting its usefulness and its relevancy. I can't do that because it is so interwoven with opinions." It does not appear what part, if any, of the report was made under such circumstances that it would be admissible as an exception to the hearsay rule—it does not appear what part, if any, was made in the regular course of business, at or near the time of the act, condition or event referred to; and it does not appear what part, if any, was entered in an official book in the course of official duty.

[7] It was prejudicial error to receive the report (Exhibit J) in evidence.

[8] Respondents argue further that a special interrogatory, regarding contributory negligence, and the jury's affirmative answer thereto sustain the judgment herein, irrespective of the question as to the admissibility of the report. A special interrogatory was as follows: "At the time of the accident in question, was Ronald Marc Reisman guilty of contributory negligence?" The jury's answer thereto was "Yes." It is to be assumed that Exhibit J, which was erroneously received in evidence, was considered by the jury in arriving at its answer to the interrogatory. That exhibit contained statements indicating that the child was negligent. Such statements were as follows: The child was "using incorrectly equipment reserved for older children"; "[I]t must be realized that sometimes these tragic accidents will occur no matter how many precautions are taken to prevent them"; "[C]ommon sense indicates that, in spite of all possible precautions that can be taken and are being taken, accidents will occur." It cannot be concluded that the answer to the interrogatory would have been the same if said re-

port had not been received in evidence. The judgment is not sustained by said interrogatory and answer.

By reason of the above conclusions it is not necessary to consider other contentions.

The judgment is reversed. The purported appeal from the order denying motion for new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

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123 Cal.App.2d 509

STOCKTON MORRIS PLAN CO.
v.
MARIPOSA COUNTY et al.
Civ. 8250.

District Court of Appeal, Third District, California.
Feb. 25, 1954.

Action in claim and delivery by assignee of contract of sale. The Superior Court, San Joaquin County, Thomas B. Quinn, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Peek, J., held that the assignee of contract of sale could not maintain claim and delivery action, where contract had been held void in prior action in which assignee had been a party.

Affirmed.

1. Replevin 🔑8(1)

Plaintiff in claim and delivery action must recover upon strength of his own right to possession and not on weakness of adversary's title or right to possession.

2. Sales 🔑225(1)

Seller's assignee of sales contract, which had been held void in prior action to which assignee was a party, could not maintain claim and delivery action against parties who had obtained possession under such contract. Streets and Highways Code, § 909; Const. art. 11, § 18.

Lafayette J. Smallpage & Harold J. Willis, Stockton, for appellant.

Robert Owen Curran, Dist. Atty. of Mariposa County, Mariposa, for respondent.

PEEK, Justice.

The history of this controversy first shows an action by plaintiff in claim and delivery to recover possession of certain grading equipment, or if recovery could not be had, then the market value thereof. When the case was called for trial defendant county moved for judgment on the pleadings. Apparently the motion was submitted pending the introduction of certain testimony, following which the trial court entered judgment for the county on its motion. Plaintiff's appeal from that judgment was reversed, 99 Cal.App.2d 210, 221 P.2d 232, upon the grounds that complaint alleged legal title in plaintiff; a right to possession; actual possession in defendant; a demand by plaintiff for possession and a refusal by defendant to deliver; and hence a cause of action was stated as against defendant's motion. Following the return of the case to the trial court, it was stipulated that the cause might be resubmitted upon the evidence introduced at the first hearing. Thereafter the court made and entered its findings favorable to the defendant county and judgment was entered accordingly. Plaintiff has now appealed from that judgment.

It should be noted that a second action was instituted by plaintiff against the seller of the equipment. That action was predicated upon the assigment to plaintiff of the contract of sale alleged to have been executed by the seller, the California Tractor and Equipment Corporation and the buyer, " 'Mariposa County District No. 5' ". From a judgment for plaintiff the defendant equipment company appealed. Stockton Morris Plan Co. v. California Tractor & Equipment Corp., 112 Cal.App.2d 684, 247 P.2d 90, 91. In the opinion in that case we held that the " 'Mariposa County District No. 5' " was not a legal entity capable of contracting; that if the contract were treated as being by the county then it also was void, first because it was not signed by the required number of members of the county board of supervisors, Streets and Highways Code, section 909, and second, it was in violation of Constitution of this state Article XI, Section 18, in that it provided for installment payments extending beyond the fiscal year in which it was executed; that such a contract could not be made the basis of an action; that it was illegal regardless of the intent of the parties; that no one could be estopped from denying its legality; and that "* * * under such circumstances no relief to any of the parties to this transaction can be given by a court." 112 Cal.App.2d at page 689, 247 P.2d at page 92.

Returning to the present proceeding, it is apparent that appellant has misconstrued the opinion in the first appeal. As noted that appeal involved only the question of the sufficiency of the complaint as against a motion for judgment on the pleadings. The present appeal is now before us following a hearing on the merits and hence an entirely different rule must apply.

As stated in 10 Cal.Jur.2d 496, the essential object of a claim and delivery action is "* * * the enforcement of the right of the plaintiff to the present possession of chattels against a defendant who unlawfully detains them * * *" That text concludes with the statement that the "* * * ultimate issue is the single question of whether or not the plaintiff is entitled to the possession of the property." Page 497.

[1, 2] It is plaintiff's contention that since the County of Mariposa is not a party to the contract, it therefore has no right to retain possession of the equipment. But, as previously noted, plaintiff, in order to recover in this proceeding, must do so upon the strength of its own right to possession and "* * * not on the weakness of [its] adversary's title or right of possession * * *" 46 Am.Jur. sec. 23, p. 15. Moreover any right of possession in plaintiffs could only exist by reason of the contract as assigned to it by the equipment company. However, that contract was void and unenforceable for the reasons stated in the second appeal and therefore, under such circumstances, this court could give "* * * no relief to any of the parties to this transaction * * *." 112 Cal.App.2d 684, 689, 247 P.2d 90, 92.

The judgment is affirmed.

VAN DYKE, P. J., and BEDEAU, Justice pro tem., concur.

123 Cal.App.2d 679

COREY v. COREY.

No. 15861.

District Court of Appeal, First District,
Division 1, California.

March 5, 1954.

Rehearing Denied April 2, 1954.

Action for divorce wherein defendant was ordered to pay $40 per month for the support of minor children of the parties whose custody was awarded to plaintiff. The Superior Court for the City and County of San Francisco, Eustace Cullinan, J., made an order recalling a writ of execution theretofore issued and quashing the levy which had been made thereunder and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence supported the finding that the defendant had fully paid the required amount.

Order affirmed.

Divorce 🔑308

Evidence justified finding that defendant had fully paid the $40 per month which a divorce decree ordered him to pay for the support of minor children of the parties whose custody had been awarded to the wife.

J. Elwood Andresen, Oakland, for appellant.

Ernest J. Torregano, George D. Schilling, San Francisco, for respondent.

FRED B. WOOD, Justice.

Question: Does the evidence support the finding of the trial court that defendant had fully paid the $40 per month which the decree of divorce between the parties ordered him to pay for the support of their three minor children whose custody the decree awarded to the plaintiff? Our examination of the record convinces us that it does.

Upon the basis of that finding, the trial court made an order recalling a writ of execution theretofore issued and quashing the levy which had been made thereunder. From that order plaintiff has appealed.

The decree was rendered in June, 1941. The period of time here in question commenced with July, 1941, and ended with July, 1952. During that period defendant paid $94.25 more than the amount which fell due under the decree. During 1941–1948 he paid $1,082.25 more than the amount then accruing. After 1948, through July, 1952, he paid but $732, whereas $1,720 accrued during the latter period. Also, a number of the payments during the latter period were made to the daughter by check in her favor, mailed to her. The daughter, who was the youngest of the three children, attained her majority in May of 1952.

Concerning the excess payments during 1941–1948, defendant testified that when plaintiff was on relief the welfare department asked him to increase the payments for support of the children and that he agreed with the department to aid to the best of his ability; and that he told plaintiff that the extra money would go towards his judgment, that he would have a reduction later. That evidence would support an inference that plaintiff accepted and expended the extra money upon the understanding that later on it would be credited against the $40 per month subsequently accruing under the decree.

As to the several $40 checks which he sent to the daughter, plaintiff knew about them. She learned about them when her daughter received them. Plaintiff testified that she let her daughter "keep them because they were made to her, they were not made to me"; that at the time those checks were made out, the daughter was the only one of the children who was still a minor and the decree had been modified to make the $40 a month payable for her support instead of for the support of all three of the children; and that the $40 was supposed to be for the support of the daughter. That course of conduct upon the part of plaintiff, with no evidence that she ever protested to defendant his sending the payments to the daughter instead of herself, supports an inference that plaintiff acquiesced in and consented to that form and method of payment.

The evidence supports the finding.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

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123 Cal.App.2d 528

PRIEST v. BELL et al.

No. 15762.

District Court of Appeal, First District,
Division 1, California.

Feb. 26, 1954.

Quiet title action brought by grantee of mother, who, allegedly, had previously executed and delivered a deed to her several children. The Superior Court, Alameda County, Cecil Mosbacher, J., entered judgment for grantee and defendants appealed. The District Court of Appeal, Bray, J., held, inter alia, that evidence was sufficient to support finding of lack of delivery of deed from mother to her children.

Judgment affirmed.

1. Deeds 🔑194(1)

In a quiet title action, the burden of proving nondelivery or conditional delivery of a deed is upon party who alleges nondelivery or conditional delivery.

2. Deeds 🔑56(2), 66

Whether there has been a delivery of a deed in a legal sense is dependent upon whether grantor intended that the deed should be presently operative, and the intention of the grantor is a question of fact dependent upon the circumstances surrounding the transaction.

3. Deeds ⚿194(1)

Physical delivery of a deed raises an inference that grantor is immediately parting with title but that inference may be overcome by evidence showing that such was not the intention of grantor.

4. Deeds ⚿208(1)

In a quiet title action, in determining the question of delivery of deed the court is not bound to accept as true the testimony of the possessor of a deed.

5. Deeds ⚿206

In quiet title action brought by grantee of mother, who, allegedly had previously executed and delivered a deed to her several children, evidence sustained finding that mother had executed the deed to her several children with intention that it would not be presently operative, that it would not vest a present title in children but that title would vest in children after her death.

6. Quieting Title ⚿47(2)

In quiet title action, findings that grantor did not intend to divest herself of present title but that her intention was that title would vest only upon her death and finding that deed was not delivered with intent of divesting grantor of present title, were not irreconcilable.

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J. Elwood Andresen, Oakland, for appellants.

Clarence DeLancey, Oakland, for respondent.

BRAY, Justice.

In a quiet title action, defendants Antone L. Rodrigues and Lois Rodrigues appeal from a judgment in favor of plaintiff.

The question presented is the sufficiency of the evidence to support the court's finding of lack of delivery of a certain deed.

Evidence.

Plaintiff and defendant Antone are brother and sister, and are two of the eight children of Mary E. Rodrigues, who acquired the realty from her husband on his death in 1928. Mary was born in the Azores, Portugal, had little schooling, but could read simple English. Living on the premises in 1945 were Mary, her two sons Albert and Antone, and the latter's wife. In November or December of that year Antone was heard to inform his mother that to avoid probate expense she ought to make a deed of the property to all eight children. Some, if not all, of the children had talked over with Mary the making of a deed to them. Many times she had stated that she wanted the children to have the property in the event of her death and wanted a deed to them so that upon her death the property would be divided among them without probate. It was understood that Antone was to make the arrangements for the deed. On July 12, 1946, Antone, Manuel and Mary, and possibly one or two of the other children, went to a notary public's office where the first three instructed the notary to draw a gift deed from Mary to the children. There was no testimony as to whether after signing the deed Mary handed it to Antone or anyone else. However, Antone recorded it three days later. Mary paid for its preparation. Thereafter Mary continued to collect rent from Antone, Albert and the other tenants in the house. The roof was repaired by Antone and Albert. Mary gave Antone the money for the materials and for his work. Albert made no charge. Mary paid the taxes and insurance on the property and had complete control of it. After the controversy arose, Mary stated that she had wanted the deed to be effective only when she died, that as long as she lived the property was to be her home. In 1948 Antone wanted all the children to deed the property back to the mother. He had a deed prepared for that purpose, dated February 20, 1948. His purpose was to get the title into her name so that she could borrow on the property and loan him money to go into the trucking business. The other children refused to sign. Antone claims that in 1949 Clement asked to see this deed which Antone and Manuel apparently had signed, and then against Antone's wish took it away. It bears an acknowledgment by all eight children dated December 21, 1949. Antone denies acknowledging it. In June, 1948, Antone and his wife recorded a declaration of homestead on the property and in November, 1949, Antone executed and recorded a gift deed of his interest, if any, to his wife. August 18, 1950, Mary deeded the property to plaintiff.

There came a time when Antone would no longer pay rent. His mother wanted him either to pay or get out. At first he refused to do either. Eventually he left. He contends that the Board of Health forced him out because of his baby and the crowded conditions.

The court found that Antone influenced his mother to execute her deed without any valuable or other consideration; that she was under his influence; that she signed and acknowledged it for the purpose of avoiding probate proceedings and with the intention that it would not be presently operative but that the title to the property would remain in her and vest in the children after her death; that it was not her intention at any time to divest herself of the title nor to vest a present title in the grantees; that the deed was not delivered with the intent of divesting herself of present title.

Delivery.

[1-3] Defendants contend that their possession of the deed raises a presumption of delivery which has not been overcome, and that manual delivery of a deed vests title in the grantee regardless of the intent with which the deed is delivered. While possession and recording of the deed has been held to raise a presumption of delivery, Hill v. Donnelly, 43 Cal.App.2d 47, 49, 110 P.2d 135,[1] and the burden of proving nondelivery or conditional delivery is upon the plaintiff, Kuenzel v. Grettenberg, 88 Cal.App.2d 656, 199 P.2d 732, "Whether a deed has in fact been delivered, in a legal sense, is dependent upon whether the grantor intended that the deed should be presently operative. This intent is a question of fact dependent upon all the circumstances surrounding the transaction." Hill v. Donnelly, supra, 43 Cal.App.2d at page 49, 110 P.2d at page 136. In our case there was no evidence of manual delivery. Assumption of such delivery depends upon the presumption or inference following from defendants' possession. As against this presumption or inference there is evidence from which the court could reasonably infer that there was no delivery by Mary, at all, or at least there was no delivery with intention that the deed should be presently operative. Defendants' testimony itself shows that Mary only intended the deed to be operative at her death. In Counter v. Counter, 104 Cal.App.2d 786, 232 P.2d 551, 554, where a deed was delivered with intent that it not become effective until after the death of one of the grantors, we quoted from Hefner v. Sealey, 175 Cal. 18, 19, 164 P. 898: "'The delivery of a deed is not effected by a mere manual tradition of the instrument, unless the act "be accompanied with the intent that the deed shall become operative as such" (citation); i. e., that it shall presently pass title, without the reservation of any right of revocation or recall. [Citation.] Whether or not the requisite intent existed is a question of fact for the trial court or jury.'" and said: "Physical delivery raises an inference that the grantors are immediately parting with the title. But that inference may be overcome by evidence showing that such was not the intention of the grantors." The following language, also from the Counter case, is particularly applicable to the evidence in our case, 104 Cal.App.2d at page 789, 232 P.2d at page 554: "Here, while the circumstances were such as to support a conclusion, had the trial court made it, that the grantors intended to vest title reserving to themselves only a life estate, such a conclusion is not compelled. A very reasonable conclusion is the one drawn by the court, namely, that the grantors did not intend to part with the title but merely intended the deed as a testamentary disposition to take effect upon their death."

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[1] See, In re Estate of Galvin, 114 Cal.App.2d 354, 250 P.2d 333, for discussion on the question of whether it raises a presumption or an inference.

[4, 5] Defendants cite Shaver v. Canfield, 21 Cal.App.2d 734, 70 P.2d 507, a case in which the grantor's intention that the deeds were not to take effect was not disclosed at the time of delivery, and Security-First Nat. Bank of Los Angeles v. Leatart, 75 Cal.App.2d 211, 170 P.2d 687, where the court said that the evidence showed without conflict that the grantor intended that the deed become effective upon delivery. Obviously these cases are not in point. In the Leatart case the court stated the rule which is applicable here, 75 Cal.App.2d at page 214, 170 P.2d at page 689: "If in parting with possession of a conveyance the grantor intends thereby to divest himself of title, there is an effective delivery of the deed, and the solution of the question is grounded on the intention of the grantor, which is a question of fact to be determined by the trial court on all the evidence bearing thereon." In Estate of Galvin, supra, 114 Cal.App.2d 354, 250 P.2d 333, we discussed at considerable length the question of evidence against the presumption or inference arising from possession of a deed, and the fact that in determining the vital question of delivery the court is not bound to accept as true the testimony of the possessor. There is no testimony that Mary ever intended to or did deliver a deed which would be presently effective. All the evidence including defendants' own testimony, except the inference or presumption which defendants rely upon, refutes such an intention.

Findings Irreconcilable?

[6] There is nothing irreconcilable between the findings that neither at the time she signed and acknowledged the deed nor any other time did Mary intend to divest herself of present title nor to invest it in the grantees until her death, that her intention was that title would vest only upon her death, and the finding that the deed was not delivered with the intent of divesting herself of present title. The cases such as Hill v. Donnelly, supra, 43 Cal.App.2d 47, 110 P.2d 135, and Webb v. Saunders, 79 Cal.App.2d 863, 181 P.2d 43, upon which defendants rely for the claimed inconsistency, were cases involving a present intention to pass title, which intention is absent here. "A valid delivery of a deed depends upon whether the grantor intended that it should be presently operative * * *." Huth v. Katz, 30 Cal.2d 605, 608, 184 P.2d 521, 523.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

123 Cal.App.2d 431

UNRUH et al. v. SMITH et al.

Civ. 4641.

District Court of Appeal, Fourth District, California.

Feb. 24, 1954.

Action by farmers for damages for breach of contract whereunder processors agreed to process and sell farmers' cucumbers. The Superior Court, Kern County, Norman F. Main, J., rendered judgment for farmers and processors appealed. The District Court of Appeal, Mussell, J., held that farmers were entitled to recover for cucumbers which, by acts of processors, they were prevented from shipping.

Judgment affirmed.

1. Contracts 🔑335(2)

Farmers' amendment to complaint for damages for breach of contract whereunder processors agreed to process and sell cucumbers which farmers were to deliver, was sufficient to allege that processors had prevented farmers' performance.

2. Contracts 🔑322(3)

In farmers' action for damages for breach of contract whereby processors agreed to process and sell cucumbers which farmers were to deliver, evidence supported finding that processors would not have accepted, processed, shipped, and sold cucumbers, in accordance with contract, even if farmers had delivered them in accordance with contract.

3. Contracts ⇨303(4)

Prevention of performance by a promisee is equivalent to performance by the promisor.

4. Contracts ⇨303(4)

Where a party to a contract prevents a fulfilment of a condition or its performance by adverse party, he cannot rely on such condition to defeat his own liability.

5. Pleading ⇨237(6)

Where cause of action was not changed by amendment, permitting farmers to amend complaint for damages for breach of contract, whereunder processors agreed to process and sell cucumbers delivered by farmers, so as to conform to proof that processors had prevented farmers' performance, was not error.

6. Appeal and Error ⇨959(3)
Pleading ⇨236(5)

Trial court is invested with discretionary power to permit and even to order pleadings to be amended at any stage of the trial of a cause, and even after its submission, so as to make such pleadings conform to proofs, and this discretion will not be interfered with on appeal except in cases of manifest abuse. Code Civ.Proc. § 470.

7. Pleading ⇨237(3)

Amendments not substantially changing the cause of action or defense may be made to conform pleadings with proof at any stage of the trial.

8. Contracts ⇨350(1)

In farmers' action for damages for breach of contract whereunder processors agreed to process and sell cucumbers delivered by farmers, evidence supported implied finding that processors' advice, on when to pick cucumbers, offered under terms of contract, was faulty in that it inhibited farmers from seeking other markets and cut down their production.

9. Damages ⇨189

In farmers' action for damages for breach of contract whereunder processors agreed to process and sell cucumbers delivered by farmers, evidence supported findings concerning volume of cucumbers which farmers had had available and which processors had refused, and market value of such cucumbers.

10. Damages ⇨124(1)

Farmers were entitled to recover for cucumbers which, by act of processors, they were prevented from delivering to processors in accordance with contract whereunder processors agreed to process and sell farmers' cucumbers.

11. Damages ⇨124(3)

Where loss of profits was a natural and direct consequence of processors' breach of contract to process and sell farmers' cucumbers, farmers could recover prospective profits without devising a perfect measure of damages.

12. Damages ⇨124(1)

Trial court properly considered excess processing charges, commissions, and freight in computing damage suffered by farmers who brought action for damages for breach of contract whereunder processors agreed to process and sell cucumbers.

Mack & Bianco, Bakersfield, for appellants.

Baker, Palmer & Wall, Bakersfield, for respondents.

MUSSELL, Justice.

Defendants appeal from a judgment for plaintiffs in an action for damages for breach of the following contract:

"This agreement entered into Aug. 10, 1950 between Bryan Smith Farms and C. A. Unruh & Howard J. Miller.

"C. A. Unruh & Howard J. Miller agrees to grow 42 acres of cucumbers on their ranch located near the Kern County Airport and to harvest and deliver the same to the Bryan Smith Farms' packing house in Edison.

"Bryan Smith Farms agrees to advance cucumber seed at the stipulated price of $1.20 per pound which will be deducted from the sale of the cucumbers, furnish planting sled, and some advise in regards to growing and harvesting.

"Bryan Smith Farms also agrees to process, ship, and sell said cucumbers at a reasonable going rate to be determined by the cost of handling and materials at the time of harvest.

"Bryan Smith Farms agrees to rent trailers for harvesting to above mentioned growers for a reasonable going rate. All charges to be deducted from sale of cucumbers, balance of revenue from the sale of said cucumbers to be paid said growers at the time collections are made from sale of said cucumbers.

"(Signatures)"

Plaintiffs allege that pursuant to this contract they planted, cultivated and brought to maturity on their land 50,000 lugs of cucumbers; that they at all times performed all of the stipulations, conditions and agreements on their part to be performed at the time and in the manner specified in the contract; that the reasonable value of the cucumbers at the time the crop was ready for marketing, over and under the cost of processing, shipping and selling was 50 cents per lug; that the defendants failed and refused to perform the contract; that plaintiffs were dependent upon defendants to take care of such crop and were unable to market it because of defendants' breach of the contract, all to their damage in the sum of $25,000.

Defendants admitted the execution of the contract, denied the other material allegations of the complaint and cross-complained for the sum of $1,925.49 for unpaid advances.

During the trial the court permitted plaintiffs to amend their complaint to conform to the proof and in the amendment plaintiffs alleged that they cultivated and brought to maturity in excess of 60,000 lugs of cucumbers; that plaintiffs picked and delivered to defendants 10,024 lugs and that defendants refused to process, ship or sell the balance of 50,000 lugs and refused to rent trailers to plaintiffs for the harvesting of said balance; that as a result of defendants' refusal to process, ship and sell said cucumbers plaintiffs were unable to deliver 50,000 lugs so grown and were unable to sell or dispose of the same at the time said cucumbers were ready for market and said cucumbers were left on the vines and became overripe, spoiled and unmarketable; that plaintiffs performed all of the stipulations, conditions and agreements stated in said contract to be performed on their part at the time and in the manner specified, except as prevented by the failure of defendants to process, ship and sell the said crop.

Evidence

Plaintiffs were tenants in possession of a 42-acre ranch in Kern county and the defendant Bryan Smith operated a packing house at Edison in said county. On August 10, 1950, the parties entered into the contract (prepared by defendants) hereinbefore set forth and thereafter plaintiffs, pursuant to the agreement, planted, cultivated and brought to maturity on said land a crop of cucumbers which matured at the average rate of 800 main lugs per day from October 17, 1950 to December 15, 1950, or a total of not less than 48,000 main lugs.

There was evidence that in order to produce a maximum yield of cucumbers, regular and continuous picking is required during the harvest period; that if so picked the acreage planted by the plaintiff in 1950 with reasonable certainty would have produced marketable cucumbers for a period of at least eight weeks, from October 17 to December 15, 1950, in an amount not less than 54,000 lugs of marketable, good grade cucumbers; that during said period there were 52 shipping days, not including Sundays and holidays; that during the first 23 shipping days, from October 17 to November 12, 1950, inclusive, there were available for processing and sale sufficient cucumbers from said crop to have packed out 10,000 lugs of good grade, marketable cucumbers, after making allowance for culls and discards, in addition to the cucumbers actually processed and sold by the defendants; and that during the last 29 shipping days during said period, from November 12 to December 15, 1950, there would have been available with reasonable certainty, if the cucumbers had been regularly picked, 24,000 lugs of good grade, marketable cucumbers, after making allowance for culls and discards, in addition to those actually processed and sold by the defendants.

Plaintiff Unruh testified that on or about October 5, 1950, the cucumber plants matured; that he made several trips to defendants' shed and ranch and told them that the plants were matured and that they should start picking; that defendant Smith stated that "he didn't figure there was enough there to pay to go in and start picking and he did tell us that he wasn't set up for them at that time; that he would be set up in a week or ten days"; that defendants' foreman informed plaintiffs that they had nothing to worry about and that they would have to wait; that he would start as soon as he got the machinery up; that the picking was commenced on or about October 18, 1950; that on one occasion at about the middle of the season plaintiffs delivered to defendants four trailer loads of cucumbers which were allowed to become soft and overripe; that when plaintiffs started, they were picking four or five loads a day; that Smith would stop them and say "don't bring any more; that is all; that is enough for today"; that Smith told him not to worry about it that in a couple of days or so he would put in a big crew and get over the field but that Smith sent in a crew of pickers on one day only; that it was necessary to go over the field every two or three days and pick the large cucumbers off in order to keep the vines alive; that at the beginning of the season trailers were available but as the season went on, when plaintiffs wanted trailers they would not be available; that there were "quite a few times when there were not enough trailers; that he could not give an estimate of the average times because there were so many times he went there to get trailers; that Smith was 'running tomatoes' and he did not stop and run cucumbers"; that Smith stated that he was harvesting tomatoes and needed his trailers; that "I just kept telling him that we just had to get the trailers and had to pick faster than we were picking and he said he couldn't just handle it"; that the cucumbers were ready for picking on October 10, 1950 and that it was on October 18, 1950 when he got the first trailers; that in the latter part of the season when the cucumbers were too large Smith told plaintiff to pick all that he could; that it was then too late as the cucumbers were too large.

There was evidence that the price of handling cucumbers was 80 cents per lug and marketing reports admitted in evidence by stipulation showed that from October 17, 1950 to November 12, 1950, the average market price of good grade cucumbers was the sum of $1.19 per lug and that from November 13, 1950 to December 15, 1950, the average price was $1.98. There was evidence that the reasonable cost of processing and shipping (not including freight) was 90 cents per lug, including 10 cents profit to defendants; that the reasonable cost of picking and hauling was 10 cents per lug and that the average freight cost was 5 cents, making a total of $1.05 per lug.

The trial court found generally in accordance with the foregoing evidence and further found that "the contract between the parties required the defendant to furnish 'some advice in regards to growing and harvesting'; that such 'advice' as to harvesting and statements to plaintiffs as to when they should pick and when they should not pick cucumbers were constantly and repeatedly given and made by defendant to plaintiffs throughout the harvest period and that plaintiff relied on said advice, statements and representations of defendant and did not seek other outlets except small casual sales; that by reason of such advice, plaintiffs were prevented from picking cucumbers for sale as fast as the maturity of the crop and the state of the market justified; that the reasonable going rate for processing and packing cucumbers of the type of pack contemplated by the parties was 90 cents per lug; that defendant charged $1.10 per lug for processing and packing; that by charging the same against the cost of the lug before offering it for sale, the defendant by his own act prevented the marketing of large quantities of cucumbers * * * and made impossible an exact determination by the court of the quantity of cucumbers that would have been sold if the reasonable rate for processing had been charged; that during the 1950 season there was a market available for plaintiffs' cucumbers at the prices set forth in the market reports in evidence; that defendants did not timely account to plaintiffs as to the result of the various sales of cucumbers or any of them, but instead failed and neglected to make any accounting of the returns from the sale of cucumbers handled until after this action was filed; that until the harvest season was over, plaintiffs did not know that said cucumbers were not being sold at a substantial profit, and were deprived of any opportunity to protect themselves in the market by seeking other outlets and purchasers; that plaintiffs at all times during said crop season were ready, willing and able to perform all of the terms and conditions of their contract with defendants, both expressed and implied, and did perform the same in full, except as prevented by the defendants; but that to the extent found herein the plaintiffs were prevented from performing said contract by reason of defendants' advice to the plaintiffs not to pick, and by the defendants' failure and refusal to process, ship and sell said cucumbers at a reasonable going rate as required by the contract." The court further found that the reasonable cost to produce the extra fancy lug as actually packed by the defendant was $1 per lug; that the defendants actually processed and sold from plaintiffs' crop 10,024 lugs for a net return to plaintiffs of $1,224.06, and plaintiffs were entitled to receive an additional 10 cents per lug, the difference between the processing cost actually charged to the plaintiffs and the reasonable charge therefor, or a total of $1,002.40; that the defendant improperly charged double commissions on certain sales and plaintiffs were entitled to $499.29 for such sums; that the defendants improperly charged plaintiffs for freight, commission, storage, drayage and processing on cucumbers shipped without destination, consignment or sale in the sum of $906.53; that of the additional 10,000 lugs available during the first marketing period, the market would have taken had they been offered for sale 8,000 lugs at $1.19 per lug, which on the basis of $1.05 cost per lug and 12 cents commission, would have returned to the plaintiffs a net of 2 cents per lug, or a net of $160; that of the 24,000 lugs available during the second marketing period, the market would have taken, had they been offered for sale, 20,000 lugs at $1.98 per lug, which on the basis of $1.05 cost per lug and 20 cents commission, would have returned to the plaintiffs a net of 73 cents per lug, or a total of $14,600; that the defendants were entitled to an offset on their counterclaim of $1,925.49 and that the plaintiffs were entitled to recover a net total of $15,242.73.

[1-4] Appellants first contend that the findings are not responsive to the pleadings. They argue in this connection that the cause of action made out by the pleadings was full performance; that plaintiffs' allegation was that pursuant to the contract they agreed to plant, harvest and deliver 42 acres of cucumbers to the defendants' packing house; that pursuant to the contract, they brought to maturity 50,000 lugs of cucumbers and performed all of the stipulations and agreements on their part to be performed and in the manner specified in the contract; that the primary and only obligation imposed on the plaintiffs by the contract was that they were to "harvest and deliver" the cucumbers; that it was only such cucumbers as were by plaintiffs harvested and delivered to the shed of the defendants that the defendants were required to process, ship and sell and that this was a condition precedent to the obligations, if any, of the defendants. However, the complaint was amended to conform to the proof that the market would have accepted at least 20,000 lugs of cucumbers in addition to those sold by defendants, if defendants had not refused and neglected to rent a sufficient number of trailers to plaintiffs and had not refused to process and ship at least 20,000 additional lugs. The amendment to conform to the proof sufficiently alleged a prevention of performance of the contract by the defendants. It is alleged in the complaint that plaintiffs were dependent upon the defendants to take their said crop and were unable to market the same by reason of defendants' breach of the contract. While it is true that plaintiffs did not actually deliver the 20,000 lugs in question, the record supports

the inference that defendants would not have processed, shipped and sold them if such delivery had been made. Prevention of performance by the promisee is equivalent to performance by the promisor. Crawford v. Pioneer Box & Lumber Co., 105 Cal.App. 760, 769, 288 P. 694; Sexton v. Richardson, 6 Cal.App. 459, 92 P. 395. Defendants could not by refusing to accept the cucumbers claim the benefit of such prevention and thereby prevent plaintiffs from obtaining damages for breach of the contract. A party to a contract cannot take advantage of his own act or omission to escape liability thereon. Where a party to a contract prevents the fulfillment of a condition or its performance by the adverse party, he cannot rely on such condition to defeat his liability. Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 371, 210 P.2d 757.

[5–7] Appellants next argue that the court erred in permitting plaintiffs to amend their complaint to conform to the proof. We find no prejudicial error in the order permitting the amendment. As was said in Burrows v. Burrows, 18 Cal.App.2d 275, 279, 63 P.2d 1135, 1136:

> "Under the provisions of section 470 of the Code of Civil Procedure the trial court is invested with discretionary power to permit and even to order the pleadings of the parties to be amended at any stage of the trial of the cause, and even after its submission, so as to make such pleadings conform to the proofs; and it has been uniformly held that this discretion will not be interfered with upon appeal except in cases of its manifest abuse."

It does not appear that defendants were prejudiced by the amendment. The action was for breach of contract and the cause of action was not changed by the amendment. Amendments not substantially changing the cause of action or defense may be made to conform pleadings with proof at any stage of the trial. Richter v. Adams, 19 Cal.App.2d 572, 577, 66 P.2d 226.

[8] It is next contended that the implied finding that the advice of the defendants to the plaintiffs when to and when not to pick was faulty is unsupported by the evidence. We cannot agree with this contention. The questioned finding was that the "advice" given by defendants as to the harvesting and statements to plaintiffs as to when they should or should not pick cucumbers was relied upon by the plaintiffs and that they did not, therefore, seek other outlets for their crop, and that by reason of such advice they were prevented from offering the cucumbers for sale as far as the maturity of the crop and the state of the market justified. Some of the "advice" given and statements made by defendants were in the nature of directions to plaintiffs as to when the cucumbers were to be delivered and when they would be accepted for processing and sale by defendants and plaintiffs were by reason thereof unable to deliver a large portion of their crop to defendants' packing house.

[9–11] Appellants further argue that the finding that 8,000 lugs of cucumbers could have been sold during the first harvesting period at an average of $1.19 per lug and that 20,000 lugs could have been sold during the second harvesting period at an average of $1.98 per lug is based on speculation and conjecture. However, there is substantial evidence as to the number of lugs of cucumbers available for processing, packing and shipping during the entire season, the market price and the cost of processing, packing and shipping, from which the trial court estimated the amount of damage suffered by plaintiffs. They were entitled to recover for the cucumbers which by the acts of defendants they were prevented from shipping. Rice v. Whitmore, 74 Cal. 619, 620, 16 P. 501. Where, as here, the prospective profits were the natural and direct consequences of the breach of the contract by defendants they may not wholly escape on account of the difficulties of devising a perfect measure of damages which their own wrong has produced. Hoag v. Jenan, 86 Cal.App.2d 556, 562, 195 P.2d 451.

[12] Finally it is argued by appellants that the court improperly allowed offsets to the counterclaim. We find no merit in this contention. Appellants, by their cross-complaint, set up that there was an offset of

$1,925.49. The court properly considered the excess processing charges, commission and freight in computing the damage suffered by plaintiffs in making a full settlement of the controversy.

Judgment affirmed

BARNARD, P. J., and GRIFFIN, J., concur.

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123 Cal.App.2d 582

PEOPLE v. GREGORY.

Cr. 5050.

District Court of Appeal, Second District, Division 1, California.
March 1, 1954.

Defendant was convicted of assault with a deadly weapon. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., rendered judgment and defendant appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to support finding that defendant's actions were not in necessary self defense.

Judgment affirmed.

1. Criminal Law 🔑260(11), 1144(13), 1159(2)

On appeal from guilty verdict or decision, reviewing court must take cognizance of and accept the view of the evidence most favorable to the judgment rendered, and may not interfere with the conclusions arrived at by the duly constituted arbiter of facts, if circumstances reasonably justify the verdict or decision.

2. Assault and Battery 🔑92

In prosecution for assault with a deadly weapon, evidence was sufficient to support finding that defendant was not acting in necessary self defense when assaulting victim with knife. Pen.Code, §§ 692, 693.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the crime of assault with a deadly weapon. To the aforesaid charge he interposed a plea of not guilty.

Trial by jury was appropriately waived and it was stipulated that the matter be submitted to the court on the transcript of the preliminary examination, both parties reserving the right to offer additional evidence. Witnesses were sworn and testified on behalf of defendant. The court found him guilty as charged in the information. Motion for a new trial was denied, and also an application for probation, and defendant was sentenced to serve ninety days in the county jail. From the judgment of conviction he prosecutes this appeal.

A review of the record discloses the following factual background surrounding this prosecution. Defendant and the complaining witness, Dave Jones, had been together playing poker at a location in the City of Watts, County of Los Angeles, on the evening previous to the assault and the morning of the assault (November 15, 1952). Jones left to obtain some liquor, taking defendant's car.

The complaining witness testified that he returned to the location in Watts but that the defendant was gone and that he then drove defendant's car to his (the complaining witness) home in Los Angeles. That at about nine o'clock in the morning of the 15th of November, 1952, the defendant came to Jones' home and upon being admitted to the home defendant came in with his hands in his pocket and said: "Why did you go away?" and Jones replied: "You know I was going after the liquor."

At this time defendant struck Jones with a knife, the blows with the knife striking the complaining witness in the neck, under the arms, above the ears, and in the back. Jones then grabbed defendant's hands, at which time he saw the knife. After the altercation, Jones received medical attention, including stitches in the neck, above the ear and under the arm. After the blows were struck Jones held on to defendant to keep him from cutting him any more.

Jones was then taken to the Georgia Street Hospital and then to the General Hospital and was at the time of trial under a doctor's care.

The defendant took the stand to testify in his own behalf, admitting that he was with the complaining witness on the evening preceding and the early morning of the assault and that he gave Jones the keys of his car to get some liquor out of the glove compartment, explaining that he did not want the victim to drive the car because he had been consuming liquor; that he found his car gone and that he went over to Jones' house to ask him why he had taken the car away. He was then asked what occurred and he stated in part: "So I reached in my pocket and I grabbed him in the collar and he stuck his hand in his pocket; and so I said, 'Well, don't come out with anything or I'll hurt you.' And in the meantime he had his knife and I had my little knife, * * *"

Defendant testified that he then started to hit Jones with his knife and admitted that he cut the complaining witness.

[1] Appellant's sole ground for reversal of the judgment is that the evidence is insufficient to sustain his conviction in that it shows that he acted in necessary self-defense. On appeal following a guilty verdict or decision, the reviewing court must take cognizance and accept the view of the evidence most favorable to the judgment rendered. And though the evidence be conflicting, and shows circumstances that might also reasonably be reconciled with the innocence of the accused, a reviewing court may not interfere with the conclusions arrived at by the duly constituted arbiter of the facts, if the circumstances reasonably justify the verdict of the jury or decision of the trial judge. This court is not authorized to attempt a determination of the weight of the evidence, but is limited to a decision only as to whether sufficient facts could not have been found in the trial tribunal to warrant the inference of guilt.

[2] Viewed in the light of the foregoing rules, the testimony herein narrated does not bring appellant within the protective provisions of either section 692 or 693 of the Penal Code. Appellant's counsel, in urging leniency for appellant, well summarized the existing factual situation when he said to the trial judge: "* * * and I imagine your Honor found that there was no self-defense, and I don't particularly argue with that; but I just think he was angry, and that this fellow was abusive and nasty in his talk, asked him, 'What are you going to do about it?' one of those things, and the defendant just lost his temper, as I imagine a lot of people would in a similar situation. This fellow was just a bad, sullen individual who was taking advantage of people, and the defendant wouldn't stand for it."

The record amply supports the findings of the trial judge that there was no legal justification for the aggravated assault with a knife by appellant, People v. Alexander, 1 Cal.App.2d 570, 571, 37 P.2d 125; People v. Albori, 97 Cal.App. 537, 275 P. 1017; People v. Pullins, 95 Cal.App.2d 902, 905, 214 P.2d 436; People v. McCoy, 25 Cal.2d 177, 190, 192, 153 P.2d 315; People v. Rader, 24 Cal.App. 477, 481, 141 P. 958.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

123 Cal.App.2d 472

WILSON v. STEARNS et al.

Civ. 19711.

District Court of Appeal, Second District,
Division 1, California.

Feb. 25, 1954.

Rehearing Denied March 15, 1954.

Hearing Denied April 21, 1954.

Action by broker to recover commissions on sale of tract properties. The Superior Court of Los Angeles County, George Francis, J., entered judgment from which plaintiff appealed. The District Court of Appeal, White, P. J., held that statute having effect of prohibiting practice by brokers of procuring exclusive employment agreements not having a definite termination day did not preclude recovery on contract of such character, not shown to have been procured pursuant to a "practice" of the broker who had fully performed.

Judgment reversed and remanded as to all but two defendants, as to whom judgment affirmed.

1. Brokers 🔑7

Although the general rule is that a contract made in violation of a statute designed for protection of the public and prescribing penalty for violation thereof, is void, before the rule can be applied in case of a prohibitory statute, such as that relating to practices of real estate brokers and prescribing a penalty, the statute must be examined as a whole, to ascertain whether the makers of it meant that a contract in contravention thereof should be void. Business and Professions Code, § 10176 (f).

2. Brokers 🔑3

Statute authorizing revocation or suspension of a real estate broker's license if broker is guilty of enumerated practices, was aimed at fraudulent or dishonest conduct by real estate brokers. Business and Professions Code, § 10176(f).

3. Brokers 🔑7

The word "practice" as used in statute authorizing revocation or suspension of real estate broker's license if broker is found guilty by commissioner of having indulged in "practice" of procuring exclusive agreements of employment, not containing a definite, specified date of final and complete termination, is used in its commonly recognized meaning, and indicates the habitual doing of a certain thing denounced by the statute. Business and Professions Code, § 10176(f).

See publication Words and Phrases, for other judicial constructions and definitions of "Practice".

4. Brokers 🔑40

Broker who had no previous experience in selling of tract properties and who was not shown to have previously procured employment contracts not having a definite termination date, was not precluded by statute prohibiting brokers from engaging in the "practice" of procuring such agreements, from recovering on single agreement for tract selling, which he fully performed, but which did not contain a definite termination date. Business and Professions Code, § 10176(f).

5. Contracts 🔑138(1)

The rule that the aid of the court cannot be sought to establish rights arising from a contract which violates the public policy of the state, is not generally applied to secure justice between the parties who have made an illegal contract, but from regard for the higher interest of the public.

6. Brokers 🔑40

Contracts 🔑105

In determining whether a contract is invalid as being in contravention of a statute for the benefit of the public, courts must deal with the transaction in such manner as to give effect to the fundamental purpose of the legislature and to a wide public policy, and, in determining whether real estate broker may be deprived of value of his services, already admittedly earned, his contract will not be declared invalid upon the basis of anything not embraced within the terms of the applicable statute. Business and Professions Code, § 10176(f).

7. Contracts 🔑138(2)

Where, by applying the rule that courts will not lend their aid to enforcement of an illegal agreement or one against public policy, the public cannot be protected because the transaction has been completed, and no serious moral turpitude is involved, and defendant is the one guilty of the greatest moral fault, and to apply the rule would be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.

8. Brokers 🔑85(1)

In action by broker to recover commissions due under written contract for sale of tract properties for defendant, contract, which had no definite termination date, nevertheless did not show a practice on part of broker of claiming, demanding, or receiving a fee, compensation or commission, on an agreement not containing a definite termination day, and thus admission of evidence regarding the contract was not error. Business and Professions Code, § 10176(f).

9. Pleading 🔑403(2)

Defects in a complaint may be cured by allegations of the answer.

10. Appeal and Error 🔑1039(13)

In action by broker for recovery of commissions for sale of tract properties, wherein it appeared that an individual defendant with whom broker had contracted had thereafter transferred his interest in the property in question to defendant corporation, even if pleadings be considered deficient with respect to allegations that corporation was the alter ego of the individual defendant, any variance between pleadings and proof was not prejudicial to defendants in view of answers which carefully sought to sever the corporation from the individual defendant, indicating an anticipation of issue of alter ego.

11. Corporations 🔑1

Before the courts will disregard the corporate entity and treat the corporation as the alter ego of an individual, it must appear, even though the individual may own all the stock of the corporation, that there is such a unity of interest and ownership that the individuality of such corporation and the owner or owners of its stock has ceased, and that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice.

12. Corporations 🔑1

In action by broker to recover commissions for sale of tract properties, wherein it was contended that individual defendant with whom broker had contracted had transferred his interest in the properties to a corporation which was his alter ego, evidence sustained finding that corporation was in fact the alter ego of the individual defendant.

13. Corporations 🔑1

Where it appears that a corporation is being used merely as an instrumentality through which an individual who is the owner of its capital stock transacts his business, and where an inequitable result would ensue, the two should be considered as one, and it is not necessary that the plaintiff prove actual fraud, if the recognition of the two entities as separate would result in an injustice.

14. Corporations 🔑1

In action by broker to recover commissions for sale of tract properties, wherein it appeared that defendant with whom broker had contracted had transferred the properties to a corporation as his alter ego, and that one-half of the issued stock of the corporation was held in trust for benefit of general contractor in charge of construction, evidence sustained finding that general contractor and his wife were not indebted to broker, but that his dealings were entirely with other defendants.

◆

Raymond C. Simpson and George E. Wise, Long Beach, for appellant.

Feeley & Saevig, Donald E. Feeley and Roger A. Saevig, Whittier, for respondents.

WHITE, Presiding Justice.

This is an appeal by plaintiff, a licensed real estate broker, from an adverse judgment in an action to recover commissions from defendants.

The record reveals that defendant George Stearns was a subdivider of tract properties. On January 13, 1947, plaintiff prepared and submitted to defendant Stearns a written contract, the pertinent portions of which read as follows:

> "For and in consideration of services to be performed by Roscoe J. Wilson, hereinafter called Agent, I (we) hereby employ said Agent as my (our) sole and exclusive agent to sell or exchange for me (us) that said real property situated in the County of Orange, State of California, to-wit:
>
> "N½ of N.E.¼ of Secc. 29, Twsp. 4 S. and R. 11 West of S. B. B. & M. and for buildings to be constructed thereon, and I (we) hereby grant said agent the

exclusive right to sell or exchange the same at a price (or prices) and terms to be later determined. This employment and authority shall continue irrevocably until completion of subdivision project now contemplated; but in the event the subdivision promotion is discarded and the seller decides to sell or exchange the raw or unimproved land, then this exclusive employment and authority shall be for a ninety (90) day period only, the specific dates of which shall be conveyed in a letter of notice to the agent and acknowledged by him.

"As and for the compensation of said Agent hereunder, I (we) agree to pay said Agent five (5%) percent of the selling price in the event that sale or exchange of property is made as sale or exchange of raw or unimproved land or acres, regardless of size of plot or parcel, but in the event sale is made after completion of home or homes on the land, I (we) agree to pay two and one-half (2½%) percent of the selling price of each such home so sold.

"In case a deposit is forfeited, one-half of same shall be retained by or paid to said Agent and one-half to me (us), provided, however, that Agent's portion of such forfeiture shall in no case exceed the amount of the specified commission.

"I hereby acknowledge receipt of a copy of this listing.

"Owner (SGD) George Stearns

"In consideration of the above employment, the undersigned Agent agrees that in the event the sales campaign fails to keep pace with the process of construction that the principals hereto shall, in conference, decide upon a method or methods to be employed in correcting such unfavorable situation.

"Agent (SGD) Wilson J. Wilson"

At the time the contract in question was entered into, defendant George Stearns held title to the property therein mentioned. Said property was located near the Los Alamitos Naval Air Station in Orange County, and was called Alamo Ranchos.

On April 9, 1947, the Alamo Development Company, a California corporation, was organized to engage in the general contracting and construction business in this state, including the development of the tract property referred to in the aforesaid contract.

About May 5, 1947, ninety shares of stock in Alamo Development Company were issued to defendant George Stearns, and Etta Mae Stearns, his wife, as consideration for certain real property located in San Pedro, California, which land was then subdivided by the corporation.

On June 14, 1947, Alamo Development Company sold to defendant George Stearns and his wife, 306 shares of its capital stock for $30,000 cash, and an additional 94 shares in return for the land at Alamo Ranchos, which is described in the contract here at issue. Thereafter, Alamo Development Company subdivided the Alamo Ranchos property.

While all shares of the corporation's stock were issued to defendant Stearns and his wife, the former testified he had an oral agreement with defendant Franklin Hall, a general contractor who supervised the construction of the tract homes thereafter erected, that one-half of the issued stock was held in trust for the benefit of defendant Hall.

Defendant George Stearns was president and treasurer of the aforesaid corporation, and his wife was vice-president and secretary.

When subdivision of the land involved was commenced, defendant George Stearns built a building on the tract in which he maintained an office for himself, his secretary and attorney, and in which plaintiff Wilson and his sales staff were provided with office space as the sales office for the tract. After the preliminary work of making contracts and the necessary preparations for the sale of the subdivision houses, plaintiff Wilson and his employees started making sales of the tract houses in January, 1948. Wilson had three salesmen working under him, Whitlock, the sales manager, Mrs. Whitlock, his wife and a Nellie White. All of the sales of houses in the tract were accomplished as a result of the efforts of plaintiff and his three employees.

All of the houses in the tract, 85 in number, were sold by plaintiff, the last sale being made in July, 1948. The total value of these sales made by plaintiff was $671,900.

It was stipulated at the trial that the reasonable value of plaintiff's services was that provided by the contract, to wit, $17,089.06, and that if defendants are liable for said sum, they are entitled to a credit of $5,278.34, representing a credit given by defendant Stearns to Mr. Whitlock, one of plaintiff's employees, toward the purchase by Whitlock of one of the tract houses, defendants treating said credit as an advance against commissions.

There was testimony that during the period he was engaged in selling the tract houses, plaintiff inquired of defendant Stearns about the commissions and was promised he would be paid later. That at no time did defendant Stearns say he would not pay the commissions. Plaintiff did not have any previous experience in tract selling. There was testimony that when plaintiff asked defendants Stearns and Hall about payment of commissions they would say, "They didn't have the money to pay the commissions.", "* * * just as quickly as they could get some more money—get some of the creditors taken care of, then probably there was going to be some money for the sales commissions". It appears that no written contract, memorandum or agreement was made by Alamo Development Company, Inc., to pay commissions to plaintiff for the sales made by him.

Following a trial before the court sitting without a jury, findings of fact were made, and insofar as here material, include the following:

> "That the allegations of paragraph IV are true, except that defendant, George Stearns, was the sole owner of said real property; that it is true that defendant, George Stearns, conveyed said real property to defendant, Alamo Development Company, a corporation, which was the *alter ego* of said defendant, George Stearns."

The court further found that while title to the houses sold was vested in Alamo Development Company, such corporation, "* * * was owned solely by defendant, George Stearns, and which was the *alter ego* of said defendant, George Stearns."

It was also found by the court as follows:

> "The Court finds that the contract between plaintiff and defendant, George Stearns (Exhibit A) has been fully performed by Plaintiff; that the land described in the agreement was transferred on June 23, 1947, to defendant, Alamo Development Company, a corporation; that said corporation was solely and wholly owned by defendant, George Stearns, and was his alter ego; that records were kept by said Defendants of plaintiff's sales as a broker and the amount of commissions earned; that plaintiff has fully performed every service required by said contract on his part, and that defendants, George Stearns and Alamo Development Company, a corporation, have received full benefit therefrom, which benefit, amounting to sales of their properties in excess of $671,000.00, they have received and retained; that no part of said contract between plaintiff and said defendants is executory, insofar as plaintiff is concerned; that according to the terms of said contract, the commissions to be paid to plaintiff by said defendant, George Stearns, for said services is the sum of $17,089.06; that the sum of $5,278.34 has been paid to plaintiff on account thereof; that plaintiff has never made a practice of procuring exclusive brokerage contracts wherein there was no specified termination date."

Notwithstanding the foregoing findings of fact, the court, in its conclusions of law, held:

> "That the contract alleged and introduced in evidence by Plaintiff contravenes Section 10176(f) of the Busi-

> ness and Professions Code of the State of California, and is therefore illegal and void ab initio, and no recovery can be permitted thereon."

Judgment was accordingly entered for defendants.

As his first ground for reversal appellant earnestly contends that in view of the findings of the court that he performed every service required of him by the contract in question; that defendant George Stearns and his *alter ego,* defendant Alamo Development Company, have received full benefit therefrom which they have retained, the conclusions arrived at by the court that appellant was not entitled to recover because of the provisions of section 10176(f) of the Business and Professions Code was erroneous.

Insofar as here material, the code section in question provides:

> "§ 10176. Investigation of actions of licensees: Grounds for suspension or revocation of licenses. The commissioner may, upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this State, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee within the immediately preceding three years, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:
>
> * * * * * *
>
> "(f) The practice of claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to sell, buy or exchange real estate for compensation or commission *where such agreement does not contain a definite, specified date of final and complete termination.*" (Emphasis added.)

[1] Respondents' contention is that a contract made contrary to the terms of the law designed for the protection of the public and prescribing a penalty for the violation thereof, is illegal and void, and that no action may be brought to enforce such a contract. Undoubtedly, the general rule in this state is that when it appears there is a violation of such a statute, the prescribed penalty contained therein is the equivalent of an express prohibition and, that a contract made contrary to the terms thereof is void, Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420, 73 Am.St.Rep. 31.

The rule is, however, not without exception. In Harris v. Runnels, 12 How. 79, 13 L.Ed. 901, the Supreme Court of the United States said, "before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so."

We are satisfied from an examination of the contract here in question, that it does not come within the legislative intent as expressed by the aforesaid statute.

Although believing he was precluded from rendering what he considered to be a proper judgment in the case at bar by the decision in Dale v. Palmer, 106 Cal.App.2d 663, 235 P.2d 650, the trial judge was in accord with our view of the legislative intent as evidenced by the language contained in his "Memorandum and Order for Judgment", as follows:

> "In enacting this section (§ 10176, Business and Professions Code), I think the evil which the legislature had in mind was the practice of some brokers to obtain contracts which placed themselves in a position to claim commissions for an indefinite time without performing any services, nor, perhaps ever intending to. It is difficult to see what evil there is in claiming or recovering commissions where, as in this case, valuable, timely and lawful services are rendered to the satisfaction of the seller, the seller claims no prejudice from the fact that the agency was ex-

clusive or that the termination date was indefinite and there is no evidence that the broker ever before claimed a commission under or entered into such a contract."

[2] A mere reading of the statute at once suggests that it is aimed at fraudulent or dishonest conduct by real estate brokers who engage in, "*The practice* of claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to sell, buy or exchange real estate for compensation or commission where such agreement does not contain a definite, specified date of final and complete termination." (Emphasis added.)

[3, 4] According to 72 C.J.S., at page 470, "Practice" consists of the "habitual doing of certain things, the doing of an act more than once." Black's Law Dictionary, 3rd Ed., defines "Practice" as "Repeated or customary action; habitual performance; a succession of acts of similar kind; habit, custom, * * *".

As was said by the trial judge and borne out by the record, there is not a scintilla of evidence that appellant was engaged in the "practice" denounced by the statute. In truth and in fact, the evidence shows that this was the first tract sold by appellant and that he had no previous experience in tract selling. It cannot be assumed that in adopting the statute here in question the legislature did not have in mind the general usage and commonly recognized meaning of the word "practice". If the lawmaking body had in mind that *all* contracts made in violation of section 10176 should be void or voidable, it could have expressly so provided as was done with respect to subdivision sales in sections 11540 and 11538 of the Business and Professions Code. Section 11540 provides that any sale or sales of such lots made in contravention of that statute is voidable at the option of the buyer, while section 11538 provides that it is unlawful to sell subdivision lots until a final map thereof has been duly recorded (see also, Business and Professions Code, § 16600). In the case of Lowe v. Loyd, 93 Cal.App.2d 684, at page 687, 209 P.2d 851, at page 853, hearing denied by the Supreme Court, the court, in discussing the code section and the subdivision thereof now engaging our attention, used the following language in expressing serious doubts that this section affected the validity of contracts made in violation thereof:

> "Moreover, it is conceivable that the regulation of *'practices' by real estate brokers may be the subject of regulation without affecting the validity of contracts made by them*, and we are not here considering what may or may not be sufficient cause to revoke or suspend the broker's license." (Emphasis added.)

[5, 6] We are cognizant of the rule that the aid of our courts cannot be sought through judicial proceedings to establish rights arising from a contract which violates the public policy of this state. That such "rule is not generally applied to secure justice between parties who have made an illegal contract, but from regard for a higher interest—that of the public, whose welfare demands that certain transactions be discouraged." Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 632, 204 P.2d 37, 40. That statutes such as the one now before us were enacted "for the safety and protection of the public," Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 690, 166 P.2d 265, 266, against imposition or fraud through "practices" such as are denounced by subdivision (f), § 10176 of the Business and Professions Code, but in the case at bar there was no imposition, no fraud, and no "practices" within the contemplation of the section just cited. In determining whether a contract is invalid the courts should strive to deal with the transaction so as to give effect to the fundamental purpose of the legislature and to a wise public policy. And, in determining whether a real estate broker may be deprived of the value of his services, already admittedly earned, his contract will not be declared invalid upon the basis of anything not embraced within the terms of the applicable statute.

Both the trial court and respondent lean heavily upon the case of Dale v. Palmer, supra. It is noteworthy that on petition for hearing of that case before the supreme court, three justices voted for a hearing. And the facts involved in the cited case are easily distinguishable from those present in the instant case. The Dale v. Palmer case involved an executory problem in that it was an action for anticipatory breach and for unearned commissions. The action at hand involves an agreement that was executed. It is an action for commissions admittedly previously earned and paid over to respondent Stearns. In the Dale v. Palmer case the broker sold only one house for which he received his commission. In his action at law he sought commissions for the sales of six other houses which he had not sold. By comparison, appellant here sold 85 houses, without receiving payment of his commissions, and in his action at law confined his claim to compensation for services performed. Furthermore, Dale had a dispute regarding prices with Palmer, the seller, who thereafter discharged him due to Palmer's dissatisfaction with the manner in which he had handled the only house he sold. On the other hand, appellant in the case at bar performed fully in every detail to the complete satisfaction of respondent Stearns. Still another significant distinguishing factor is that there is no showing that Dale ever conferred any benefit whatsoever upon Palmer, while in the case of appellant Wilson, the trial court made a specific finding that respondent Stearns and his *alter ego*, defendant Alamo Development Company, received and retained the full benefit from the $671,000 of sales appellant made. Thus, the distinguishing features of the two cases are brought into sharp focus by the results realized from the totality of the facts. In other words, no unjust enrichment would result for Palmer since Dale's services were executory. In contradistinction, unjust enrichment results for respondent Stearns if appellant Wilson is barred from recovering commissions on executed sales.

Because of the manifold distinguishable facts in the Dale v. Palmer case and the one at bar, we are persuaded that the holding in the former case should be confined to the exact factual situation there present, and not militate against appellant's recovery herein.

[7] This court has, on previous occasions enunciated the doctrine that law and good morals should be one and inseparable. Based on this philosophy it must be assumed that statutes such as the one now engaging our attention are enacted, as heretofore stated, for the protection and safety of the public. They are not adopted for the benefit of a greedy and avaricious participant in a venture or enterprise who seeks to keep for himself the fruits of the enterprise to the exclusion of a real estate broker who has fully performed all of his obligations under the agreement, and is entitled to share therein. Where, as here, the alleged illegal transaction has been terminated, public policy is not served or public policy protected by denying one party to the contract relief against the other. Rather than permit the unjust enrichment of respondent George Stearns, we are disposed to apply the rule announced in the case of Norwood v. Judd, 93 Cal.App.2d 276, 288, 209 P.2d 24, 31, wherein, as stated by Mr. Presiding Justice Peters, speaking for the court, in a well reasoned and considered opinion, said: "The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy. But the courts should not be so enamored with the Latin phrase '*in pari delicto*' that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. *Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.*" (Em-

phasis added.) See also, Denning v. Taber, 70 Cal.App.2d 253, 160 P.2d 900 and Brooks v. Martin, 2 Wall. 70, 69 U.S. 70, 17 L.Ed. 732.

Viewed in the light of the facts present in the instant case, we find nothing in the other cases cited by respondent which does violence to the aforesaid views herein expressed.

[8] Respondents' contention that the court erred in denying their motion made at the commencement of the trial, to exclude all testimony regarding the contract in question, on the ground that the illegality thereof was apparent on its face, cannot be sustained. The contract, upon its face, did not disclose that appellant was engaged in the "practice" of "claiming, demanding, or receiving a fee, compensation or commission", in violation of subdivision (f), § 10176 of the Business and Professions Code. The complaint alleged that the contract was fully executed and that respondent George Stearns was unjustly enriched. The case of In re Lee's Estate, 200 Cal. 310, 253 P. 145, does not aid respondents. This case simply held that a collateral attack cannot be made upon a final judgment of divorce, that evidence introduced in such an attempt was inadmissible, and could not therefore, serve to support a finding in derogation of the previously entered final judgment. We find no analogy between the facts of the cited case and those presented by the pleadings herein.

Finally, respondents contend that the finding of *alter ego* was erroneous because unsupported by pleadings or proof. We find no merit in this contention.

In his first cause of action appellant pleaded that "at all times herein mentioned", respondent George Stearns was the owner of the real property involved in this action. Execution of the written agreement between appellant and respondent George Stearns was pleaded. On information and belief it was alleged that prior to June 1, 1947, respondent George Stearns transferred an interest in the written agreement to the other respondents who accepted the benefits thereof, adopted and ratified its provisions, retaining the profits thereof. It was also alleged that appellant sold the property in his capacity as agent for respondent George Stearns and for the other respondents, and judgment was prayed for against all respondents.

Respondents George Stearns and Etta Mae Stearns, his wife, filed a separate answer "for themselves alone", by which they denied that George Stearns was the owner of the property in question; denied generally and specifically that respondent George Stearns transferred an interest in the aforesaid agreement to the other respondents prior to June 1, 1947, or that appellant was acting as agent for George Stearns and the other respondents.

Respondent Alamo Development Company, Inc., filed a separate answer and for itself alone, denied all of the allegations of appellant's first cause of action.

That respondents were neither prejudiced, surprised or unprepared to meet the issue of *alter ego* is evidenced by respondents' answer whereby they carefully sought to sever Alamo corporation from respondent George Stearns individually. That respondents anticipated and were prepared to meet the issue of *alter ego* is further evidenced by the fact that at the outset of the trial when appellant's counsel sought to introduce testimony of the formation of the corporation and who were its incorporators and officers, counsel for respondents interposed an objection, saying in support thereof, "It seems to me it is obviously leading up to a alter ego showing which has not been pleaded, * * *".

[9, 10] Defects in a complaint may be cured by allegations of the answer. By their answers respondents denied ownership of the property; its transfer from Stearns to the corporation and the existence of an agency between them and appellant. And, even if the pleadings were to be considered deficient in this respect, it is clear that respondents have not been misled to their prejudice by any variance between pleadings and proof, Marr v. Postal Union Life Ins. Co., 40 Cal.App.2d 673, 680, 105 P.2d 649; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 523, 203 P.2d 522.

[11] We are now confronted with the question raised by respondents as to wheth-

er the evidence submitted on the issue of Alamo Development Co., Inc., being the *alter ego* of respondent George Stearns was sufficient to justify and sustain the finding that the corporation was "owned solely by defendant George Stearns", and "was the *alter ego* of said defendant George Stearns". Before the courts will disregard the corporate entity of a corporation and treat it as the *alter ego* of an individual, even though the latter may own all of the stock of the former, it must appear that there is such a unity of interest and ownership that the individuality of such corporation and the owner or owners of its stock has ceased; and it must further appear that the observance of the fiction of separate existence, would, under the circumstances, sanction a fraud or promote injustice. Bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence, Marr v. Postal Union Life Ins. Co., supra, 40 Cal.App.2d at page 681, 105 P.2d at page 654.

Bearing in mind these principles, we now proceed to an examination of the interlocking relationships between the corporation and respondent George Stearns whose status as individual entities is here questioned. All of the stock of Alamo Development Company, Inc., was issued in the name of respondent George Stearns, who testified at the taking of his deposition in November, 1951, that all the stock was in his name, "and it is still in my name". (At the trial Stearns testified that in 1950, which was subsequent to the transaction here involved, he "released the stock to respondent Franklin Hall".) In any event, by reason of the conflicting testimony given by the witness Stearns, the court was entitled to reject his testimony that he had a verbal understanding with respondent Hall, the construction supervisor, that one-half of the issued stock belonged to the latter.

It appears from the record that two permits to issue shares of stock had been issued by the Commissioner of Corporations, the first dated May 5, 1947, which authorized the Corporation to issue 90 shares to George Stearns and his wife, Etta Mae Stearns, and the other authorized the Corporation to issue 306 shares to George Stearns and Etta Mae Stearns, or to either or both of them for cash and 94 shares to George Stearns and Etta Mae Stearns, or to either or both of them, for the transfer of the real property here involved. But it appears from the testimony of Stearns above quoted that the stock was all issued to him alone and that this was a one-man corporation owned by Stearns alone.

Further evidence showing respondent George Stearns's relationship to the Alamo Development Co., Inc., is the following: Stearns was the President and Treasurer of the corporation and his wife was Vice-President and Secretary; at the time Stearns signed the agreement with appellant he was the owner of the property described in the agreement and later subdivided, and title to the land was in his name; that the property was thereafter transferred to the corporation; Stearns built a building on the tract, where he maintained an office and provided appellant and his staff with office space as the sales office; he saw Mr. Whitlock, appellant's sales manager and talked to him "every time he would come in"; Stearns and Mrs. Hall, his secretary, who may have been an assistant secretary, "something like that", were authorized to sign checks at the tract on behalf of the corporation; Mrs. Hall also took the sales forms up to the lender in Los Angeles and receipted for remittances to the corporation, although Stearns receipted for some of the moneys on behalf of the corporation. Stearns was at the tract office a part of the time but not at any stated times; on several occasions Stearns discussed appellant's commissions due under the agreement and nothing was ever said about the agreement having been broken or that plaintiff would have to get a new agreement from the corporation—Stearns merely postponed payment to a future date.

[12, 13] The foregoing recital of evidence convinces us that there were here present all the necessary elements to constitute an *alter ego* relationship between George Stearns and Alamo Development Co., the corporation, namely, (1) control of the corporation by Stearns; (2) that the corporation was but the mere conduit of the business of Stearns; (3) that recognition

of the separate existence of the corporation would sanction a fraud and permit oppression and injustice. The trial court was the judge of the value and effect of evidence challenging the verity of the testimony here narrated. The separate personality or capacity of a corporation being but a statutory privilege, it must not be utilized for fraudulent purposes, such as a cloak or disguise for the evasion of contracts or other obligations. The evidence herein strongly points to the conclusion that the corporation was distinctly a one-man corporation. Where it appears that a corporation is being used merely as an instrumentality through which an individual who is the owner of its capital stock transacts his business, and where an inequitable result would ensure, the two should be considered as one, Stillman Pond, Inc., v. Watson, 115 Cal.App.2d 440, 451, 252 P.2d 717; Asamen v. Thompson, 55 Cal.App.2d 661, 669, 131 P.2d 841; Grotheer v. Meyer Rosenberg, Inc., 11 Cal.App.2d 268, 271, 53 P.2d 996; Loughran v. Reynolds, 53 Cal.App.2d 250, 252, 127 P.2d 586. "It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice." Gordon v. Aztec Brewing Co., supra, 33 Cal.2d at page 523, 203 P.2d at page 527. The injustice here manifest is that to recognize respondent George Stearns and Alamo Development Co., Inc., as two separate and distinct entities would permit the former to avoid his liability on a contract through use of the corporate fiction for that purpose. This, neither law nor equity will sanction.

As to respondent Franklin Hall and Lois Hall, the court found that they "are not indebted to plaintiff; that plaintiff's dealings were entirely with defendants, George Stearns and Alamo Development Company, a corporation, said defendant's *alter ego;* that whatever arrangements defendant, Franklin Hall had with defendant, George Stearns, had nothing to do with plaintiff, such arrangement having been made between defendants, George Stearns and Franklin Hall to protect Franklin Hall from levy by creditors."

[14] This finding is supported by competent and substantial evidence, and as to such last mentioned respondents, the judgment in their favor should be affirmed.

For the foregoing reasons the judgment is affirmed as to defendants Franklin Hall and Lois Hall. As to the remaining defendants, the judgment is reversed and the cause remanded with directions to the court below to enter judgment in favor of plaintiff and against said last mentioned defendants.

DORAN and DRAPEAU, JJ., concur.

123 Cal.App.2d 626

RAYMOND
v.
FRESNO CITY UNIFIED SCHOOL DIST. et al.

Civ. 4651.

District Court of Appeal, Fourth District, California.

March 2, 1954.

Hearing Denied April 28, 1954.

Action by building contractor for declaratory relief alleging that he was entitled to award of building contract as lowest responsible bidder. The Superior Court, Fresno County, Arthur C. Shepard, J., entered judgment for defendants and building contractor appealed. The District Court of Appeal, Mussell, J., held that Board of Education was not required to make specific finding that building contractor was not lowest responsible bidder and that its award of the contract could not be attacked, where fraud was not alleged or proved.

Judgment affirmed.

1. Schools and School Districts 🔑80(2)

Under statute requiring school board to award construction contract to lowest responsible bidder, school board may reject lowest bidder's bid without rejecting all bids. Education Code, § 18051.

2. Schools and School Districts ⚷80(2)

Where Board of Education had awarded building contract to other than the lowest bidder, it was not necessary that Board of Education make specific finding that lowest bidder was not the lowest responsible bidder. Education Code, § 18051.

3. Schools and School Districts ⚷80(2)

In action by building contractor, who alleged that he was entitled to award of building contract as lowest responsible bidder, award of contract made by Board of Education could not be attacked by building contractor, where fraud was not alleged or proved.

4. Schools and School Districts ⚷80(2)

Where members of Board of Education, who were also members of building committee, were all present when it considered contractor's bid and voted unanimously to recommend rejection of such bid and awarded contract to lowest responsible bidder, and where minutes of Board showed that upon recommendation of building committee the Board had found that contractor was not a responsible bidder and awarded contract to lowest responsible bidder, Board acted as a Board in arriving at its conclusion.

◆

Louis J. Coelho, Fresno, for appellant.

Robert M. Wash, County Counsel of Fresno County, and John E. Loomis, Asst. County Counsel, Fresno, for respondents Fresno City Unified School Dist., Board of Education of Fresno City Unified School Dist., George W. Turner, James M. Malloch, Margaret R. Robinson, Arthur L. Selland, and Geraldine R. Wheeler.

Crossland & Crossland, Fresno, for respondent Clarence E. Ward.

MUSSELL, Justice.

Plaintiff, a general building contractor, alleges in this action for declaratory relief that he was the lowest responsible bidder for the construction of a school building in Fresno; that he was entitled to the award of the contract for such construction; that contrary to law, the defendant board of education neglected and refused to award the contract to him and awarded it to the next lowest bidder without rejecting all bids and advertising for new bids; that the defendant school district, board of education and members thereof were without jurisdiction to award the contract to the next lowest bidder; that as a result of the ultra vires act of the defendants, plaintiff was deprived of a reasonable profit in the sum of $9,670 and that the taxpayers were compelled to pay $1,800 more that plaintiff's bid for the construction of said building.

On May 31, 1951, all the bids submitted to the defendant board of education for the construction of said school building were opened. Pursuant to the advertisement calling for bids, the plaintiff had bid $96,700 and the defendant Ward had bid $98,500 for the contract. Plaintiff's bid was the lowest and Ward's the next lowest. All bids were submitted by the board of education to its building and grounds committee, consisting of all the members of the said board. Thereafter the board of education heard the findings of this committee and other evidence, found that plaintiff was not a responsible bidder within the meaning of the Education Code of the State of California, section 18051, and awarded the contract to the defendant Ward.

Several months prior to the award of the contract herein, plaintiff Raymond had constructed another school building for the defendant school district. This building was known as the Jane Addams school and there were many complaints made to the members of the board concerning plaintiff's failure to properly perform that contract. On August 3, 1950, the architects of this building wrote to the assistant superintendent of the district calling attention to plaintiff's failure to perform his contract with respect to broken tile, correcting work relating to kitchen equipment, painting, window screens and latches, and adjustments of door closers. In another letter to the board the architects called attention to many particulars in which plaintiff had failed and neglected to complete his contract.

Arthur Selland, one of the board members who inspected the building, testified as to items of poor workmanship; that doors were not fitted or hung properly; that the heating system was leaking; that "during the building of the school there seemed to be so much trouble, so many things that were constantly coming up to the board. We were asked to go out there and see about things. * * * We did go out there and nobody would be on the job. There would be no one working. They would be gone. The subcontractors were calling up and complaining about no cooperation with the contractor. They would have to make so many trips to finally complete the job and the paint job in the offices was very poor."

Ralph Allred, who was principal of the Jane Addams school, testified that he discussed the paint job with the board, the fact that the walls could not be washed; that the tile had not been fixed; that the concrete work contained debris in the surface, and also discussed other items mentioned in his written report.

The defendant board of education discussed the contents of the letters written to assistant superintendent Trombetta, the various reports concerning plaintiff's performance of the Jane Addams School contract and found that plaintiff was not a responsible bidder. There was no evidence offered or received of fraud or collusion and fraud was not alleged in the complaint.

The trial court found that the defendant board, after opening bids for the construction referred to in plaintiff's complaint, took evidence upon the question of whether or not the plaintiff was the lowest responsible bidder within the meaning of section 18051 of the Education Code. Said board found that plaintiff was not the lowest responsible bidder and that the defendant Clarence E. Ward was the lowest responsible bidder; that said findings of the board of education relating thereto were supported by amply sufficient and substantial evidence; that said action of the board was not an abuse of discretion and was taken without caprice or fraud. Judgment was entered that the contract involved was duly and regularly let in the manner provided by law; that plaintiff acquired no interest therein or thereto by reason of any of the proceedings had in relation thereto; that he acquired no right at any time to have said contract awarded to him and that he was not entitled to recover damages.

Plaintiff appeals from the judgment and first argues that school boards, as such, in the State of California have no authority to reject the lowest bidder's bid without rejecting all bids. This argument is without merit. Section 18051 of the Education Code provides as follows:

> "The governing board of any school district shall let any contracts involving an expenditure of more than five hundred dollars ($500) for work to be done or for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise."

This section requires a school board to award a construction contract such as is here involved to the lowest responsible bidder. In Cyr v. White, 83 Cal.App.2d 22, 28, 187 P.2d 834, 837, the court, in considering the meaning of the term "'lowest responsible bidder'" as used in city charters, said, quoting from West v. City of Oakland, 30 Cal.App. 556, 159 P. 202:

> "'* * * There are many occasions in the experiences of municipal government when the quality of the thing to be supplied in the course of the public service depends upon conditions which differentiate bidders, and require the exercise of a sound discretion on the part of city officials in determining whether the wares or device which each individual bidder offers in the form of his own exclusive design are such as will meet the particular requirements of the intended work. In order to cover such cases it is quite usual in the provisions of city charters to find such terms as "lowest and best bidder," or as "lowest responsible bidder," and the like;

> and these phrases have been given by the courts a particular meaning, in which it must be presumed they are used by the framers of city charters, in the absence of other limiting clauses. The term "lowest responsible bidder" has been held to mean the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work, and that where, by the use of these terms, the council has been invested with discretionary power as to which is the lowest responsible bidder, having regard to the quality and adaptability of the material or article to the particular requirements of its use, such discretion will not be interfered with by the courts, in the absence, of direct averments and proof of fraud. 2 Dillon on Municipal Corporations (5th Ed.) § 811, p. 1223, and cases cited. And even when in statutes and charters the term "lowest bidder" only is employed, the courts have held that, in determining whether a bid is the lowest among several others, there may be cases where the quality and ability of the thing offered—in other words, its adaptability to the purpose for which it is required—may be considered.'"

It was further held that "the rule in this state is that it is not necessary for a city council awarding a bid to other than the lowest bidder to make a specific finding or record to the effect that the lowest bidder was not the lowest responsible bidder, and that to attack the award, the attacker must allege and prove fraud."

[1–3] In the instant case the defendant board of education was not required to make a specific finding that plaintiff was not the lowest responsible bidder and its award of the contract cannot be here attacked since fraud was not alleged or proved. Even if we assume that it was necessary that the board make a finding that plaintiff was not the lowest responsible bidder, the evidence introduced was sufficient to support the finding made by the board and the trial court so found.

As was said in Wallace v. Board of Education, 63 Cal.App.2d 611, 617, 147 P.2d 8, 11:

> "When a board has authority to hear and determine a question its determinais, in effect, a judgment having all the incidents of a court of limited jurisdiction, and if there is no charge of fraud, breach of faith, or abuse of discretion, the finding of the board is final and conclusive. Mogan v. Board of Police Com'rs, 100 Cal.App. 270 (279 P. 1080); McColgan v. Board of Police Com'rs, 130 Cal.App. 66 (19 P.2d 815)."

[4] Appellant argues that defendants failed to prove that the board of education acted as a board in arriving at its conclusion that appellant was not a responsible bidder and failed to show that a quorum of the board considered the question. However, the evidence is that the members of the board of education, who were also members of the building and grounds committee, were all present when it considered appellant's bid and voted unanimously to recommend the rejection of appellant's bid and awarded the contract to Clarence Ward Construction Company, the lowest responsible bidder. Thereafter plaintiff was notified in writing by the assistant superintendent of schools that the bid was awarded to the Ward Construction Company. Moreover, the minutes of the board show that on motion of member Selland, seconded by member Turner, that upon recommendation of the building and grounds committee, the board of education found the Raymond Construction Company is not a responsible bidder and "hereby awards the contract for the construction of the Roosevelt shops to the Clarence Ward Company, the lowest responsible bidder".

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

In re BUCHMAN'S ESTATE.

MORSE v. BUCHMAN.

Civ. 19775.

District Court of Appeal, Second District,
Division 3, California.

Feb. 26, 1954.

Rehearing Denied March 15, 1954.

Hearing Denied April 21, 1954.

Proceeding by legatee to obtain revocation of letters testamentary and removal of executor. The Superior Court of Los Angeles County, Newcomb Condee, J., removed executor, and executor appealed. The District Court of Appeal, Vallée, J., held that, where executor was not given notice that he was to be removed on ground that he was allegedly so mentally deranged as to be incompetent to act as executor, was not accorded just, fair, and impartial hearing either upon charge that inventory had not been filed in time or upon ground of alleged incompetency, and was denied opportunity of presenting any evidence, executor was denied due process of law.

Reversed.

1. Executors and Administrators 🔑14

A testator may name the person who shall be executor of his will, and such person has right to act in absence of specific statutory disqualification.

2. Executors and Administrators 🔑14

Testator's selection of an executor should not be annulled except upon clear showing that best interests of estate require it.

3. Executors and Administrators 🔑35(1)

Generally, an executor or administrator will not be removed for mere delay or failure to file an inventory within time prescribed by statute unless delay or failure has caused loss to estate.

4. Executors and Administrators 🔑35(15)

In proceeding to obtain revocation of letters testamentary and removal of an executor, burden of proving that executor's delay in filing inventory was willful or negligent was upon petitioner, and executor had right to rely upon presumption of fair conduct and faithful performance of official duty until something was offered to overcome such presumption.

5. Executors and Administrators 🔑35(15)

To refuse to permit an executor to introduce, on his own behalf evidence which tends to show reason for delay in filing inventory constitutes a denial to him of an opportunity to be heard.

6. Wills 🔑439

It is policy of law to give effect, as far as it can be legally done, to expressed will of deceased.

7. Executors and Administrators 🔑14

Nomination of executor is evidence of confidence reposed in him by testator, and such deliberate purpose and desire thus solemnly expressed as to administration should not be thwarted unless plain provisions of law or interests of justice demand it.

8. Executors and Administrators 🔑35(8)

The law does not hold an executor responsible for consequences of his mistakes which are result of imperfection of human judgment and do not proceed from fraud, gross carelessness, or indifference to duty.

9. Executors and Administrators 🔑35(16)

Whenever judge has reason to believe from his own knowledge or from credible information that an executor is incompetent to act he may, but is not required to, suspend his powers before citing him to appear and show cause why his letters should not be revoked. Probate Code, §§ 521–523, 1230.

10. Executors and Administrators 🔑35(13, 16)

Suspension of executor may take place without citation, notice, or hearing, but removal cannot, and suspension is not a necessary step looking to a removal. Probate Code, §§ 521–523, 1230.

11. Executors and Administrators 🔑35(13, 16)

Upon obtaining information that executor is incompetent to act, judge has duty to cite executor to appear and show cause why his letters should not be revoked, but judge may not remove an executor on any of the grounds specified in statute pertaining to suspension and removal of executors without citing executor to appear and giving him a fair hearing and an order predicated upon evidence. Probate Code, § 521.

12. Executors and Administrators 🔑35(10)

Where statute prescribes steps necessary to be taken in removal of an executor, such statutory requirements must be complied with, and an order of removal not predicated upon such compliance is unauthorized and ineffectual. Probate Code, §§ 521–523, 1230.

13. Executors and Administrators 🔑35(16)

Before an executor is removed, he must be accorded a hearing, and the court must have some fact legally before it in order to justify removal. Probate Code, §§ 521–523, 1230.

14. Executors and Administrators 🔑35(15)

Facts relied upon for removal of executor must be established by evidence, and any proper evidence which tends to establish or refute charges relied upon is admissible. Probate Code, §§ 521–523, 1230.

15. Constitutional Law 🔑309(1)

Fundamental conception of court of justice is condemnation only after notice and hearing.

16. Constitutional Law 🔑251

Under constitutional guaranties, no right of an individual, valuable to him pecuniarily or otherwise, can be justly taken away without its being done conformably to principles of justice which afford due process of law unless the law constitutionally otherwise provides, and due process of law does not mean according to the whim, caprice, or will of the judge but according to law.

17. Constitutional Law 🔑305

Due process of law excludes all arbitrary dealings with persons or property and shuts out all interference not according to established principles of justice, one of which being the right and opportunity for a hearing in which to cross-examine, to meet opposing evidence, and to oppose with evidence.

18. Constitutional Law 🔑251

Judicial absolutism is not a part of the American way of life, and the odious doctrine that the end justified the means does not prevail in our system for the administration of justice.

19. Constitutional Law 🔑305

When the constitution requires a hearing, it requires a fair one before a tribunal which meets established standards of procedure, which is the fair, orderly, and deliberate method by which matters are litigated.

20. Constitutional Law 🔑305

To judge in a contested proceeding implies hearing of evidence from both sides in open court, comparison of merits of evidence on each side, conclusion from evidence of where truth lies, application of appropriate laws to facts found, and rendition of a judgment accordingly.

21. Executors and Administrators 🔑35(13)

Plainest principles of justice required that executor be given notice of specific charges made against him in proceeding to obtain his removal. Probate Code, §§ 521–523, 1230.

22. Constitutional Law 🔑306

Where, in proceeding to obtain his removal, executor was not given notice that he was to be removed on ground that he was allegedly so mentally deranged as to be incompetent to act as executor, nor was he accorded a just, fair, and impartial hearing either upon charge that inventory had not been filed in time or upon ground of alleged incompetency, and he was denied opportunity of presenting any evidence, executor was denied due process of law. Probate Code, §§ 521–523, 1230.

* * *

Morris Lavine, Los Angeles, for appellant.

Jerry Giesler, Beverly Hills, and George I. Devor, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from an order of the probate court revoking letters testamentary and removing an executor.

Harry G. Buchman died testate on September 4, 1951. He named appellant Hamlin K. Buchman, his brother, executor of his will. The will left three-fourths of the estate to appellant, and one-fourth to Claire Buchman, his wife, from whom he was separated. The will was admitted to probate and an order made that letters testamentary issue to appellant on his giving a surety bond of $75,000 or a personal bond of $150,000. Letters testamentary issued to appellant on October 18, 1951. The inventory was filed May 12, 1952.

On January 26, 1953, Claire Morse, formerly Claire Buchman, filed a petition praying that a citation issue commanding appellant to show cause why, among other things, the letters testamentary issued to him should not be revoked and he should not be removed as executor. The petition averred, as one ground for appellant's removal, that he had not returned an inventory within three months after the date of his appointment. It did not allege that appellant was so mentally deranged as to be incompetent to act as executor.

On January 26, 1953, a citation issued commanding appellant to appear on February 13, 1953, and show cause why the letters testamentary should not be revoked and he should not be removed as executor. The citation was served on appellant's attorneys, but not on him personally as required by section 1207 of the Probate Code. However, he filed an answer to the petition and citation in which he averred that Claire Morse is not a person interested in the estate because of a property settlement agreement she had entered into with decedent and facts showing reasonable cause why the inventory had not been filed within three months after his appointment, one fact being that the appraisal was not completed by the appraiser until May 12, 1952, on which date it was filed.

The matter came on for hearing on March 11, 1953. Appellant was present, represented by counsel. A conference was immediately had in the judge's chambers between the judge and counsel for the petitioner and for appellant. The conference was not reported. As will appear hereafter, the attorney for appellant evidently told the judge that appellant had been having some treatments for a nervous disorder. When the judge returned to the bench, considerable discussion took place between the court and counsel with respect to other matters in the estate that were on the calendar that day. As the noon recess was about to be taken, the judge stated he had received some information under section 521 of the Probate Code which he could not ignore; that he felt it was his duty to investigate; and that on resuming the hearing in the afternoon, he would "go into some of these matters concerning the present status of the executor and any treatment that he is undergoing and so on."

On resumption of the hearing in the afternoon, appellant addressed the court stating he was not represented by counsel. Counsel for the petitioner stated the record showed that a firm of attorneys represented appellant. Appellant declared that in view of what had transpired that morning, he had asked his attorney, who attended the conference in the judge's chambers, how the court had found out that he (appellant) had been to a physician; and the attorney had said he had given that information to the judge. He stated that during the noon recess he had attempted to contact other attorneys, among them, Mr. Dee Holder. The judge interrupted, and said: "[D]o you think perhaps because of—in order to expedite the matter, would you like to resign and then your rights could be completely protected and we could go about it in that way? We could consider your suggestions as to a suitable corporate in any matter of this kind and anything of this kind could be avoided without any suggestion one way or the other, except that you feel a little nervous now." The following then occurred:

> "Mr. Buchman [appellant, the executor]: Your Honor, I feel a little bit nervous because I am taken by surprise. I feel a little bit nervous too because I appear in court not feeling that I am represented by counsel, which is the constitutional right of every citizen.
>
> "The Court: You don't feel that you want to resign at this time?
>
> "Mr. Buchman: No, your Honor. My brother, Harry G. Buchman, a man that I financed many years ago, had every confidence that I was capable of

acting as executor and he so appointed me, not only in one will but in three or four wills. * * *

"The Court: I would suggest that the simplest way would be for you as executor to resign. Certainly you would be heard and I think you perhaps could be more effective in that position.

"Mr. Buchman: No, your Honor, I will not resign. I will not resign. I won't resign in the face of that accusation, which I think he has taken advantage of, any more than I would—

"The Court: What accusation?

"Mr. Buchman: Any more than—

"The Court: Just a moment. Which accusation is that you are talking about?

"Mr. Buchman: What about the information related to the court without my knowledge?

"The Court: There is no information related to the court except what is in the pleadings here. * * *

"Mr. Buchman: * * * Now, I won't resign on any facts of this nature at this time any more than I would resign on any embarrassment on the facts in 1941.

"The Court: Of course, I am suggesting that if you did want to resign, and there might be many reasons why you would want to resign, it would be without any implication whatsoever.

"Mr. Buchman: No, your Honor, I feel I should have a chance to have counsel represent me. * * *

"The Court: Well, I tell you there is a way out. You have an Achilles heel in that you didn't file an inventory within 90 days. That is within the discretion of the court to consider that the failure of this obligation or duty would be a cause for removing you. I have had a chance to observe you here. I have had a chance to observe you here this morning in the corner. Oh, you may have a reason for it—

"Mr. Buchman: Well, I don't want my photograph taken, your Honor. I don't want my photograph taken. But I will submit to any test, your Honor, that is requested in a matter of this kind, skillful and competent examination, and I will submit myself to examination before distinguished people, distinguished physicians, your Honor."

Appellant then addressed the court at great length, following which the judge asked him whether he had consulted a neurologist recently, to which he replied that he would have no hesitancy about going into the judge's chambers. The judge then asked him if he would answer questions on the record if he went into chambers, to which he replied that he would. The judge and appellant then retired to the judge's chambers without the presence of counsel. A reporter was present. Appellant was not sworn. The judge asked him whether he had had a recent consultation with a neurologist. He said he had. The judge asked him who was his neurologist. Without answering the question, appellant made a long statement to the judge, some of it relating to the estate, most of it not. The judge again asked him if he did not want to resign. He said "No," that in the first place he wanted to be represented by counsel and he would be examined by any physician appointed by the court. The judge then said: "Of course, it is not entirely a matter of medical testimony. I have the responsibility, if I think a person is emotionally incompetent to handle the matter I really have to get an executive that can." Appellant replied: "Emotionally —I am not emotional in the operation of my property."

The judge resumed the bench and Mr. Holder appeared. The judge told Mr. Holder, among other things, that the attorney for appellant had told him in chambers that morning that appellant "had been having some treatments for a nervous disorder"; that in open court he had asked appellant about "the neurological treatment," and he had said he preferred to talk in chambers; that in chambers appellant had "conceded" there had been treatments; that he suggested other reasons for it, did not care to give the name of the doctor, but would submit to any doctor the court might appoint; and

"There is another technical cause set forth in the petition for removal with which you are acquainted, that is the failure to file inventory within 90 days, which has been a means by which the court if it wants to, can have a technical reason for removal, *that is rather difficult and almost impossible to meet.* [Italics added.] * * * I have contacted Dr. Edwin E. McNeil, M.D., who is a neurologist and a psychiatrist, and I have arranged an appointment at two o'clock tomorrow for Mr. Buchman to go there and consult with the doctor, and the doctor will render his written report to me." Appellant stated he would prefer not to have it in the hands of just one person. The judge asked Mr. Holder to advise appellant to wait until Dr. McNeil's report was in. Mr. Holder stated that appellant could have examinations by other doctors which the judge would be willing to consider. The judge, in part, replied: "Oh, yes, if I am willing to prolong the hearing. I don't know. I [sic] would be within the court's control, but I certainly want to be fair." Mr. Holder then said he wanted to get his status clear; he understood appellant was then represented by counsel. The judge replied: "As executor or administrator. I think this goes to personal privilege. I think when you are being removed for causes * * * that it would be perfectly permissible for him to have special counsel on that matter alone." The judge gave appellant Dr. McNeil's address and telephone number, and told him he was to be there the next day, Thursday, March 12, at 2 p. m. Mr. Holder stated: "I understand the only matter your Honor will be considering is the mental responsibility of Mr. Buchman to continue to act as executor under the will; is that correct?" To which the judge replied, "Yes."

The hearing was resumed on March 13, 1953, at which time Mr. Morris Lavine appeared and stated that appellant had retained him the day before and that he had presented a substitution of attorneys to the attorney of record for appellant who was present. The judge stated he could not consent to a substitution "when a conflicting estate matter, another matter is on trial"; that there had to be a motion, and that Mr. Lavine might "appear for him specially on this matter of personal privilege."

The judge then ascertained from the clerk that Dr. McNeil had not made an examination, and the following took place:

> "The Court: Well, I was well satisfied that he was incompetent here. I have a record here, his rambling statements, his staring eyes, the emotional approach, and I was sorry, but in the performance of my duty I have to be sure that there are no executors or administrators who are not competent to carry out the office, but he asked to have an examination and I suggested that he have one.
>
> "Mr. Lavine: He has had one.
>
> "The Court: But if he is not capable of permitting the examination or cooperating in one it verifies my opinion that I had already formed. There was also a technical reason why I have a right to remove him, and I am now removing him as executor on those grounds: First, that he is incompetent; and, second, that he did not file his inventory within 90 days. The order is now made.
>
> "Mr. Holder: Now, if your Honor please, may I make the observation first—
>
> "The Court: But he is removed. Now, you can go on from there. I expect there will be an appeal.
>
> "Mr. Lavine: Yes, your Honor, there will be an appeal.
>
> "The Court: Well, I will appoint a special administrator to proceed, but it is my duty, I cannot do anything else, and that is why I am acting as I am. I do not have to go any further than that.
>
> "Mr. Lavine: Well, your Honor, we have a doctor here this morning. He saw him yesterday. And we are also ready to make an offer of proof.
>
> "The Court: You can make your offer of proof if you want. I was ready to make my decision and it was

because of consideration for him that I let him go to that doctor. He did not cooperate with that doctor.

"Mr. Lavine: That is not true.

"The Court: It verified my opinion that he is probably not emotionally stable enough to handle it as executor.

"Mr. Lavine: How does it show, your Honor, he did not cooperate with that doctor? May I ask that question?

"The Court: You heard the oral report.

"Mr. Lavine: No, there has been no report. The doctor is not present and the facts of the matter are, your Honor, we are prepared to show that Mr. Buchman went to the office of Dr. McNeil and said, 'I will be glad to coöperate with you for an examination. I want a witness present I want a stenographer present.'

"The Court: You know very well that a psychiatric examination canno be made with a third party present.

"Mr. Lavine: Another doctor made it and he is present.

"The Court: I know, you can get dozens of doctors, you can get testimony on either side. It is not disrespect to the doctors, but it is not the examination and the ultimate decision has to be made by the court. But I must confess I was all ready [to] decide the matter the other day, but I extended to him the courtesy of allowing him an interview with a doctor who has no interest in any way and who knows none of the parties and in whom the court has confidence, particularly because of two or three other matters he testified in. But I am not going to continue this. There is no necessity to continue it. The record is made and I will stand or fall by it, but I will not proceed without—

"Mr. Lavine: May I address the court and make my offer of proof? I still think that I have the right to make the offer of proof and make my record.

"The Court: Yes, you may make your offer."

Mr. Lavine made the offer of proof set forth in the margin.[1] The judge agreed that the offer of proof be deemed to have been made before the ruling; he rejected the offer to proof and rejected an

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[1] "Mr. Lavine: At this time the petitioner offers to prove that he kept the appointment at two o'clock with Dr. McNeil; that he went to the office of Dr. McNeil; that he stated to Dr. McNeil that he would be glad to have an examination, that he would be glad to cooperate with the doctor, answering any questions and have any examination made if he had a stenographer with him, so that his attorney might know what questions were asked and what foundation the doctor might have for any opinion that he might give; and that he felt that he should have the witness, that the judge himself had had a stenographer present when he had questioned the defendant—questioned Mr. Buchman; and that at other times when the judge had gone to visit other incompetent persons, or persons who were thought to be incompetent, where there had been questions, that the judge had always taken a stenographer.

"The Court: Well, you know, Mr. Lavine, I am a judge and not—

"Mr. Lavine: That's right.

"The Court: And I do not see why you are bringing that up because I never do anything off the record, but a psychiatrist can be cross-examined on his opinion, but to form his opinion I think any of the doctors will testify—I have heard many of them testify they have to make an examination in the usual way, and that is without the presence of a stenographer or any other witness, but that has nothing to do with me.

"Mr. Lavine: May I continue my offer of proof, if your Honor will permit me to make this offer of proof, and I would like to make it as a matter of law.

"The Court: All right, Mr. Lavine.

"Mr. Lavine: That the doctor then left Mr. Buchman's presence and went to the telephone and excluding Mr. Buchman he had the conversation and later came back and said that he had talked with the trial judge in the matter, Judge Condee, and had a conversation, and he was engaged in this conversation for ten to fifteen minutes; that afterwards the doctor said he wouldn't have the examination taken in the presence of a stenographer; that thereafter, Mr. Buchman returned, and called his attorney, Morris offer by Mr. Lavine to have appellant go to an independent psychiatrist providing the psychiatrist did not talk with either side and was willing to have a reporter present and the hearing taken down or have a recording device present to record the ex-

Lavine, and I advised him to see some other psychiatrist immediately, and he went to see Dr. Victor Parkin and was examined by Dr. Victor Parkin for a matter in excess of two hours; that Dr. Victor Parkin is a psychiatrist of many years standing in this County; that he is on the Judges' list of this County as a qualified psychiatrist to be called by the various judges; that for at least 20 years last past he has been a psychiatrist called by the District Attorney's office of Los Angeles, and that he has been called in by the District Attorney's office in many other counties in this State; that he has been a Government witness on behalf of the United States Government in psychiatric cases; he is a member of the County Medical Board and a member of the Lunacy Commission; that he has examined thousands of cases of mental—involving mental questions and he has given his opinion to various courts during at least 25 years to my knowledge, and probably longer; that Dr. Victor Parkin is present in this courtroom to give the court the benefit of his opinion; that it is the opinion of Dr. Victor Parkin, if he is allowed to testify, that Hamlin Buchman is qualified and business-wise, that he is mentally qualified; that he is not in anywise incompetent; that he fits all of the requirements of the statute in regard to the competency of an executor; that he is able to manage his business affairs; that he is able to manage the affairs of business of others; that he has understanding; that he is a very acute business man; that he has capacity and understanding in handling his business affairs and that he is presently, in the opinion of the doctor, well qualified to continue and mentally fit and competent to continue in this position; that all of the matters which a psychiatrist generally asks were taken down by a stenographer in the presence of Mr. Buchman and in the presence of Dr. Parkin; that Dr. Parkin has conducted numerous psychiatric examinations in the presence of stenographers, and that it has been the custom of those examined in matters involving at least criminal cases for a long time that psychiatrists do take the questions and answers down; that these questions and answers are sometimes taken down by a recording device today, or at least in one instance to my knowledge in a case in this court a psychiatrist took a complete set of questions and answers by such a recording device during the course of the interview, and that it is presently practiced by a number of psychiatrists today; and that this petitioner had a right to do so and had a right to have his counsel understand those matters.

"I offer further to prove by Dr. Parkin that the presence of a third party during the interview is not inimicable to or contrary to the best interests of the psychiatric examination, nor to form and prepare an intelligent opinion of the person's understanding, qualifications, capability, honesty, and integrity.

"I offer to prove also that in so far as one of the grounds on which your Honor has removed the executor, the fact that he filed an inventory late, and that that was no fault of his, but the fault of the appraiser, and that the matter was in the appraiser's hands, and that the appraiser was appointed by this court, and that is the only thing that has been pointed out in this proceeding that would in anywise raise any technical ground.

"That your Honor in relying on the technical ground has overlooked the fact that this is a testamentary appointment; that the appointment was made in this case by the deceased in his will, and that in making that testamentary appointment he left three-quarters of the estate, and perhaps the entire estate, to this executor, and that there is a serious question as to whether the objectors have any interest whatsoever in the estate. It involves a question of law which has not been finally resolved by this court or any other court, and that to remove him would be an abuse of discretion in piling a large amount of costs upon this executor that should not be piled upon him, because he is qualified financially, he has handled business matters for a number of years and he had entered into contracts as recently as this last month, all of which have shown an understanding in financial matters and business matters in this respect.

"That is my offer of proof, your Honor.

"I am also informed that the citation in this matter was not served upon the executor himself; that there was no personal service upon Mr. Buchman at any time of the citation in this matter. I note the citation was signed by George I. Devor. I do not believe that it was ever served upon Mr. Buchman, personally.

"The Court: Well, I do not want to

amination. The judge again stated that the executor was removed. Findings of fact and conclusions of law were thereafter made. The findings were in part predicated on the unreported conference between the judge and counsel in chambers. The conclusions of law were that the executor was so mentally deranged as to be incompetent to act as executor and (written in longhand by the judge) "That said Buchman did not file his inventory in the time prescribed by law." An order was thereupon entered removing appellant as executor and revoking the letters testamentary issued to him.

Appellant contends: he was denied due process of law; the trial judge prejudged his mental competence; he was removed without any evidence; the order of removal was arbitrary and capricious; the court erred in rejecting the offer of proof.

[1] It is the universal rule that a testator may name the person who shall be the executor of his will, and such person has a right to act in the absence of a specific statutory disqualification. In re Estate of Wellings, 192 Cal. 506, 510, 221 P. 628; Annotations, 95 A.L.R. 828; 54 Am.Dec. 518. It has been held that, in the absence of some statute, the power to name an executor to administer an estate is coextensive with the power to bequeath or devise the estate itself. In re Guye's Estate, 54 Wash. 264, 103 P. 25, 26, 132 Am.St.Rep. 1111.

[2] The same considerations apply to the removal of an executor. A testator's selection of an executor should not be annulled except on a clear showing that the best interests of the estate require it. In re Estate of Sherman, 5 Cal.2d 730, 744, 56 P.2d 230.

[3–5] Appellant did not have an "Achilles' heel" because of the delay in filing the inventory until it was established that the delay was willful or that he was negligent and the delay had caused detriment to the estate. The general rule is that an execu-

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be unfair to Mr. Buchman, but when the matter of his incompetency is called to the court's attention the court must act in the matter.

"We have the record of the other afternoon, we have the record of the examination in chambers, and I was actually ready to act at that time. I had no intention of making this a panel of psychiatrists. I have had Dr. Parkin, he is well known to me. He is one side and some other is on the other side. As I say, I don't want to infer any disrespect to the psychiatrists, because they always take sides, and that is why I am anxious to always get one who takes it for no other reason than to get the facts that he believes true.

"Now, if an independent psychiatrist had made a full and favorable report as to Mr. Buchman recently, which I can't believe any one could if he had heard the hearing the other afternoon, and that record stands. And then his evasiveness of the treatment on consultation and so forth, and the record is here. That may be a matter that you can take advantage of, Mr. Lavine, on appeal. But I have made the order and I am going to stand upon the record. * * *

"Mr. Lavine: Your Honor said something about an independent psychiatrist.

"The Court: Yes.

"Mr. Lavine: We still offer to have Mr. Buchman go to an independent psychiatrist, providing that psychiatrist doesn't talk with either side or any one and is willing to have a reporter and the hearing taken down.

"The Court: Well, since it has been suggested that the court talked to Dr. McNeil, the court only knows him in connection with two cases here in which he seemed to be very competent, and the clerk put him on yesterday afternoon and he said that Mr. Buchman was there but he would not proceed with the examination without a reporter, and I asked him, 'Do you want to make an examination that way?' and he said, 'No, that is not the usual way to make an examination,' and I said, 'That is entirely up to you.' And that is the extent of the conversation. And until I got the report this morning I did not know the report had not been made.

"Mr. Lavine: Well, we are still willing to have a doctor who has a recording device and nobody else present. Some of these doctors have and they take down a complete report, they have a recording device.

"The Court: Well, the matter is closed and you have your record and you are lucky you haven't got more of a record, you have more of a fighting chance to get it reversed."

tor or administrator will not be removed for the mere delay or failure to file an inventory within the time prescribed by the statute, unless the delay or failure has caused a loss to the estate. In re Chadbourne's Estate, 15 Cal.App. 363, 114 P. 1012; Willoughby v. Willoughby, 203 Ala. 138, 82 So. 168, 169; In re Fehlmann's Estate, 134 Or. 33, 292 P. 1029, 1033, 72 A.L.R. 949; 33 C.J.S., Executors and Administrators, § 90c, page 1035; 21 Am.Jur. 459, § 153. The burden of proving that the delay in filing the inventory was willful or negligent was on the petitioner, and appellant had the right to rely on the presumption of fair conduct and faithful performance of official duty until something was offered to overcome it. Anyone with any knowledge of the probate of estates knows that in many cases the filing of the inventory is unavoidably delayed without the fault of the representative. To refuse to permit an executor to introduce evidence in his own behalf which tends to show reason for the delay, as was done in the present case, is to deny him the opportunity to be heard. 11a Cal.Jur. 423, § 303.

In re Graber, 111 Cal. 432, 44 P. 165, was an appeal from an order denying a petition to revoke letters testamentary for failure to file an inventory within the time prescribed by the statute. It was contended the statute was mandatory. The court held it was directory, saying, 111 Cal. at page 435, 44 P. at page 165: "The statute says the court may, *upon notice,* revoke the letters testamentary or of administration. The fact that such revocation can only take place after notice is a clear indication that the executor or administrator is to be given an opportunity to come before the court and show cause why his letters should not be revoked."

[6, 7] In re Chadbourne's Estate, 15 Cal.App. 363, 114 P. 1012, was an appeal from an order removing an executor for failure to publish notice to creditors within the statutory period. Reversing the order, the court made these pertinent observations, 15 Cal.App. at pages 367, 371–373, 114 P. at page 1013: "[I]t should be and is the policy of the law to give effect, as far as it can be legally done, to the expressed will of the deceased. The nomination of the executor is evidence of the confidence reposed in him by the testator, and the deliberate purpose and desire thus solemnly expressed as to the administration should not be thwarted, unless the plain provisions of the law or the interests of justice demand it. * * * It has been declared that 'the principle governing the disposition of applications such as this is expressed in the phrase "whom the testator will trust so will the law." * * * The reason for taking away the authority of a person so chosen should be well grounded upon undoubted proof of his utter improvidence and unfitness for the duties of his trust.' * * * In Haines v. Carpenter, 1 Woods, 262, Fed.Cas.No.5,905, it is said: 'A strong case must be made out to induce the court to take possession of the property from an executor who has qualified and given bond for the faithful discharge of his trust and has taken possession under the will.' * * * It may be said also that he is commanded to file his inventory within a certain time. * * * Yet if he fails to do so, and has a sufficient excuse, the court will overlook his default. In re Graber [111 Cal. 434, (44 P. 165).] * * So in Hubbard v. Smith, 45 Ala. 516, where the administrator had failed to return an inventory in the time required by law, the court said: 'He ought to have filed an inventory, as any other administrator is required to do, and to have made annual settlements, but the mere omission to do so when he was not negligent and there has been no detriment to the estate is not ground for reversal.' Indeed, the cases are numerous where there has been a technical violation of the law, and yet where the delinquent has been relieved of the penalty on account of inadvertence, surprise, or excusable neglect. * * * There is also the other consideration of some moment that the forfeiture of an office is involved, and the rule is that such provisions must be strictly construed, and forfeiture is not favored."

[8] No man is infallible; the wisest makes mistakes; but the law holds no executor responsible for the consequences of his mistakes which are the result of the

imperfection of human judgment and do not proceed from fraud, gross carelessness, or indifference to duty. There was no showing that appellant did not act in the utmost good faith and with a sincere purpose to discharge as promptly as possible his legal duty; nor was it made to appear that by reason of delay in the filing of the inventory any detriment was caused to the estate.

In re Estate of Richardson, 74 Cal.App. 2d 350, 168 P.2d 774, relied on by respondent, is not in point. In that case the executor did not file the inventory until twenty months after his appointment. It appears from the record that a citation was issued; a hearing was had; witnesses were sworn, examined, and cross-examined. The executor was given an opportunity to explain the delay and to show reasonable cause for not filing the inventory within the statutory time. The trial court concluded that the executor had not satisfactorily explained or shown reasonable cause for the delay. The effect of the holding on appeal was merely that the trial court's finding that the executor had neglected the estate was supported by the evidence. The Richardson case has no application to the facts in the present case.

Section 521 of the Probate Code provides: "Whenever a judge of the court has reason to believe from his own knowledge, or from credible information, that any executor * * * is incompetent to act, * * * he must cite such executor or administrator to appear and show cause why his letters should not be revoked, and may suspend his powers until the matter is investigated." Section 522 reads: "Any person interested in the estate may appear at the hearing and file allegations in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, and the issues shall be heard and determined by the court." Section 523 provides that if the executor appears "and the court is satisfied *from the evidence* that there exists cause for his removal, his letters must be revoked." (Italics added.) Section 1230 provides that "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. * * *"

[9-11] Whenever a judge has reason to believe from his own knowledge or from credible information that an executor is incompetent to act he may, but is not required to, suspend his powers before citing him to appear and show cause why his letters should not be revoked. In re Estate of Healy, 137 Cal. 474, 475-476, 70 P. 455. Suspension is not a necessary step looking to a removal of an executor. Suspension may take place without a citation, notice, or hearing; while removal cannot. In re Estate of Kelley, 122 Cal. 379, 382, 55 P. 136. Upon obtaining the information specified in section 521, it is the duty of the judge to cite the executor to appear and show cause why his letters should not be revoked. He may not remove an executor on any of the grounds specified in section 521 without citing him to appear and giving him a fair hearing and an order predicated on evidence. See Schroeder v. Superior Court, 70 Cal. 343, 11 P. 651.

In re Moore, 83 Cal. 583, 23 P. 794, was an appeal from an order removing an administrator. Prior to the proceeding in which the order was made, a petition for the removal was heard and denied. The widow petitioned to be appointed administratrix on the ground that two years previously the administrator had been committed to an insane asylum. Her petition was denied and she appealed. On appeal it was held that the fact the administrator had been sent to an insane asylum did not create an absolute vacancy in the administratorship of the estate; the application having been made after his incapacity had been removed and he had again entered upon the discharge of his duties as administrator, the court properly refused to appoint another in his place. In re Estate of Moore, 68 Cal. 281, 9 P. 164. After that decision on appeal, the widow again petitioned for the removal of the administrator on the ground, among others, that he was incompetent to act. The trial court ordered that he be removed. The administrator appealed from that order. The expression of the court in reversing the order is particularly apposite in the case at bar. It said, 83 Cal. 586, 23 P. 794:

"The judgment is clearly erroneous. If it be conceded that there is an allegation in the petition upon which the finding of the court could be based, there is not a word of evidence in the record to support the finding. The only evidence offered by either party on the question of delay in the settlement of the estate was offered by appellant, and tended to show that the administration of the estate had been prolonged by reason of litigation, for which the administrator was not responsible; but the court, on the objection of respondent, excluded it. If it be assumed that the fact that the administration of the estate was continued for 16 years without a final account, is sufficient, *prima facie,* to justify the finding, it was clearly error to reject evidence offered by appellant tending to excuse the delay in closing the estate. To show unavoidable delay and good faith, the appellant was entitled to introduce in evidence, if he desired to do so, every paper in the case which tended to show the history of the various proceedings had therein, from their commencement to the time of trial. But, as a matter of fact, it is apparent that the issue referred to was abandoned by the petitioner at the trial. He made no attempt to prove his allegation. The burden of proof rested on him, and not upon the administrator; but he offered no evidence of negligence, or of injury by reason of delay. Appellant had the right to rely upon the presumption of fair conduct and faithful performance of official duty until something was offered by the petitioner tending to overcome it, and the mere fact that the proceeding had been pending for 16 years did not throw upon him the duty of disproving the charge of negligence.

"The court could not, of its own motion, remove the administrator without giving him an opportunity to be heard. Sections 1436–1440, Code Civil Proc. [Now Prob. Code, §§ 521–523]. Nevertheless, this is practically what was done in this case; for not only was there no evidence offered by the petitioner to show unnecessary delay in the settlement of the estate, but, as stated before, the administrator was not allowed to introduce evidence in his own behalf which, if admitted, would have tended to show that for about 10 years the widow had been prosecuting a claim for certain sums of money alleged to be due her as family allowance, and that the litigation had terminated, only a few days before the trial of this action, in a judgment denying her petition. * * * In Deck's Estate v. Gherke, 6 Cal. [666] 667, it is stated, in the statement of facts, that the order removing the appellant from the administration was made on an order to show cause. That case is authority only for the proposition that the appellate court will interfere with the exercise of the power conferred upon the probate judge in such matters only where there has been gross abuse of discretion. All the cases agree upon that matter. Here, there was no evidence at all introduced in support of the charge of wrongfully prolonging the administration."

In Re Estate of Wacholder, 76 Cal.App. 2d 452, at page 464, 173 P.2d 359, at page 366, this court, reversing an order removing an executor, said: "While it is the clear duty of the court to remove an executor or administrator when his unfitness has been proved, it is at the same time the right of every trustee to receive full acquittance of charges impugning his integrity or competence which are not established by clear and satisfactory evidence."

[12–14] Where the statute prescribes the steps necessary to be taken to remove an executor, the statutory requirements must be complied with, and an order of removal not predicated on such compliance is unauthorized and ineffectual. 33 C.J.S., Executors and Administrators, § 91b, page 1039. Before an executor is removed he must be accorded a hearing and the court must have some fact legally before it in order to justify removal. The facts relied on for removal must be established by evidence, and any proper evidence which tends to establish or refute the charges relied on is admissible. Hanifan v. Needles, 108 Ill. 403, 409–412; In re Paull's Estate, 90 Ohio App. 403, 101 N.E.2d 209; In re Glessner's Estate, 343 Pa. 370, 22 A.2d 701; In re Burr, 118 App.Div. 482, 104 N.Y.S. 29; 33

C.J.S., Executors and Administrators, § 91f and g, page 1042.

Luckey v. Superior Court, 209 Cal. 360, 287 P. 450, relied on by respondent, is not analogous. In Luckey an administrator was removed. A hearing was had. The proceeding was not instituted pursuant to section 1436 of the Code of Civil Procedure, now section 521 of the Probate Code. The present proceeding was had under section 521. The nub of the holding of the Luckey case is that an administrator may be removed on grounds other than those specified in section 521. See In re Estate of Guzzetta, 97 Cal.App.2d 169, 217 P.2d 460.

[15–17] The fundamental conception of a court of justice is condemnation only after notice and hearing. No one may be deprived of anything which is his to enjoy until he shall have been divested thereof by and according to law. Under the constitutional guaranties no right of an individual, valuable to him pecuniarily or otherwise, can be justly taken away without its being done conformably to the principles of justice which afford due process of law, unless the law constitutionally otherwise provides. Due process of law does not mean according to the whim, caprice, or will of a judge, Matter of Lambert, 134 Cal. 626, 632–633, 66 P. 851, 55 L.R.A. 856; it means according to law. It excludes all arbitrary dealings with persons or property. It shuts out all interference not according to established principles of justice, one of them being the right and opportunity for a hearing: to cross-examine, to meet opposing evidence, and to oppose with evidence. Massachusetts Bonding & Ins. Co. v. Industrial Accident Comm., 74 Cal.App.2d 911, 170 P.2d 36.

[18–20] Judicial absolutism is not a part of the American way of life. The odious doctrine that the end justifies the means does not prevail in our system for the administration of justice. The power vested in a judge is to hear and determine, not to determine without hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. Procedure is the fair, orderly, and deliberate method by which matters are litigated. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgment accordingly.

[21, 22] The constitutional right to notice and hearing cannot be taken away in the fashion that was attempted in the present case. The judge's conception of his duty was entirely erroneous. The plainest principles of justice required that appellant be given notice of the specific charges against him. No notice was given him that he was to be removed on the ground that he was so mentally deranged as to be incompetent to act as executor. If the judge had reason to believe from what was told him in chambers, or from appellant's conduct, or from both, that he was incompetent to act, he had the authority to suspend his powers. He had no authority or power, without notice or hearing, to remove him. Appellant was not only not accorded a just, fair, and impartial hearing; he was not accorded the right or opportunity of any hearing, either on the charge that the inventory was not filed in time or on the ground, not charged, that he was so mentally deranged as to be incompetent to act as executor. No legal evidence was produced that he was incompetent to act. He was denied the opportunity of presenting any evidence. His offer of proof was erroneously rejected. In short, he was denied due process of law.

Reversed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I concur. The judge noticed that petitioner was emotionally upset by the proceedings and for that reason removed him. Under the circumstances the fact that appellant was disturbed by what was going on was not evidence of incompetency. It was enough to disturb any normal, self-respecting person.

123 Cal.App.2d 591

POWER
v.
INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 15997.

District Court of Appeal, First District, Division 1, California.

March 2, 1954.

Workman's compensation proceeding by widow to recover benefits on death of husband. The Industrial Accident Commission held that husband's death was not caused by an injury arising out of and in the course of employment. Widow brought writ of review. The District Court of Appeal, Fred B. Wood, J., held that referee's summary which related that widow had testified that decedent's employer had stated that he did not observe whether widow's husband had worked overtime, was erroneous and contrary to widow's actual testimony at hearing, and commission's rejection of claim on basis of such summary, was improper.

Order in accordance with opinion.

Workmen's Compensation ⟹1820

Where referee's summary of evidence was erroneous, Industrial Accident Commission's decision, which was based on referee's summary and not on reporter's verbatim transcript, that decedent had not suffered injury in the course of his employment, was improper. Labor Code, § 5315.

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Henry G. Sanford, San Francisco, Thomas M. Mulvihill, San Francisco, for petitioner.

Everett A. Corten, T. Groezinger, San Francisco, for respondent Industrial Accident Commission.

Dion R. Holm, City Atty., Jerome Cohen, Deputy City Atty., San Francisco, for respondent City and County of San Francisco.

FRED B. WOOD, Justice.

This is a proceeding to review a decision of the Industrial Accident Commission rendered after reconsideration. The decision adopted and affirmed the Findings and Order that had been made and filed prior to reconsideration, by the referee who conducted the original hearing: a finding that the death of the employee was not proximately caused by an injury arising out of and occurring in the course of employment, nor while doing anything incidental thereto; an order that the applicant (widow of the deceased employee; the petitioner herein) is not entitled to any benefits under the state workmen's compensation, insurance and safety laws.

Upon reconsideration, a hearing was held before a different referee. He made a report in which he summarized the testimony adduced before him and authorized the parties to submit their views in writing, which they did. Later, he filed a further report in which he recommended findings of fact that the injury arose out of and occurred in the course of employment and proximately caused death. From that he drew and recommended the legal conclusion that the applicant was entitled to an award.

When considering the case and making its final decision, the commission had before it (in addition to the complete record of the first hearing) both reports of the second referee, the written statements of the parties, and the documentary evidence adduced before the second referee. It did not have a verbatim record of the testimonial evidence introduced at the second hearing. (That testimony had not been transcribed.)

Petitioner claims that the commission in rejecting the second referee's findings and recommendations without reviewing the testimonial evidence which he considered and weighed, violated her right to due process. She invokes section 5315 of the Labor Code which declares that the commission may confirm, adopt, modify or set aside the findings, order, decision or award of a referee and may, with or without further proceedings, and with or without notice, enter its order, findings, decision or award "based upon the record in the case."[1] and cites judicial decisions upon this issue.

In one of those decisions, National Automobile & Casualty Co. v. Industrial Accident Comm., 1949, 34 Cal.2d 20, 206 P.2d 841, the Supreme Court held that "the commission may make a factual determination contrary to that of a referee although the testimony is conflicting and it did not itself hear the testimony or observe the witnesses, but did examine the evidence and record." 34 Cal.2d at page 28, 206 P.2d at page 845. In discussing the problem the court quoted the pertinent code sections and reviewed the case law, including one case which holds that if the commissioners make a determination contrary to the recommendations of a referee who heard the evidence or read the record they are required to make an independent examination of the record. Pages 28–30 of 34 Cal.2d, pages 845–846 of 206 P.2d.

There are at least two cases in which decisions were annulled for failure of the commission to review the record; Bethlehem Steel Co. v. Industrial Accident Comm., 1940, 42 Cal.App.2d 192, 108 P.2d 698, adoption of the recommendations of a second and different referee (increasing the award) without a reading by him of the testimony adduced at the first hearing; Deter v. Industrial Accident Comm., 1941, 45 Cal.App.2d 664, 116 P.2d 112, adoption of the recommendations of a referee who had neither heard nor read the evidence adduced at the first hearing nor all of the evidence adduced upon rehearing.

The respondent commission claims that this requirement is not applicable in this case because it reviewed the second referee's summary of the testimony adduced before him (as well as the rest of the record mentioned) and that under the circumstances of the case an examination of a verbatim transcript of that testimony was not necessary; that such review gave the commission a comprehension of the evidentiary facts.

The commission directs attention to the fact that the only witnesses who testified at the second hearing were persons who had already testified at the first hearing. It claims that the referee's summary shows that the testimony of those witnesses was substantially the same on each occasion, save for the single exception noted below. The commission invokes Santa Maria Gas Co. v. Industrial Accident Comm., 1941, 46 Cal.App.2d 775, 117 P.2d 43, 951. In the Santa Maria case an award was made based upon a disability rating of 35¾%. Subsequently, three additional hearings were held. Later, the employer petitioned to terminate liability. Following a hearing thereon the commission found that the disability was 76% and amended the original award upward upon the basis of this increased percentage. The employer challenged the amended award upon the ground that the commission made the increase without competent evidence in addition to that which it had before making the original award. The reviewing court found and held that "the record herein indicates that it is not true that all of the conditions found to exist as a basis for the last permanent rating were known to exist and were rated in the previous awards. In view of the medical reports submitted after such awards were made it cannot be said that there was no new evidence sufficient to warrant the commission in reopening and amending its previous decision and award under the continuing jurisdiction vested in the commission by section 5803 of the Labor Code". 46 Cal. App.2d at page 777, 117 P.2d at page 44. The employer petitioned for a rehearing. In denying that petition the court filed an opinion in which it discussed a contention that "the matter was disposed of by the commission after a final hearing held before a referee who had not conducted the former hearings and without the record of the evidence adduced at the former hearings having been transcribed for consideration by the commission." 46 Cal.App.2d at page 778, 117 P.2d at page 952. In overruling that contention, the court distinguished the Deter case, supra, and said: "In the case at bar the action of the commission about which petitioner complains is the increase of the percentage of disability to 76. This action was based, as the record reveals, upon the evidence produced at the final hearing and an examination of the evidence adduced at the former hearings was, *under the circumstances,* unnecessary in the determination of such question. The evidence produced at the final hearing was sufficient, as a matter of law, to support the action of the board in fixing the rate of disability at 76 per cent." Pages 778–779 of 46 Cal.App.2d, page 952 of 117 P.2d; emphasis added.

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[1] Until September 22, 1951, section 5315 and its predecessor statute, § 59 of Stats.1917, ch. 586, pp. 831, 870–871, declared that in such a case the commissioners' action be "based in whole or in part upon the report of the referee, or upon the record in the case." The 1951 amendment deleted the words "in whole or in part upon the report of the referee, or". Stats.1951, ch. 778, pp. 2266, 2267. The 1953 amendment made no change in that regard. Stats.1953, ch. 1256, p. 2814, effective September 9, 1953. The decision here under review was dated September 18, and filed September 21, 1953.

The 1951 amendment, obviously, was not of such a character as to remove the statutory requirement for a review of the record (in the types of cases to which it applied), nor did it lessen the legislative emphasis upon the desirability of and need for that requirement.

Consequently, those judicial decisions, rendered prior to the effective date of the 1951 amendment, which annulled commission decisions for failure to review the record when rejecting a referee's recommendations, continue in full force and effect insofar as the provisions of section 5315 are concerned.

The circumstances of the Santa Maria case are not necessarily the circumstances of our case. The question here is not the percentage of disability. It is the question whether or not the injury was so connected with the employment as to be compensable. The injury occurred after regular business hours. The employee had a key to the office but there was a conflict of evidence on the question whether he worked after hours and no direct evidence concerning his activities at the office on the night in question whether at work or not.

At the second hearing, a letter from Mr. Bryant, head of the department in which the decedent was employed, was put in evidence. In that letter Mr. Bryant stated that he did not know that the deceased employee had a key to the office; that he had not given the employee permission to remain in the office after 5:00 p. m.; and that the employee's supervisor said he had never assigned any duties to be performed by the employee after 5:00 p. m.

Petitioner testified concerning a conversation she had with Mr. Bryant after the accident. The referee summarized this testimony as follows: "She talked to Mr. Bryant and in his conversation he told her that he had known her husband for a number of years; that he was a conscientious worker and that on occasions he would work evenings; that he would do so on bills required for collection. She was asked again to recapitulate the conversation and she did so; the next occasion stating that he often worked overtime. On cross-examination, she observed that the conversation took place two, three or four days next after the date of death. She stated that Mr. Bryant did not observe whether her husband had worked overtime. In fact, she said that he did not use the term." This testimony was given at the second hearing, not at the first.

The commission says in its answer that the second referee's report demonstrates that, with the sole exception of the petitioner's testimony concerning her conversation with Mr. Bryant, the testimony of the witnesses at the second hearing was "substantially and materially identical with that contained in the transcript of their testimony taken at the first hearing." Answer to Pet., p. 18. The commission concludes therefrom: "It is thus apparent that a transcript of the testimony received at the rehearing could contribute nothing more to the commission's comprehension of the evidence than does the existing record." Idem, p. 18.

That statement, presumably made before the testimony given at the second hearing had been transcribed,[2] minimizes the importance of the exception, the conversation between petitioner and Mr. Bryant, which significantly bore upon the principal issue in the case.

However, we need not and do not decide whether the commission could have made its decision without examining a verbatim record of the testimony given at the second hearing if the summary of petitioner's testimony had been accurate.

That summary is inaccurate in an important respect. It says that, *upon cross-examination,* the witness *"stated that Mr. Bryant did not observe whether her husband had worked overtime. In fact, she said that he did not use the term."* (Emphasis added.)

Thus, the summary unequivocally tells the reader that upon cross-examination petitioner flatly contradicted and in effect withdrew the testimony which she has just given upon this pivotal issue. But, in fact, she did no such thing, as the verbatim transcript of her testimony clearly demonstrates. The questions put to her, and her answers, upon cross-examination, were these: "Q. Did he [Mr. Bryant] tell you *when* Mr. Power worked overtime? A. Oh, no, he didn't say. Q. Did he tell you that Mr. Power was working overtime *on the night that he passed away?* A. No, he didn't say." (Emphasis added.) That, obviously, was not a statement that Mr. Bryant "did not observe whether" her husband had worked overtime, nor a statement that Mr. Bryant "did not use the term" overtime. The summary in this respect is so grossly inaccurate as to be false and misleading. Doubtless it was an inadvertent inaccuracy upon the part of the referee. It did not mislead him, for he apparently gave full credit to this witness when making his determination, probably relying upon his memory of the words as they came from her lips upon the witness stand. Yet, the summary is misleading to any reader who did not hear the testimony. The commission's examination of such a summary is no substitute for the reading and appraisal of the very words of the witness as recorded in the reporter's verbatim transcript. We need not examine the summary further to ascertain if it contains other inaccuracies; nor need we consider other points of error assigned by the petitioner.

The decision is annulled with directions to conduct further proceedings not inconsistent with the views herein expressed.

PETERS, P. J., and BRAY, J., concur.

123 Cal.App.2d 681

PEOPLE v. WALKER et al.

Cr. 5091.

District Court of Appeal, Second District,
Division 3, California.
March 5, 1954.

Defendant was convicted of burglary with explosives. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment on the verdict and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to corroborate testimony of accomplice.

Judgment and order affirmed.

1. Criminal Law 🔑511(1)

Evidence necessary to corroborate testimony of accomplice must create more than a suspicion of guilt, but is sufficient even though it is slight and, when standing by itself, is entitled to but little consideration. Pen.Code, § 1111.

2. Criminal Law 🔑511(2)

When evidence offered as corroboration of testimony of accomplice tends to connect defendant with commission of crime in such way as reasonably may satisfy jury that accomplice is telling the truth, such evidence is sufficient. Pen.Code, § 1111.

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[2] The answer was written and filed by the commission before the writ herein was issued; several weeks before the return to the writ was filed.

3. Criminal Law ⚷511(1)

In prosecution for burglary with explosives, evidence was sufficient to corroborate testimony of accomplice. Pen.Code, §§ 464, 1111.

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Al Matthews, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Martin M. Ostrow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

John R. Walker and Mural Tashjian were charged jointly with the crime of burglary with explosives. Pen.Code, sec. 464. On the first trial the jury was unable to agree on a verdict. Prior to the second trial Mural Tashjian pleaded guilty to the crime of second degree burglary. Walker was convicted in a second jury trial. He appeals from the judgment of conviction and from an order denying his motion for a new trial.

The evidence upon which appellant was convicted consisted of the testimony of his alleged accomplice, Tashjian, and certain other items of evidence tending to corroborate this testimony. The only question raised on appeal is whether the additional evidence was sufficient corroboration of the testimony of the accomplice, as required by section 1111 of the Penal Code.

The facts were as follows: About 4:30 a. m., January 12, 1953, two police officers noticed light coming from the Devonshire Inn and left their patrol car to investigate. Upon announcing themselves to those within they saw three men run away from the rear of the premises. One of these three, Mural Tashjian, was apprehended, but the other two escaped. Both officers testified that one of the two who escaped was similar in build and stature to appellant.

Examination of the premises revealed that a hole had been cut through the roof of the building, and that the lower panel of the door separating the room thus entered from a room containing two floor safes had been removed. The two safes bore marks of an acetylene torch and their tops had been partially removed. The rear door of the Inn was open but the circuit of the burglar alarm had been bridged at that point by a wire with clips attached to its ends called a jumper wire. A jumper wire is a length of wire used to close breaks in electric circuits. In the area behind the Inn were found a portable radio and two suitcases. The radio was found to emit only Los Angeles police calls. Among the varied items found in the suitcases were a complete oxyacetylene torch outfit in good working order, welder's goggles, wrecking bars, an ice pick, a rubber mallet, pinhole flashlight, a saw and blades, wrenches, a rope, a cement drill, bits, and another jumper wire.

On the evening of the day of the burglary, appellant registered at a hotel under a fictitious name, although his rent at his usual residence was paid about a week in advance. The following morning he was arrested as he left the hotel.

The next day the police opened a garage in Hollywood with a key which had been in appellant's possession when he was arrested, and found, among other items, a cardboard box which contained various papers which will be discussed below.

Appellant's co-defendant, Tashjian, testified that appellant participated in the burglary, and described it in detail. The independent evidence connecting appellant with the crime was as follows:

The portable radio found at the rear of the Devonshire Inn had been greatly modified. The original tuning circuit had been removed and a crystal detector circuit had been installed, so that the frequencies detected depended on the frequency of the crystal inserted in the circuit. The crystal in the set responded only to the frequency of the Los Angeles District police calls. In appellant's car was found a crystal which responded to the frequency used by the Los Angeles Police for outlying districts. A packing slip for two crystals of corresponding description was found among appellant's papers in the garage. In the same place there were found radio circuit diagrams which showed the original wiring of the set and all of the modifications which had been made in the set. Appellant was well versed in the fields of electricity and radio, and testified as an expert witness in his own behalf. His explanation of this evidence was that he had been commissioned by one Jack Arthur to convert the radio for installation on Mr. Arthur's motorcycle. Although defense witnesses testified that Jack Arthur existed and had had some dealings with appellant, this person was not produced by the defense, and the police produced evidence of a fruitless search for such person or a motorcycle registered to such person. An expert witness for the prosecution testified that the radio in question was not suitable for installation on a motorcycle.

[1-3] Also among the effects found in the garage were a sales slip for two wrecking bars, two ice picks and a rubber mallet. A clerk at the store which had issued the sales slip testified that the items had been purchased in January 1953, and that the five items set forth on the sales slip resembled the corresponding items found in the two suitcases. Some months before the burglary appellant repaired and adjusted the sound system of the Devonshire Inn, making numerous calls during a 10-day period. Appellant admitted that he knew Tashjian and the third man prior to January 12, 1953. The rule as to the legal sufficiency of corroboration was stated in People v. Trujillo, 32 Cal.2d 105, 110, 194 P.2d 681, 684: "Such corroboration must create more than a suspicion of guilt, but is sufficient even though it 'be slight and, when standing by itself, entitled to but little consideration'. People v. Negra, 208 Cal. 64, 69, 280 P. 354, 356; People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720; People v. Shaw, 17 Cal.2d 778, 803, 112 P.2d 241; People v. Yeager, 194 Cal. 452, 473, 229 P. 40. It is sufficient when the evidence offered as corroborative tends to connect a defendant with the commission of the crime in such a way as reasonably may satisfy a jury that the accomplice is telling the truth." The briefs discuss at length statements found in earlier cases which, it is assumed, lay down a different approach to the question. See People v. Kempley, 205 Cal. 441, 461, 271 P. 478. The discussion is purely academic. The evidence we have summarized was ample to supply the corroboration of the testimony of the accomplice which the law requires.

The judgment and order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

42 Cal.2d 435

HALL v. HALL.

L. A. 22517.

Supreme Court of California.
March 4, 1954.

Divorce action by wife, wherein the Superior Court of Los Angeles County, Lewis Drucker and J. T. B. Warne, Judges pro tem., entered interlocutory decree requiring husband to pay alimony and wife's attorneys' fees and an order requiring him to pay attorneys' fees and costs on appeal, and husband appealed. The Supreme Court, Edmonds, J., held that award of $350 per month to wife as alimony, in addition to family home and $200 per month for support of two daughters, was excessive, in view of amount remaining for husband's living expenses.

Judgment reversed in part and affirmed in part and order as to payment of counsel fees and costs on appeal affirmed.

Prior opinion, 259 P.2d 733.

1. Appeal and Error 🔑345(1)

A motion for new trial which is not authorized by statute does not toll the running of the time within which an appeal must be taken. Rules on Appeal, rules 2(a), 3(a, b); Code Civ.Proc. §§ 656, 657.

2. Statutes 🔑223.2(24)

Code of Civil Procedure, section 656, defining new trial, must be read in conjunction with section 590 defining an issue of fact. Code Civ.Proc. §§ 590, 656.

3. Divorce 🔑175

For the purpose of appeal, proceeding for allowance of temporary support or counsel fees in a divorce action is considered to be collateral to the main action, even though the necessity for such allowance is presented in a hearing initiated by order to show cause. Civ.Code, §§ 137.2, 137.3.

4. Divorce 🔑239, 243

Right to permanent support and maintenance is properly at issue at time cause of action for divorce is tried and determined and ensuing interlocutory decree is intended to bring an end to all matters so litigated and in controversy. Civ.Code, § 139.

5. New Trial 🔑3

A default proceeding is not the "trial of an issue" for re-examination of which a new trial may be granted. Code Civ. Proc. §§ 590, 656.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial of an Issue".

6. Divorce 🔑151, 181, 239

Allowance of permanent support and maintenance constituted determination of an "issue of fact" for the re-examination of which a new trial could be granted, and hence husband's motion for new trial on ground that such allowance was unreasonable and excessive and contrary to provisions of Civil Code was effective to extend the time for taking an appeal from interlocutory decree of divorce. Rules on Appeal, rules 2(a), 3(a, b); Civ.Code, § 139; Code Civ.Proc., §§ 590, 656, 657.

See publication Words and Phrases, for other judicial constructions and definitions of "Issue of Fact".

7. Divorce 🔑235

Trial court has wide discretion in making award of permanent alimony for support of wife. Civ.Code, § 139.

8. Divorce 🔑240(2)

As used in Civil Code provision for allowance of alimony, having regard for the "circumstances" of the respective parties, quoted word includes practically everything which has a legitimate bearing upon the present and prospective matters relating to lives of both parties. Civil Code, § 139.

See publication Words and Phrases, for other judicial constructions and definitions of "Circumstances".

9. Divorce 🔑240(2)

In awarding permanent alimony, court should consider needs of the parties and their abilities to meet such needs, earning ability and actual earnings, and property owned and obligations to be met by each. Civ.Code, § 139.

10. Divorce 🔑240(5)

Award of $350 per month to wife as alimony was excessive, in view of other provisions of interlocutory decree granting her a divorce and giving her and two daughters, one of whom had attained her majority, a total of $550 per month and family home, and leaving husband only $270 per month for his living expenses after payment of life insurance premiums, taxes and other fixed charges which he must pay under decree. Civ.Code, § 139.

11. Divorce ⚷194, 223, 227(2)

Where wife had neither money nor assets which could be readily liquidated, sufficient to pay counsel fees, requiring husband to pay such fees and cost of printing wife's brief on appeal by husband from portion of interlocutory decree was not abuse of discretion, and award of $750 as attorneys' fees for trial services and $200 for services rendered to wife on appeal was not excessive.

Sheppard, Mullin, Richter & Balthis, James C. Sheppard and Richard B. Hoegh, Los Angeles, for appellant.

Moore, Trinkaus & Binns and Henry T. Moore, Los Angeles, for respondent.

EDMONDS, Presiding Justice.

Peirson Hall has appealed from that part of an interlocutory decree which ordered him to pay alimony and the fees of Mrs. Hall's attorneys. He has also appealed from an order requiring him to pay the cost of printing her brief on the appeal and $200 as attorneys' fees in connection therewith.

Pursuant to their stipulation, the decree divided the community property of the parties, compels Hall to pay $100 per month for the support of a minor child and to maintain in force certain insurance policies upon his life. In addition, he is ordered to pay $350 per month for the support of Mrs. Hall and $750, in monthly installments, as the fees of her attorneys.

Hall moved for a new trial upon the ground that the allowance of support and maintenance was unreasonable and excessive. He also moved to vacate the judgment and enter a different judgment upon the ground that the conclusion of law requiring the payment of support and maintenance was neither consistent with, nor supported by, the findings of fact. Both motions were denied.

[1] Mrs. Hall urges that the appeal, because filed more than 60 days after the entry of the decree, Rules on Appeal, rule 2(a), was not timely and must be dismissed. Although recognizing that either of the motions made by Hall, if proper, would extend the time within which an appeal may be taken, Rules on Appeal, rules 3(a) and 3(b), she contends that neither of them lies to review that portion of a decree of divorce which awards alimony. She relies upon the settled rule that a motion for a new trial which is not authorized by statute does not toll the running of the time within which an appeal must be taken, Reeves v. Reeves, 34 Cal.2d 355, 359, 209 P.2d 937, and argues, by way of analogy, that the same rule should obtain when a motion to vacate a judgment is made improperly.

[2] A new trial is defined by section 656 of the Code of Civil Procedure to be "a reexamination of an issue of fact in the same court after a trial and decision by a jury, court or referee." This section must be read in conjunction with section 590 of that code which declares that an issue of fact arises upon "a material allegation in the complaint controverted by the answer". Harper v. Hildreth, 99 Cal. 265, 270, 33 P. 1103. The decisive question here presented is whether the allowance of support and maintenance constitutes the determination of an "issue of fact" within the meaning of these code provisions.

In Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L.R.A. 411, the husband sought to annul his marriage. Judgment was for the wife, and the court awarded counsel fees to her pursuant to section 137 of the Civil Code, which at that time provided: "When an action for divorce is pending, the court may, in its discretion, require the husband * * * to pay as alimony any money necessary to enable the wife * * * to support herself or her children, * * * or to prosecute or defend the action." A motion for a new trial, one of the grounds being that counsel fees should not have been allowed, was denied.

As then allowed by statute, the husband appealed from the order denying a new trial; he also noticed an appeal from the judgment. "As the appeal from the judgment was taken too late", the court said, "we cannot consider the objections to the allowance of alimony." The appeal was dismissed and the order denying a new trial affirmed. "The allowance of alimony is an incident to an action for a divorce", said the court, "and, although the determination as to its allowance may involve a controversy as to facts, [it] is not the trial of an issue in the case. It may be before or after trial." 111 Cal. at page 269, 43 P. at page 758.

This principle was followed by the District Court of Appeal in two later cases in which there had been an allowance of permanent support and maintenance pursuant to section 139 of the Civil Code. Stanton v. Stanton, 113 Cal.App. 462, 465–466, 298 P. 524; Scheibe v. Scheibe, 57 Cal.App.2d 336, 342–343, 134 P.2d 835. In the Stanton case there was a lump-sum award of $20 per week for alimony and support of a child. The husband contended, as justifying the reversal of the interlocutory decree of divorce, that there was no evidence or findings to support the award. After noting the additional fact that the complaint did not demand support, the court stated: "But * * * an allowance of alimony or money for the support of the wife is an incident to a divorce action and the determination as to allowance of alimony is not the trial of an issue in the case." 113 Cal.App. at page 466, 298 P. at page 525. That language was quoted with approval in Scheibe v. Scheibe, supra, where an allowance of alimony had been made in the absence of either allegations or evidence in regard to the necessities of the wife. The award was upheld as being "incidental to the determination of a divorce action". 57 Cal.App.2d at page 342, 134 P.2d at page 840.

[3] Justification for the broad language appearing in the Hunter case and similar decisions of that period may be found in the then prevailing procedure for obtaining temporary support and counsel fees. Usually, an allowance was made upon the *ex parte* application of the wife without previous notice to the husband. See Mudd v. Mudd, 98 Cal. 320, 321, 33 P. 114. It was presumed that the court would give proper consideration as to the needs of the wife, the ability of the husband to pay, and the value of any legal services rendered. Turner v. Turner, 80 Cal. 141, 144, 22 P. 72; Mudd v. Mudd, supra, 98 Cal. at page 321, 33 P. 114; Rose v. Rose, 109 Cal. 544, 546, 42 P. 452. The husband's remedy for an improvident order was by a motion to set it aside or to modify it. Mudd v. Mudd, supra, 98 Cal. at page 322, 33 P. 114. Normally, the proceeding upon a wife's application was conducted with greater informality than one in which the parties appeared as adversaries. Cf. Arnold v. Arnold, 215 Cal. 613, 615, 12 P.2d 435. Furthermore, even under the modern practice by which the necessity for an allowance for temporary support or counsel fees is presented in a hearing initiated by an order to show cause, for the purpose of appeal, the proceeding is considered to be collateral to the main action. Lincoln v. Superior Court, 22 Cal.2d 304, 310, 139 P.2d 13.

[4] However, the legal principles properly to be considered in determining whether an award of *temporary* alimony or counsel fees, now authorized by sections 137.2 and 137.3 of the Civil Code, may be reversed upon a motion for a new trial have no application to an allowance of *permanent* support and maintenance made under section 139 of the Civil Code. That section "clearly contemplates that the right to alimony, as well as other financial and property rights, shall have been presented and litigated in the action for divorce, and established by the judgment". Howell v. Howell, 104 Cal. 45, 47, 37 P. 770, 771. Otherwise stated, the right to permanent support and maintenance "is properly at issue" at the time the cause of action for divorce is tried and determined; the ensuing interlocutory decree is intended to bring an end to all matters so litigated and in controversy. McCaleb v. McCaleb, 177 Cal. 147, 149, 169 P. 1023; Wilson v. Superior Court, 31 Cal.2d 458, 463, 189 P.2d 266.

[5] Reeves v. Reeves, supra, states no contrary rule. There the appeal from an in-

terlocutory decree of divorce was dismissed upon the ground that the time within which it might have been taken was not extended by proceedings on motion for a new trial. But the decree was obtained by default, and in holding the motion improper, the court followed the firmly established rule that a default proceeding is not the "trial of an issue" within the meaning of section 656 of the Code of Civil Procedure. 34 Cal.2d at page 359, 209 P.2d 937; Foley v. Foley, 120 Cal. 33, 36–37, 52 P. 122.

[6] In the present case, Hall's motion for a new trial was made upon the ground that the allowance of support and maintenance is "unreasonable and excessive and contrary to the provisions of Section 139 of the California Civil Code". Other points relied upon by him were that "the evidence is insufficient to justify the decision", and "errors in law occurring at the trial and excepted to by the defendant" entitle him to a further hearing. The grounds upon which such a motion may be based, Code Civ.Proc. § 657, are as applicable to a re-examination of an allowance of permanent support and maintenance as to any other controversy adjudicated by a court sitting without a jury. On that question, as well as on other material issues, the trial judge should have the opportunity to correct errors and to reopen the case, upon a proper showing. Insofar as Stanton v. Stanton, supra, and Scheibe v. Scheibe, supra, are inconsistent with these conclusions, they are disapproved.

Upon the merits of his appeal, Hall claims that the award of $350 per month constitutes an abuse of discretion. He also challenges the allowance of costs and attorneys' fees for trial purposes and to permit his wife to defend against the appeal.

The Halls were married in 1930 and have two unmarried daughters, 21 and 16 years of age, respectively, at the time suit was filed. The husband is now 57 years of age, and as a Judge of the United States District Court, receives a gross salary of $1,250 per month. Mrs. Hall, 42 years old, was not gainfully employed at the time of trial, and Hall's salary constitutes the parties' sole source of income. The daughters are living with their mother in the family home. In the year preceding trial, one daughter earned approximately $500 and the younger one $265.

It is conceded that neither of the parties has any assets except the community property which, pursuant to stipulation, was disposed of by the decree. The trial court further found that Mrs. Hall "is unemployed and has no income or means of her own with which to support herself; by reason of her faithful devotion to her duties as a wife and mother, plaintiff has not maintained any vocational skill or trade so that she is at this time without a vocation."

Mrs. Hall was given the family home valued at $28,000, but subject to an indebtedness of $5,000, household furniture and furnishings worth approximately $3,000, a 1946 Dodge automobile, and 180 shares of stock worth $3,600. Her net worth, therefore, is about $30,000. Hall probably has no net worth. His assets consist of a law library and a 1949 Studebaker automobile, both of undetermined value, and 180 shares of stock worth $3,600, but pledged for an indebtedness of $3,000. Other liabilities consist of miscellaneous debts amounting to $650 and an unpaid federal tax assessment of about $500.

By the terms of the decree, Hall must pay $350 as alimony and $100 for support of his minor daughter. He must maintain three term life insurance policies, one for the benefit of each daughter, until he reaches the age of 65, and one for the benefit of Mrs. Hall for three years. Each policy is in the amount of $5,000. He also has another policy for $1,100 and "a Federal Employees Benefit of some kind, about $1,400 payable to my estate". The premiums upon all of them amount to about $60 per month.

Hall also was ordered by the decree to pay the balance of his wife's attorneys' fees, amounting to $625, and costs of $25 at the rate of $50 per month. When Hall's notice of appeal was filed, the court required him to pay $200 additional for counsel fees plus costs. These fees are to be paid in monthly installments of $50. In summary, under the interlocutory decree and subsequent order, Hall must pay $600 per month.

Hall agreed, and Mrs. Hall assented, to pay $100 per month to the adult daughter until such time as she completes her formal education or marries. He must pay $40 per month towards satisfaction of the tax delinquency. His current medical expenses are $50 per month and treatment may be necessary for an indefinite period in the future. The parties disagree as to the amount of state and federal income taxes which each must pay. However, if it be assumed that Hall is entitled to claim both daughters as dependents, his probable tax liability would be about $190 per month. These additional deductions leave Hall $270 to meet current "living expenses", which he testified required $410.

Mrs. Hall and the two daughters, considered as a unit, have been given $550 per month to meet their expenses. Mrs. Hall is liable for taxes on the amount of alimony received by her, which would be about $66 per month on the payments allowed by the court.

A further possible source of income to Mrs. Hall is the home, which although community property and constituting the bulk of the property of the parties, was awarded to her. Unquestionably the home has a substantial rental value although it appears that $73 per month must be paid on the mortgage, and taxes, prorated on a monthly basis, amount to $50.

[7–9] The principles which the trial judge must apply in awarding alimony are few and necessarily general in nature. An allowance for support must be made "having regard for the circumstances of the respective parties". Civil Code § 139. In making that award the trial court has a wide discretion. Baldwin v. Baldwin, 28 Cal.2d 406, 413, 170 P.2d 670. "Circumstances" includes "practically everything which has a legitimate bearing upon the present and prospective matters relating to the lives of both parties." Lamborn v. Lamborn, 80 Cal.App. 494, 499, 251 P. 943, 945. "[I]t refers to the needs of the parties and the abilities of the parties to meet such needs; and in measuring such circumstances, consideration should be given to property owned and obligations to be met as well as to ability to earn and actual earnings." Becker v. Becker, 64 Cal.App.2d 239, 242, 148 P.2d 381, 383.

[10] Here, the wife and daughters were given $550 per month and the family home. When the amounts of life insurance premiums, taxes, and other fixed charges which Hall must pay are added, only $270 remains for his living expenses. Although the discretion of the trial court should be upheld if it has been reasonably exercised, the needs of the respective parties do not justify the amount of alimony here allowed to the wife.

[11] The appeal from the order requiring Hall to pay the counsel fees of his wife upon the appeal, together with incidental costs, was timely taken. No abuse of discretion is shown in the amounts allowed by this order. The allowance of $750 as attorneys' fees for the trial also is not excessive. The record shows that Mrs. Hall did not have either money or assets which could be readily liquidated, sufficient to pay the fees of counsel. The evidence established her need for the amounts awarded to her.

Insofar as the judgment awards Mrs. Hall $350 per month for support and maintenance, it is reversed; in all other respects it is affirmed. The order requiring Hall to pay $200 counsel fees and the cost of printing the answering brief on appeal is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

42 Cal.2d 429

PEOPLE v. McGARRY.

L. A. 5523.

Supreme Court of California.
In Bank.
March 1, 1954.

Murder prosecution. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and imposed death penalty, and defendant moved for a new trial on ground that newly discovered evidence would tend to mitigate his punishment, and appealed from order denying such motion. The Supreme Court, Shenk, J., held that the trial court had not abused its discretion in denying the motion, which was predicated upon excerpts from contempt proceeding instigated by defendant's divorced wife through homicide victim because of defendant's failure to pay support ordered by court, which evidence defendant contended gave rise to his belief that he was a victim of fraud and conspiracy.

Affirmed.

1. Criminal Law ⟾911, 1156(1)

Motion for new trial of criminal prosecution is addressed to sound discretion of trial court, and its action will not be disturbed except for clear abuse of discretion.

2. Criminal Law ⟾938(1)

In order for trial court to grant new trial of criminal prosecution on ground of newly discovered evidence, it must appear that the evidence, not merely its materiality, is newly discovered, is not cumulative, and is such as to render a different result probable on retrial, and that accused could not with reasonable diligence have discovered and produced such evidence at the trial, and such facts must be shown by the best evidence of which the case admits.

3. Criminal Law ⟾938(1)

Trial court did not abuse discretion in denying motion for new trial of first degree murder prosecution in which death penalty had been imposed for fatal shooting of lawyer who had successfully represented defendant's wife in her separate maintenance action and in subsequent contempt proceeding for failure to pay support money ordered by court, which motion was predicated upon the theory that newly discovered evidence would tend to mitigate punishment, where such evidence consisted of excerpts from transcript in contempt proceeding, which evidence gave rise to defendant's belief that he was victim of fraud and conspiracy. Pen.Code, § 189.

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Ellery E. Cuff, Public Defender, and Noel B. Martin, Deputy Public Defender, Los Angeles, for appellant.[1]

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Deputy Atty. Gen., for respondent.

SHENK, Justice.

This is an appeal from a judgment of conviction of murder in the first degree, imposing the death penalty, and from an order denying a motion for a new trial. The homicide occurred on March 30, 1953.

The defendant is 65 years of age. His victim, Richard K. Gandy, was a member of the law firm which represented the defendant's wife in her successful action for separate maintenance. In that action, begun in 1948, an order was made requiring the defendant to pay certain sums in support of his wife and child, and for attorneys' fees. He refused to do so and a contempt proceeding was instituted against him in July, 1949. In an attempt to justify his refusal he contended that the marriage was invalid because his purported wife had not secured a divorce dissolving her marriage to a former spouse. He was found guilty of contempt and was committed to jail. After remaining there for 43 days he paid the support money in the sum of $450 and was released. He asserted that Mr. Gandy was instrumental in prolonging litigation in the separate maintenance suit and in hindering opportunities for reconciliation; that letters written to Gandy inquiring of the whereabouts of the defendant's child were unanswered; that he was "shaken down" for the $450 and that his wife got not "a dime of it." In October, 1951, he went to the office of the decedent and engaged in an argument with him over the case. There is evidence that the defendant made threats against the decedent at this time.

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[1] Defendant chose to represent himself during the presentation of the prosecution's case. Thereafter, during the presentation of the defense and with his consent, he was represented by the Public Defender appointed by the court.

Several months prior to the homicide the defendant purchased a gun and ammunition for the purpose of shooting Gandy. On the morning of March 30, 1953, he deposited with the manager of the trailer court in which he lived an envelope containing the pink slip to his automobile for the stated reason that he didn't know whether he would be back. He left the court about 9:30 a. m. with the loaded gun in his possession. When asked during the trial when it was that he had definitely made up his mind to shoot Gandy he answered: "* * * I just can't say when I did. I know definitely that morning when I went down to get Mr. Gandy I certainly had it on my mind that morning and I wasn't insane or anything like that." He testified that nothing unusual had happened to disturb him and that he hadn't seen or been in contact with Gandy since the scene in the latter's office almost a year and a half before. He went by bus directly to the attorney's offices and freely admits that when he entered the outer office it was his intention to shoot Mr. Gandy. He gave the name of "C. Deagen" to the secretary, fearing that Gandy would not see him if he gave his true name. He waited in the reception room reading a magazine until Mr. Gandy came in and passed through the room. Because he was not quite sure of the identity of his intended victim, whom he had seen only on his one previous visit to the offices, he inquired of the secretary if the man was Mr. Gandy, because he "wanted to be very sure." A few minutes later Mr. Gandy summoned the defendant into his inner office. In his own words the defendant testified: "I said, 'My name is not Deagen, it's McGarry'; and then I shot him." After the shooting the defendant walked to the outer office and twice asked that police be called. Mr. Gandy died that day from the effects of a single bullet wound near his heart. Although the defendant freely admitted an intention to shoot, he denied any intention to kill the decedent. He also testified that he "would have taken any one of five guys, just in order to get where I am right now, to get this thing in court."

From the evidence there is no question but that the killing was "wilful, deliberate, and premeditated", Penal Code, § 189, and that the jury was justified in determining it to be murder of the first degree. The defendant does not question this determination. He questions only the propriety of the sentence requiring the death penalty, and argues that the motion for a new trial was supported by such new evidence that if it were revealed on a second trial it would sufficiently impress the minds of the jurors to make a sentence of life imprisonment reasonably probable. He contends, therefore, that it was an abuse of discretion for the trial court not to grant the motion, and this is the only question on appeal.

The affidavit in support of the motion for a new trial recites the events taking place prior to and during the contempt proceedings and is highlighted by the defendant's bitterness against those who he felt were responsible for what he considered to be the perpetration of fraud upon him and his frustration in his attempt to draw attention to his plight. The so-called newly discovered evidence consists of excerpts from the transcript in the contempt proceedings which indicate that the defendant there raised the question of the propriety of the support order he refused to obey. With reference thereto the judge presiding is claimed to have stated "I am making an investigation before sentencing." The investigation referred to had been frequently mentioned during the course of the trial of the present case. The defendant's testimony that the judge had stated that he would investigate was corroborated by one witness. On the other hand a law partner of the decedent testified that no statement of this nature had been made, and his testimony was corroborated in rebuttal by the clerk of the court in which the contempt proceedings were conducted. The clerk further testified that he had refreshed his memory from the reporter's transcript in that proceeding. However, the transcript itself was not placed in evidence, although it was suggested by an alternate juror that excerpts be read therefrom.

Assuming the truth of the averments of the affidavit it is the defendant's theory of mitigation that with the additional evidence from the transcript in the contempt proceeding, he was justified to some extent in taking matters into his own hands to bring to light and rectify the injustice which he claimed had been done to him. The significance of the promised investigation was argued at the trial and the jury instructed that it "was entirely free to act according to its own judgment" in fixing the penalty at death or life imprisonment in the event that it found the killing to be murder of the first degree.

It is contended by the defendant that the evidence contained in the transcript was newly discovered; that it was corroborative and not merely cumulative and that it was unknown and unavailable to the defense on trial of the cause. No reason is stated why the transcript was not available during the trial, but it is claimed that the statement of the clerk who testified as to the content of the transcript on rebuttal came as a surprise and without adequate time for the defendant thereafter to put the transcript on record.

[1] It has been repeatedly held that a motion for a new trial is addressed to the sound discretion of the trial court, and its action will not be disturbed except for a clear abuse of discretion. People v. Sing Yow, 145 Cal. 1, 4–5, 78 P. 235; People v. Demasters, 109 Cal. 607, 608, 42 P. 236.

[2] The elements of the standard by which a trial court in its discretion may properly grant a new trial on the ground of newly discovered evidence are set forth in People v. Sutton, 73 Cal. 243, 15 P. 86. At page 247 of 73 Cal., at page 88 of 15 P. it is stated that "it must appear—'First, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence is not cumulative merely; third, that it is such as to render a different result probable on a retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at the trial; and, fifth, that these facts be shown by the best evidence of which the case admits.' 1 Hayne, New Trial & App. § 83." More recent cases have turned on a lack of one or more of the foregoing requirements, but the overall rules have withstood the test of time and properly state the existing law. See People v. Richard, 101 Cal.App.2d 631, 635–636, 225 P.2d 938.

It is convincingly argued that the evidence in support of the motion for a new trial is not newly-discovered; that it is merely cumulative, that had the defendant exercised reasonable diligence he most certainly could have produced it at the trial; but consideration will be given to the merits of the defendant's claim that the so-called newly discovered evidence is of such significance as to make a recommendation of leniency reasonably probable on retrial.

It was sought throughout the trial and on this appeal to mitigate the character of the defendant's admitted crime on the basis of the facts as they appeared to him, and not on the facts as they actually existed. Thus he argues that there was implanted in his mind a firm conviction that he was the victim of a fraud and a conspiracy and that this dominated the whole course of his conduct leading up to and following the homicide. He cites the original proceedings in which his wife was successful in obtaining an order for separate maintenance against him; his unsuccessful efforts to obtain a determination that the marriage was not a valid one; his failure to learn from the deceased of the whereabouts of his child; the contempt proceedings for his failure to pay the support ordered because of his insistence that the marriage was void; his confinement in jail for 43 days in defiance of the determination that he was in contempt; his payment of $450 which he considered as a "shake-down" in order to get released from jail; a belief that the deceased and others had unjustly and improperly deprived him of his property; his argument with the deceased previous to the attack resulting in death, and the fact that he believed an investigation had been promised but not made. The foregoing was considered during the trial. That the promised investigation was not an important factor in making up his mind that a wrong had been done him is indicated by the defendant's admission that he never actually knew whether it had been made and apparently he made no effort to ascertain the fact. Moreover there is nothing in the record or in the offer of the additional evidence to indicate that the judge had not in fact made the investigation before sentencing the defendant.

[3] In ruling on the motion for a new trial the court could properly conclude that the offered evidence was available to the defendant during the trial by the exercise of reasonable diligence; that it was not newly discovered evidence in any true sense; that in any event it was of unimportant significance as against the mass of evidence already in the record bearing on the same theory of mitigation of punishment; that the same arguments were made on the motion for a new trial as had been made to the jury on the question of mitigation; that the evidence embodied in the offer was not even remotely connected with the actions of the defendant prior to the homicide, and that with the additional evidence there was no reasonable probability that a new jury would recommend life imprisonment. There was therefore no abuse of discretion in denying the motion for a new trial.

The judgment and order are affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, SPENCE, JJ., concur.

42 Cal.2d 376

MEYER et al.
v.
STATE BOARD OF EQUALIZATION.

Sac. 6273.

Supreme Court of California.
In Bank.
March 1, 1954.
Rehearing Denied March 25, 1954.

Action to recover sales tax paid on amount which represented transportation charges for coke sold. The Superior Court, Sacramento County, James O. Moncur, J., entered judgment for plaintiffs, and defendant appealed. The Supreme Court, Edmonds, J., held, inter alia, that the sale by out-of-state corporation on plaintiffs' order and consignment to ultimate buyer in California constituted a sale and resale and the resale was taxable under Sales and Use Tax Law.

Reversed.

Schauer, Shenk, and Carter, JJ., dissented.

Prior opinion, 256 P.2d 375.

1. Appeal and Error ⚿1008(3)
Trial ⚿136(3)

Where only evidence was written documents without qualifying testimony, their legal effect was question of law, and interpretation given them by trial court was not binding upon appeal.

2. Appeal and Error ⚿1008(3)

In absence of extrinsic evidence, there is no issue of fact in action involving written documents, and it is duty of appellate court to make final determination in accordance with applicable principles of law.

3. Licenses ⚿15.1(8)

Where coke purchase order was placed by California corporation with California company, which in turn placed order with out-of-state company, which issued sales contract to California company, as buyer, with California corporation named as consignee, and coke was shipped directly to corporation under uniform straight bill of lading, the original of which, together with weight certificate and invoice, was sent to California company, which sent its own invoice, together with original bill of lading and weight certificate to corporation, and purchase order and California company's invoice provided for f. o. b. delivery at destination point, there was a "sale" and "resale", and resale was a "taxable sale" within Sales and Use Tax Law, and California company was not a "broker". Revenue and Taxation Code, § 6006.

See publication Words and Phrases, for other judicial constructions and definitions of "Broker", "Resale", "Sale" and "Taxable Sale".

4. Licenses 🔑15.1(8)

Where there was a sale of coke by out-of-state corporation to California company and resale by such company to buyer in California, fact that buyer was consignee of coke shipped by out-of-state corporation did not exonerate California company from liability for sales tax. Revenue and Taxation Code, § 6006.

5. Sales 🔑216

Where shipment was made f. o. b. at destination point, title to goods shipped did not pass to buyer until goods arrived at their destination.

6. Licenses 🔑29

Where title to goods sold did not pass until goods arrived at destination, transportation charges were part of "gross receipts" and subject to sales tax. Revenue and Taxation Code, § 6012.

See publication Words and Phrases, for other judicial constructions and definitions of "Gross Receipts".

7. Commerce 🔑63

Where there was an interstate sale of coke and intrastate resale, levy of sales tax upon resale was not unconstitutional as interfering with interstate commerce, though coke was consigned directly to ultimate buyer by interstate seller. Revenue and Taxation Code, § 6006.

8. Appeal and Error 🔑918(1)

Where appeal was presented on partial transcript, consisting of judgment roll and notices designated by rules on appeal, and including exhibits which comprised stipulation of facts, and pleadings included amendment to answer of board of equalization which declared that answer was filed pursuant to leave of court contained in memorandum directing findings filed in the matter, and no contention was made that amendment was filed without authority and no motion made to augment record to include transcript of such proceeding, Supreme Court would presume that the amendment was proper. Rules on Appeal, rule 5(d).

9. Pleading 🔑252(2)

An amendatory pleading supersedes the original pleading, which ceases to perform any function as a pleading.

10. Evidence 🔑208(6)

A superseded pleading is not admissible as direct evidence to establish a fact in issue.

11. Witnesses 🔑392(1)

A superseded pleading may be offered in evidence for purpose of impeachment of party who has testified in the action.

12. Witnesses 🔑392(1)

Pleadings in prior actions between the parties or in other actions which are pending may be considered either as evidence or for purpose of impeachment.

13. Evidence 🔑208(6)

In action to recover sales tax paid on amount which represented transportation charges for coke sold, superseded answer, which failed to deny plaintiffs' allegation that plaintiffs had acted as broker, not as seller, was not admissible to establish that plaintiffs had acted as broker. Revenue and Taxation Code, § 6006.

14. Appeal and Error 🔑837(10)

Where action was tried upon stipulation of facts consisting solely of documents, and superseded pleading of defendant was not offered in evidence, plaintiff, because of failure to timely offer superseded pleading as evidence, could not rely upon superseded pleading on appeal.

15. Pleading 🔑258(5)

In action to recover sales tax paid on amount which represented transportation charges for coke sold, where defendant inadvertently failed to deny allegation of complaint that plaintiff was a broker for buyer, not a seller, court properly permitted defendant to amend pleading to deny such allegation, though trial had been completed. Revenue and Taxation Code, § 6006.

16. Pleading 🔑229

An amendment contradicting admission made in original pleading may be allowed where it is clearly shown that earlier pleading was result of mistake or inadvertence.

17. Pleading 🔑229

A court should exercise great liberality in permitting amendments of pleadings at any stage of trial to adequately present all issues which are properly involved in the litigation.

18. Appeal and Error 🔑948

An abuse of discretion by trial judge in making procedural rulings will never be presumed, but must appear affirmatively from the record.

19. Appeal and Error 🔑907(1)

Where no transcript of proceedings relating to allowance of amendment of answer was included in record on appeal, and in absence of application to augment transcript, record would be presumed to include all matters material to appellate review of the judgment.

20. Pleading 🔑129(2)

In action to recover sales tax paid on amount which represented transportation charges for coke sold by out-of-state corporation on order of California company and consigned to California corporation, failure of answer to deny allegation in complaint that sale was made by out-of-state corporation and that California company was broker to purchasers in California did not admit that the taxable sales between California company and California corporation were made by someone other than California company. Revenue and Taxation Code, § 6006.

Edmund G. Brown, Atty. Gen., James E. Sabine and Irving H. Perluss, Asst. Attys. Gen., and Norman B. Peek, Dep. Atty. Gen., for appellant.

Anthony J. Kennedy and Carl Kuchman, Sacramento, for respondents.

EDMONDS, Justice.

H. Meyer and B. Meyer, doing business as H. L. E. Meyer, Jr. & Co., paid retail sales taxes on shipments of coke from an Illinois manufacturer to various consumers in California. In computing the taxes, the Meyers omitted from their calculations of "gross receipts"[1] the costs of transporting the coke. Based upon such costs, an assessment for additional taxes was levied by the State Board of Equalization and paid by the Meyers under protest. After exhausting their administrative remedies, they sued for the amount of the protested payment, and the appeal is from a judgment in their favor.

The transportation charges were stated separately from the purchase price, the complaint charged, and the transportation occurred after the sale of the coke to the purchaser. The Meyers also asserted that the assessment of a sales tax upon transportation charges is an unconstitutional burden upon interstate commerce. In paragraph VIII of the complaint it was alleged that "said sales were made by Pickands Mather & Co., Cleveland, Ohio, as agent for Interlake Iron Corporation, South Chicago, Illinois, and *plaintiffs as broker to purchasers in California.*" (Italics added.)

The Board's answer admitted or denied expressly some of the allegations of the complaint, but others, including those stated in paragraph VIII, were not mentioned.

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[1] Section 6012 of the Revenue and Taxation Code provides:

"'Gross receipts' mean the total amount of the sale * * * price * * * without any deduction on account of any of the following: * * *

"(c) The cost of transportation of the property prior to its sale to the purchaser. * * *

"'Gross receipts' do not include any of the following: * * *

"(g) Transportation charges separately stated, if the transportation occurs after the sale of the property is made to the purchaser."

By stipulation, the sole evidence presented at the trial consisted of the documents used in connection with a shipment of coke to General Metals Corporation, a California company. It was agreed that this shipment is representative of all of the purchases covered by the additional assessment. The documents show the following transaction:

Upon receiving from General Metals a purchase order for a quantity of coke, the Meyers executed with Pickands Mather & Co., agents for Interlake Iron Corporation, a coke sales contract naming Meyer & Co. as buyer, Pickands Mather, agents, as seller, and General Metals as consignee. The coke was shipped to General Metals under a uniform straight bill of lading, the original together with a weight certificate and Pickands Mather's invoice being sent to Meyer & Co. The invoice stated the quantity of the coke and the price, being "22.10 Per Ton F.O.B. Cars Oakland, California, Transportation Charges Collect & Allowed."

The Meyers then sent to General Metals their own invoice, attached to which was the original bill of lading and original weight certificate. This invoice was addressed to General Metals and recited as "Bought of H. L. E. Meyer Jr. & Co." the same quantity of coke at "23.10 per 2000# fob car Oakland, Calif. Transportation charges collected & allowed."

As conclusions of law from the stipulated facts, the trial court determined that in the transactions covered by the additional assessment, the Meyers acted as brokers and not as buyers or sellers, and there was no sale within the meaning of section 6006 of the Revenue and Taxation Code.[2] It was further concluded that such an additional assessment would be an unconstitutional burden upon interstate commerce. As "findings of fact" it was declared that the transportation occurred after the sale of the coke to the California consumers and that such charges were stated separately from the purchase price.

The Board contends that each of these conclusions is erroneous. It takes the position that the transaction was a sale of the coke to the Meyers and a resale by them to General Metals Corporation.

The "finding of fact" that the transportation charges, separately stated, were incurred after the sale of the coke is also challenged by the Board. No conclusion of law was drawn from it as to whether such charges are to be excluded from "gross receipts" as defined by section 6012 of the Revenue and Taxation Code. However, for the purpose of this appeal, such finding may be treated as a conclusion of law. Cf. Lenchner v. Chase, 98 Cal.App.2d 794, 802, 220 P.2d 921.

The Meyers take the position that title passed to General Metals Corporation when the coke was delivered to the carrier. The Board asserts that title passed to the Meyers at the time the coke was delivered to the consignee, and did not pass to General Metals until such delivery or a later time. It points out that the sale to Meyer & Co. was f. o. b. destination point and a similar arrangement existed between the Meyers and General Metals.

[1, 2] The sole evidence being the written documents without qualifying testimony, their legal effect is a question of law, and the interpretation given to them by the trial court is not binding upon appeal. In the absence of extrinsic evidence, "there is no issue of fact, and it is the duty of an appellate court to make the final determination in accordance with the applicable principles of law." In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, 830; Moore v. Wood, 26 Cal.2d 621, 629–630, 160 P.2d 772; Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 826–827, 167 P.2d 719, 164 A.L.R. 685; In re Estate of Fleming, 31 Cal.2d 514, 523, 190 P.2d 611.

By the contract between them, Pickands Mather agreed to sell and Meyer & Co. agreed to buy the coke. Meyer & Co. was described as "buyer" with Pickands Mather as "seller". Pickands Mather's invoice to the Meyers states charges for coke "sold to" Meyer & Co. Similarly, the invoice sent to General Metals states charges for coke

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2. "'Sale' means and includes:
"(a) Any transfer of title or possession * * * of tangible personal property for a consideration."

"bought of H. L. E. Meyer Jr. & Co." The bill of lading and weight certificate covering the shipment were sent to the Meyers, and there is a complete absence of any direct dealings between Pickands Mather and General Metals.

Rule 5 of section 1739 of the Civil Code provides: "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place * * * the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." Here the sales contract provided for consignment of the coke to General Metals Corporation, "Foot of 105th Avenue, Oakland, California."

[3] No contract between Meyer & Co. and General Metals Corporation was included in the stipulation of facts. However, the purchase order of General Metals and Meyer & Co.'s invoice both provide for f. o. b. delivery, Oakland being stated as the destination point. Under the principles discussed in connection with the sale between Pickands Mather and Meyer & Co., title did not pass to General Metals until after the delivery of the coke in Oakland. In Graybar Electric Co. v. Curry, 238 Ala. 116, 189 So. 186, the Supreme Court of Alabama in an almost identical transaction concluded that, in legal effect, it was a sale and resale. Affirmed 308 U.S. 513, 60 S.Ct. 139, 84 L.Ed. 437, rehearing denied 308 U.S. 638, 60 S.Ct. 259, 84 L.Ed. 530.

[4] The fact that General Metals was the consignee of the coke does not exonerate the Meyers from liability for the sales tax.

[5] A similar situation was shown in Standard Oil Co. v. Johnson, 24 Cal.2d 40, 147 P.2d 577, in which a sales tax was sought to be levied upon shipments of fuel oil to out-of-state destinations under standard bills of lading naming the buyer consignee, with freight charges prepaid by the shipper. The court held that there was no tax liability. "Whether or not delivery to a carrier constitutes delivery to the buyer depends upon the intention of the parties as ascertained from the contract and the other circumstances of the case, and ordinarily, unless a contrary intent appears, where the seller contracts to deliver goods at a given destination and he delivers them to a carrier consigned to the buyer with freight charges paid by the seller (f. o. b. point of destination), the delivery to the carrier does not constitute delivery to the buyer and title does not pass until the goods have arrived at their destination." 24 Cal.2d at pages 45–46, 147 P.2d at page 580.

[6] The Meyers seek to distinguish the Standard Oil case on the ground that there the freight charges were paid by the seller and included in the costs of the sale. In the present case, it is argued, the freight charges were paid by General Metals and allowed by the Meyers in their invoice to General Metals, and by Pickands Mather in their invoice to Meyer & Co., as a deduction from the sales price. Such a distinction is immaterial. The present situation is expressly included within the scope of the retail sales tax under Sales and Use Tax Ruling No. 58 (Title 18, California Administrative Code, § 2028) which provides that in an f. o. b. destination contract, no deduction may be taken for freight whether paid by the shipper or paid to the carrier by the purchaser and deducted from the sales invoice as a "freight allowance". In principle, there should be little distinction between the two situations, particularly where, as here, the transaction is handled as a charge to the buyer's open account.

[7] The trial court's conclusion that the levy of a sales tax upon the shipments included within the assessment would be an unconstitutional burden upon interstate commerce is based apparently upon the erroneous view as to the nature of the transactions which has been advanced by the respondents. However, it is not an interstate sale by Pickands Mather which is being taxed but an intrastate sale from Meyer & Co. to General Metals. Accordingly, the claim of unconstitutionality is without merit. Cf. Wiloil Corp. v. Pennsylvania, 294 U.S. 169, 175, 55 S.Ct. 358, 79 L.Ed. 838; Graybar Electric Co. v. Curry, supra, 189 So. at pages 189–190.

[8] The appeal is presented on a partial clerk's transcript consisting of the judgment roll and the notices designated by Rule 5(d) of the Rules on Appeal, and including the

exhibits which comprise the stipulation of facts. The pleadings include an amendment to the Board's answer which declares that it was filed "Pursuant to leave of court contained in the Memorandum Directing Findings filed in the above entitled matter on November 20, 1951." No contention is made by the Meyers that the amendment was filed without authority, and it must be presumed that the recital in the pleading is correct. Livermore v. Webb, 56 Cal. 489, 492; Dowling v. Comerford, 99 Cal. 204, 206, 33 P. 853; Riverside County v. Stockman, 124 Cal. 222, 223–224, 56 P. 1027; Segerstrom v. Scott, 16 Cal.App. 256, 260, 116 P. 690; Gaddis v. Grant, 39 Cal.App. 437, 439, 179 P. 410. In the Segerstrom case it was said: "The amended answer itself declares that the same was filed by leave of the court 'first had and obtained,' and there is nothing appearing on the judgment roll inconsistent with this statement of the amended answer. In the absence of an affirmative showing to the contrary, this declaration of the amended answer must be accepted as verity, and even if it contained no such declaration, and there was no proper affirmative showing that it was not true, this court would be compelled to indulge the presumption that the amended answer was duly filed, or filed with the trial court's permission." 16 Cal. App. at page 260, 116 P. at page 692. Thus, in absence of both a direct assertion that the pleading was unauthorized and a motion by the Meyers to augment the record to include a transcript of that proceeding, this court must presume that the amendment was proper.

The Meyers assert, however, that it "is established by the pleadings * * * that title passed from Interlake Iron Corporation * * * to the California Purchasers, with plaintiff serving as broker." They take the position that a fact once admitted remains an admission, regardless of whether a contrary amendment to the pleading is filed, with or without permission from the court.

[9] It is well established that an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading. Pfister v. Wade, 69 Cal. 133, 138, 10 P. 369; Kentfield v. Hayes, 57 Cal. 409, 411; Collins v. Scott, 100 Cal. 446, 453, 34 P. 1085; Darsie v. Darsie, 49 Cal.App.2d 491, 493, 122 P.2d 64; Viera v. Viera, 107 Cal.App.2d 179, 180, 236 P.2d 630. Accordingly, the only answer that may be considered as a pleading is the one modified by the Board's amendment. Cf. Bray v. Lowery, 163 Cal. 256, 260, 124 P. 1004.

[10–13] It is generally recognized, however, that a superseded pleading may be given some evidentiary effect, although the courts are not in accord as to the circumstances under which it may be considered. See IV Wigmore on Evidence (3d Ed.1940) 61, § 1067. By a long line of decisions, it is established in this state that such a pleading is not admissible as direct evidence to establish a fact in issue. Mecham v. McKay, 37 Cal. 154, 165; Ponce v. McElvy, 51 Cal. 222, 223; Morris v. Lachman, 68 Cal. 109, 112, 8 P. 799; Osment v. McElrath, 68 Cal. 466, 470, 9 P. 731; Wheeler v. West, 71 Cal. 126, 128, 11 P. 871; Stern v. Loewenthal, 77 Cal. 340, 343–344, 19 P. 579; Ralphs v. Hensler, 114 Cal. 196, 198–199, 45 P. 1062; Miles v. Woodward, 115 Cal. 308, 316, 46 P. 1076; Pollitz v. Wickersham, 150 Cal. 238, 248, 88 P. 911; Cornwell v. Mulcahy, 62 Cal.App. 658, 661, 217 P. 568; Gajanich v. Gregory, 116 Cal.App. 622, 629, 3 P.2d 389; Jackson v. Pacific Gas & Electric Co., 95 Cal.App.2d 204, 209, 212 P.2d 591.[3] The reason for this view is that too free a use of superseded pleadings so as to embarrass the amending party is in derogation of the policy of liberality in permitting amendments to pleadings. See Taft v. Fiske, 140 Mass. 250, 252, 5 N.E. 621, 622. However, where the party has testified in the action, a superseded pleading may be offered for the purpose of impeachment. Johnson v. Powers, 65 Cal. 179, 180, 3 P. 625; In re O'Connor's Estate, 118 Cal. 69, 71, 50 P. 4; Schuh v. R. H. Herron Co., 177 Cal. 13, 17, 169 P. 682; Williams v. Seiglitz, 186 Cal. 767, 774, 200 P. 635; Weissbaum v. Eibeshutz, 211 Cal. 170, 173, 294 P. 396; Kambourian v. Gray, 81 Cal.App.2d 783, 789, 185 P.2d 27; but see Caccamo v. Swanston, 94 Cal.App.2d 957, 969, 212 P.2d 246. And pleadings in prior actions or in others which are pending may be considered either as evidence or for the purpose of impeachment. Duff v. Duff, 71 Cal. 513, 522, 12 P. 570; Kamm v. Bank of California, 74 Cal. 191, 197, 15 P. 765; Coward v. Clanton, 79 Cal. 23, 28, 21 P. 359; Mellor v. Rideout, 83 Cal.App. 621, 626, 257 P. 173; In re Estate of McCarthy, 127 Cal.App. 80, 87, 15 P.2d 223; Tieman v. Red Top Cab Co., 117 Cal.App. 40, 45, 3 P.2d 381; Oceanview Memorial Park v. Caminetti, 59 Cal.App.2d 703, 711, 139 P.2d 674; Dolinar v. Pedone, 63 Cal.App.2d 169, 176, 146 P.2d 237; Jones v. Tierney-Sinclair, 71 Cal.App.2d 366, 373–374, 162 P.2d 669; McNeil v. Dow, 89 Cal. App.2d 370, 373, 200 P.2d 859.[4] Under these decisions, the board's original answer was not admissible to establish that the Meyers acted as broker in the transaction.

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[3] In Rhode v. Bartholomew, 94 Cal.App.2d 272, 210 P.2d 768, an amended complaint was filed containing allegations inconsistent with the original one. The court said: "The allegations of the original complaint which were stricken stand as admissions of the facts alleged. A party will not be permitted to disprove admissions in his pleadings." 94 Cal. App.2d at page 279, 210 P.2d at page 773. This statement is not supported by reasons or citation of authority, nor is the holding in Lowmiller v. Monroe, Lyon & Miller, Inc., 101 Cal.App. 147, 153, 281 P. 433, 282 P. 537. In Miller v. Lee, 66 Cal.App.2d 778, 785, 153 P.2d 190, 194, it was said that a superseded pleading may be admitted "as containing admissions * * * [and] for the purpose of impeaching" the opposing party's testimony. That the pleading may be considered for the latter purpose is

[14] But even in those jurisdictions which allow a superseded pleading to be admitted as direct evidence of a fact in issue, the board's original answer would not serve to support a judgment for the Meyers. As stated by Dean Wigmore in his work on evidence, "since the superseded pleading is offered, like any other statement of the party constituting quasi-admission, as an item in the general mass of evidence against the party, it must of course be put in evidence *at the proper time.* It therefore cannot be commented on in argument unless * * * it has been thus formally offered in due season." IV Wigmore on Evidence 68, § 1067. Here the superseded pleading was not offered in evidence; on the contrary, the action was tried upon a stipulation of facts consisting solely of documents evidencing a representative transaction. Any attempt now to rely upon the superseded pleading must be rejected because of the failure timely to offer it as evidence.

Although not stated specifically in their briefs, the Meyers apparently take the position that it was error for the trial judge to permit an amendment to the answer. They describe the amendment as "belated" and assert that an "attempt after trial to amend a pleading so as to deny what was admitted is completely ineffectual."

[15–17] Even if it may be assumed that the Meyers, who have not appealed from the judgment, properly may attack the trial court's ruling on the amendment, Cf. Ray v. Parker, 15 Cal.2d 275, 282, 101 P.2d 665; Salter v. Ulrich, 22 Cal.2d 263, 268, 138 P.2d 7, 146 A.L.R. 1344; Henigson v. Bank of America Nat. Trust & Savings Ass'n, 32 Cal.2d 240, 244, 195 P.2d 777; Mott v. Horstmann, 36 Cal.2d 388, 393, 224 P.2d 11, the record does not support their position. Although it has been stated that "a party will not be allowed to file an amendment contradicting an admission made in his original pleadings", Treager v. Friedman, 79 Cal.App.2d 151, 172, 179 P.2d 387, 400; Tognazzi v. Wilhelm, 6 Cal.2d 123, 127, 56 P.2d 1227; Rhode v. Bartholomew, 94 Cal.App.2d 272, 278, 210 P.2d 768, that rule is not without exception. Such an amendment may be allowed where it is clearly shown that the earlier pleading is the result of mistake or inadvertence. Tognazzi v. Wilhelm, supra, 6 Cal.2d at page

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established by the California cases. See infra.

[4] In Coward v. Clanton, supra, 79 Cal. 23, 21 P. 359, it was held error to reject an offer of the respondent's answer in another action, which the respondent claimed had been "superseded" by his pleadings in the action then before the court. Although the language used in the decision is broad, the holding is consistent with the authorities previously cited.

127, 56 P.2d at page 1229; Jackson v. Pacific Gas & Electric Co., supra, 95 Cal.App.2d at page 212, 212 P.2d at pages 595, 596; Seidell v. Anglo-California Trust Co., 55 Cal.App.2d 913, 923, 132 P.2d 12; LeCyr v. Dow, 30 Cal.App.2d 457, 462–463, 86 P.2d 900; Cox v. Rosenberg, 58 Cal.App. 181, 188, 208 P. 377. Nor is it error to allow the amendment after the trial had been completed. Feigin v. Kutchor, 105 Cal.App.2d 744, 748, 234 P.2d 264; Burrows v. Burrows, 18 Cal.App.2d 275, 279, 63 P.2d 1135. As stated in Seidell v. Anglo-California Trust Co., supra, where an amendment to an answer was allowed to include a denial inadvertently omitted from an earlier pleading, "It is a well-established rule which is founded on good reason and justice that a court should exercise great liberality in permitting amendments of pleadings at any and all stages of the trial to adequately present all issues which are properly involved in the litigation." 55 Cal.App.2d page 923, 132 P.2d at page 18.

Although the Meyers do not allege specifically that granting leave to file the amendment was an abuse of the trial judge's discretion, they argue that they were precluded from reopening the case to present additional evidence. Citing Federated Income Properties v. Hart, 84 Cal.App.2d 663, 191 P.2d 59; Crawford v. Senegram, 7 Cal.App.2d 449, 46 P.2d 173; and Eddy v. American Amusement Co., 21 Cal.App. 487, 132 P. 83. These cases approved denial of permission to reopen a cause for additional evidence when the evidence, because merely cumulative or corroborative, or lacking in conviction would not alter the result. The Meyers do not point to any evidence which could be produced to disprove or discredit the legal effects of the documents.

[18, 19] An abuse of discretion by the trial judge in making procedural rulings will never be presumed, but must appear affirmatively from the record. Berry v. Chaplin, 74 Cal.App.2d 669, 672, 169 P.2d 453. On the facts here shown it is clear that the Board's failure to deny the allegation in question was not intentional; otherwise there would have been no reason for it to file an answer, enter into a stipulation as to the facts, or go on trial, for the obligation to make refund would have been established by the pleadings. In any event, no transcript of the proceedings relating to the allowance of the amendment has been included in the record on appeal, and in the absence of an application to augment it, that record must be presumed to include all matters material to appellate review of the judgment. Rules on Appeal, rule 52; cf. In re Estate of Pierce, 32 Cal.2d 265, 274–275, 196 P.2d 1; People v. Crain, 102 Cal.App.2d 566, 582, 228 P.2d 307. On the record properly before this court, no abuse of discretion appears.

[20] There is no merit in the final contention by the Meyers, that the amended answer expressly admits that the taxable sales were made by someone other than they. The complaint alleged that "said sales were made by Pickands Mather & Co. * * * *and* plaintiffs as broker to purchasers in California." (Italics added.) It is clear from the complaint that the sales were by Pickands Mather "and plaintiffs". Very properly, the Board has never denied the original sales by Pickands Mather, but seeks to impose a tax upon the *resale* by the Meyers. It is the capacity in which the resale is made that is disputed, and the Meyers do not assert that the amendment is formally insufficient to place that fact in issue.

In summary, the amended pleadings placed in issue the legal capacity of the Meyers and the nature of the transactions for which a tax has been exacted. A determination of those issues requires a construction of legal documents, a question of law. Reasonably construed, the documents indicate a sale of coke to the Meyers with a resale by them to General Metals.

The judgment is reversed.

GIBSON, C. J., and TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent.

Perhaps the most striking and regrettable thing about the majority opinion is the all too apparent fact that in *favor of a reversal* it assumes that there was before the court evidence which is not in the record and which establishes mistake and inadvertence of such magnitude as to justify allowing, after the trial had concluded, the filing of an amendment denying a matter previously admitted, while at the same time such majority opinion assumes *against affirming the judgment* that there was nothing before the trial court—not even the earlier pleading containing the admission—which could support the trial court's findings and conclusions.

The principal issue in this case is primarily one of fact: Whether the plaintiffs in negotiating a sale and delivery of coke from a source outside California to a firm in California acted as brokers or as retailers. The defendant assessed plaintiffs upon the theory that they acquired title to the coke, sold it at retail, and are chargeable with "gross receipts" including the claimed retail price and the costs of transportation. There is no question raised by plaintiffs as to the propriety of a *use* tax on the coke, as such, payable by the consumer (and here collected from the consumer by plaintiffs and by them remitted to the State) but plaintiffs deny any liability, direct or secondary, for a *sales* tax including the transportation charges in its base. Upon conflicting evidence the trial court found in favor of plaintiffs. The majority opinion argues the weight of the evidence and the inferences to be drawn therefrom; it draws inferences in favor of reversing, rather than of affirming, the judgment and, in effect, makes findings of fact and conclusions of law contrary to those of the trial court. As is hereinafter shown with some particularity the evidence supports the trial court's determinations. Hence, the judgment should be affirmed.

Arguing for a reversal, the majority point out that plaintiffs are described as "buyer" in their contract with Pickands Mather and that plaintiffs' invoices to General Metals recite that coke was "bought of" plaintiffs. That evidence is accepted by the majority as conclusive but it is not conclusive. The courts do not regard the use in a document of descriptive terms such as "buy" and "sell," "buyer" and "seller," as conclusive evidence of the character of the transaction. For example, an owner's authorization of a broker "to sell" real estate does not authorize him to execute a contract of sale of the property (Duffy v. Hobson (1870), 40 Cal. 240, 244; Armstrong v. Lowe (1888), 76 Cal. 616, 18 P. 758; Holway v. Malloy (1945), 70 Cal. App.2d 317, 319–320, 160 P.2d 893); the agreement of a mortgagee that a mortgagor could "buy" the mortgaged property means that the latter can redeem it (Day v. Davis (1905), 101 Md. 259 [61 A. 576, 578]); "buying" a motion picture means licensing a theatre to show it (Loew's, Inc., v. Lieberman, D.C. (1948), 78 F.Supp. 201, 203).

In conflict with the evidence accepted by the majority, and supporting the trial court's findings and judgment, are the following facts:

The Conduct of Defendant in Respect to First Admitting and Later Purporting to Deny Certain Material Facts, and The Facts as Established by the Exhibits Attached to the Stipulation of Facts.

From the inception of the controversy the plaintiffs' position has been, and their complaint has alleged in substance, that they acted only as brokers and never had either title to or possession of the coke which was the subject of the sales. Specifically the complaint alleges: (Par. VIII.) that the sales were made "by Pickands Mather & Co., Cleveland, Ohio, as agent for Interlake Iron Corporation, South Chicago, Illinois, and plaintiffs as broker to purchasers in California." (Par. IX.) "That said transportation occurred after the sale of the coke to said purchasers." (Par. X.) "That said transportation charges were separately stated from the purchase price to said purchasers and from the gross receipts from said sales." (Par. XI.) "That said assessment is a burden upon interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution * * *."

In its original answer the defendant denied all the allegations of certain paragraphs (Nos. VII, IX, X, and XI) of the complaint and some of the allegations of one other paragraph (No. IV) of the complaint. Under well established laws of pleading the defendant, by failing to deny them, admitted all other averments of the complaint including all of those set forth in paragraphs numbered I, II, III, V, VI, and VIII. The admitted averments include the allegation that the sales in controversy "were made by Pickands Mather & Co., Cleveland, Ohio, as agent for Interlake Iron Corporation, South Chicago, Illinois, and plaintiffs as broker to purchasers in California."

The stipulation of facts contains no statement which challenges the truth of plaintiffs' averments in respect to the capacity in which they acted, or the identity of the purchasers or their geographic locations, or the truth of defendant's admissions of such averments.

The complaint was filed on April 11, 1951; the answer containing the denials and admissions was filed on April 26, 1951; the case was tried on September 7, 1951; on November 27, 1951 (about two and two-thirds months after the trial) according to a self-serving recital in a purported amendment to the answer, the court allowed (at least there was filed) an amendment to the answer in the following language: "Pursuant to leave of court contained in the Memorandum Directing Findings * * * defendant files its amendment to the answer herein as follows: * *

"IV.

"Admits the allegations contained in Paragraph VIII of said complaint, save and except that defendant denies * * * each and every allegation of said Paragraph VIII * * * commencing with the word 'plaintiffs' in line 4, page 3, of said complaint, and ending with the word 'California' in line 5, page 3, of said complaint."

In this connection it is to be noted, in the first place, that the record contains no authorization for the filing of such purported amendment. There is in the record no document purporting to be a Memorandum Directing Findings. There is no evidence of consent by plaintiffs that any amendment be filed. The Stipulation of Facts is dated August 29, 1951; at the trial on September 7, 1951, the stipulation was received in evidence as Plaintiffs' Exhibit 1. Such stipulation obviously and necessarily was drawn in view of and in the light of the issues as they were then framed by the pleadings. The pleadings at that time admitted that plaintiffs had acted only in the capacity of brokers. The author of the majority opinion in arguing for a reversal asserts that "[A]t the time of trial, by its answer, the board admitted conclusively that the Meyers acted as broker in the transaction and on that state of the pleadings it could not offer any evidence to dispute the fact. * * * However, * * * If the board's amendment properly was allowed, it no longer is conclusively bound to the judicial admission of the original answer."

Obviously, to plaintiffs, the vice of the matter is that at the time of trial there was no occasion for them to, and they could not, offer any evidence directed solely to the capacity in which they acted. Their allegation that they acted only as brokers stood admitted. If the trial court, months after the taking of evidence was closed, assumed to allow ex parte an amendment changing the issues in a manner materially prejudicial to plaintiffs, it erred egregiously, and an amendment so allowed should not be used as the crutch for a reversal.

The majority mention the general rule that "a party will not be allowed to file an amendment contradicting an admission made in his original pleadings" (citing Tognazzi v. Wilhelm (1936), 6 Cal.2d 123, 127, 56 P.2d 1227, and other cases) but assert that "Such an amendment may be allowed where it is clearly shown that the earlier pleading is the result of mistake or inadvertence." On this latter theory the majority hold that the trial judge was justified in allowing the amendment even though the record contains no evidence whatsoever tending to show mistake or inadvertence. This holding, to the end of a reversal, is declared in the face of the assertions in other parts of the opinion that "By stipulation, the sole evidence presented at the trial consisted of the documents used in connection with a shipment of coke to General Metals Corporation, a

California company" and that "The sole evidence being the written documents * * their legal effect is a question of law * * *. In the absence of extrinsic evidence, 'there is no issue of fact.'" One needs only to glance through the stipulation of facts to observe that neither it nor any of the exhibits attached to it, contains the faintest suggestion relative to inadvertence or mistake in filing the original answer.

As to the status of the pleadings and the evidence the plaintiffs' position is thus stated in the petition for a hearing in this court: "The trial was had upon a stipulation of facts formally entered into in writing in advance of trial. Respondents were bound by their stipulation. No leave exists to reopen it. *The stipulation was formed and entered into in the light of the issues framed by the pleadings. Those issues were solely the allegations of Paragraphs IX, X, and XI denied by the Answer, and had nothing to do with respondents' status as a broker, or otherwise.* Those issues were solely whether or not the transportation occurred after the sale of the coke with the transportation charges being separately stated; and whether or not the assessment of appellant upon the transaction burdened inter-state commerce." (Italics added.)

The majority opinion, in its efforts to answer the plaintiffs' claims, is replete with inconsistencies and unfair statements, all designed to the end of reversing—not affirming—the trial court. Thus, in an effort to justify the post trial amendment so that it may be given controlling effect over the findings of the trial court, the majority argue the propriety of the assumed ruling and the facts and the inferences to be drawn in support thereof as follows:

"An abuse of discretion by the trial judge in making procedural rulings will never be presumed, but must appear affirmatively from the record. [Citation.] [This statement is obviously unfair in that in truth it is the defendant, *not* the plaintiffs, who is appellant. The plaintiffs are satisfied with the judgment in their favor and with the necessarily presumed ruling in their favor as to the effect of the purported amendment.] On the facts here shown it is clear that the Board's failure to deny the allegation in question was not intentional; otherwise there would have been no reason for it to file an answer, enter into a stipulation as to the facts, or go on trial, for the obligation to make refund would have been established by the pleadings. [The foregoing statement is not accurate; it ignores the fact that the board does impose the tax (or responsibility for collecting it) on brokers who have possession of the goods sold and the contention of plaintiffs that, since they at no time had possession, the matter is governed by Title 18, Section 1969, California Administrative Code, applying tax responsibility only to brokers in possession.] In any event, no transcript of the proceedings relating to the allowance of the amendment has been included in the record on appeal, and in the absence of an application to augment it, that record must be presumed to include all matters material to appellate review of the judgment. [Citations.] On the record properly before this court, no abuse of discretion appears."

Obviously the foregoing argument, asserted by the majority for a reversal, on any fair application of the law boomerangs against them. If we do indulge the presumption that the record contains "all matters material to appellate review of the judgment" then we find nothing whatsoever either to support the purported amendment or to warrant reversing the judgment or any contention that the findings are not fully supported. According to the majority's exact language "The appeal is presented on a partial clerk's transcript consisting of the judgment roll and the notices designated by Rule 5(d) of the Rules on Appeal, and including the exhibits which comprise the stipulation of facts." Examination of the document entitled "Stipulation of Facts" discloses that it does not purport to declare *all* the facts or the *"sole"* facts material to the cause. The stipulation merely declares "It is hereby stipulated by and between plaintiffs and defendant that the following are facts for the purpose of this action * * *." Furthermore, indicating that other matters were received or considered in evidence, the stipulation bears on its face the endorsement "Pl Ex # 1 Meyer v. State Bd. of Equaliz. 9/7/51."

Although assuming in favor of a reversal, and of sustaining the allowance of the amendment to its pleading by defendant after the trial, that there was evidence not reported showing mistake and inadvertence, the majority straining to the same end, and against supporting the trial court's findings of fact, say "Here the superseded pleading was not offered in evidence. * * Any attempt now to rely upon the superseded pleading must be rejected because of the failure timely to offer it as evidence." The foregoing statement is made, it will be remembered, notwithstanding the fact that the purported amendment was filed more than two months after the taking of evidence had been concluded and in the face of the fact that this record, prepared as specified by defendant-appellant, contains no reporter's transcript and no certification that oral testimony or exhibits other than Plaintiffs' Exhibit 1 were not received. Certainly there is no showing that the original answer was not received. In truth, at the time of trial when the evidence was being received, it is undisputed that the only answer before the court was the original answer.

It is worthy of mention that the very argument advanced by the appellant (defendant) in its opening brief in opposing one element of plaintiffs' contentions supports them in another. It is there declared that "Meyer [plaintiffs] and General Metals [the consignee-purchaser-consumer] never entered into any express contract to sell. It would seem that there was merely an offer (purchase order) to buy a certain amount of coke * * *. The only way this offer could be accepted was by delivery of the coke to General Metals. Title to the coke could not as a matter of elemental contract law pass until delivery. * * * While perhaps Meyer might be able to show an implied contract to sell or an acceptance of the offer of General Metals by the purchase of the coke from Pickands and consignment to General Metals, nevertheless the fact that no express contract to sell was entered into by the parties indicates that they never intended title to pass until the coke was actually received." The foregoing statement tends strongly to support plaintiffs' position (and the trial court's finding) that they acted as brokers and never had title; nevertheless it was a proper one for the Attorney General to make because it tended to defeat the claim of plaintiffs that the tax was a burden on interstate commerce and, hence, not even collectible from the consumer.

Again, by way of drawing inferences against the judgment and in favor of a reversal, the majority ignore the fact that the tax law in question imposes a "use" tax as well as a sales tax. They assume, against the judgment, that the tax collected from the consumer and forwarded to the board by plaintiffs was a *sales* tax imposed on plaintiffs as sellers rather than a use tax collected by them as brokers from the consumer, and, having so assumed, they draw the inference that plaintiffs thereby admitted that they had made a retail sale.

But if the majority can draw inferences and indulge presumptions so could the trial judge. The trial judge presumed (as he was required to do by subdivisions 1, 33 and 20 of section 1963 of the Code of Civil Procedure, and such presumptions are evidence) that the plaintiffs were innocent of "crime or wrong," that "the law has been obeyed" and that "the ordinary course of business has been followed." Accordingly, the trial judge, from the fact that plaintiffs collected and remitted a use tax, in the proper amount on the coke sold if they acted as brokers, and giving effect to the mentioned presumptions, as well as the other evidence in the record, made findings in favor of plaintiffs. The findings of fact include the following:

"I

"That each of the allegations of paragraphs VIII, IX and X of the complaint are true.

"II

"That it is true the sales attributed to plaintiff upon which said additional assessment was based consisted in the amount of $85,547.87 thereof of transportation charges paid to railroad carrier by General Metals Corporation, Oakland, California, for freight upon carloads of Chicago Solvay Coke shipped by Interlake Iron Corporation from its Chicago Coke Oven Plant, South Chicago, Illinois, upon uniform straight bills of lading designating Interlake Iron Corporation as shipper and General Metals Corporation as consignee, all of which coke was delivered by railroad carrier under said bills of lading directly from said place of shipment to said consignee.

"III

"That it is true each of said shipments was made upon contracts of sale entered into at Chicago, Illinois; that it is true performance of said contracts required interstate shipment of coke from Illinois to California.

"IV

"That it is true plaintiffs at no time had either possession or title to any of said coke; that it is true plaintiffs at no time transferred either title or possession of said coke to the buyer thereof, General Metals Corporation.

"V

"That it is true plaintiffs acted in the capacity of a broker in bringing the seller and the buyer of said coke together; that it is true plaintiffs collected from the buyer of said coke and remitted to the agent of the seller of said coke the purchase price thereof exclusive of said transportation charges.

"VI

"That it is true plaintiffs did not collect from the buyer of said coke a use or sales tax measured by the amount of said transportation charges; that it is true plaintiffs did not pay to defendant a use or sales tax measured by the amount of said transportation charges."

It is at once obvious from the fact that the court found all of the allegations of paragraph VIII of the complaint to be true, that it either considered the amendment to be improperly before it or so unintelligible and uncertain as to raise no issue or that the evidence otherwise required a finding in favor of plaintiffs' allegation. In truth, it is the duty of this court to presume in favor of the judgment that the trial court found in favor of the plaintiffs on all three of those grounds. In any event, it is indisputable on this record that the trial court in the light of all the evidence, was convinced that the defendant's earlier pleading, admitting the truth of plaintiffs' allegations in paragraph VIII, is in fact true.

If we apply the purported denial to the allegations of paragraph VIII it is at once obvious that the portion denied contains no verb and that the purported denial is unintelligible and should not be construed as sufficient to raise any issue. It also must be presumed, in favor of sustaining the judgment, that the trial court construed the amendment as raising no issue in respect to the capacity in which the plaintiffs acted. But even if we assume that the purported denial does challenge plaintiffs' averments as to the capacity in which they acted, and as to the identity and geographic location of the purchasers, it is to be observed that the purported amendment expressly admits "That said sales [the sales on which the tax arose] were made by Pickands Mather & Co., Cleveland, Ohio, as agent for Interlake Iron Corporation, South Chicago, Illinois." If "said sales" (on which the tax was imposed) were made by "Pickands Mather & Co., Cleveland, Ohio," they obviously were not made by plaintiffs in California. It further appears from the documentary evidence, without any conflict, that the coke in question was shipped from Chicago upon uniform bills of lading designating Interlake Iron Corporation as shipper and General Metals Corporation as consignee, and was delivered by railroad carrier under the bills of lading directly from the place of shipment to the consignee. It is simply impossible, in view of the above recited facts, for plaintiffs ever to have had possession of the coke.

As to the findings of the trial court it is to be further remembered that defendant at least originally admitted all the allegations of paragraph VIII. The original answer is still in the record and for purposes of finding the facts still supports the findings which were made. (See Coward v. Clanton (1889), 79 Cal. 23, 26, 21 P. 359 [pleading in another action between same parties received as an admission although it had been superseded by amended pleading]; Lowmiller v. Monroe, Lyon & Miller, Inc. (1929), 101 Cal.App. 147, 152, 281 P. 433, 282 P. 537 [original answer, followed by amended answer, could be considered as "declaration against interest"]; Miller v. Lee (1944), 66 Cal.App.2d 778, 785, 153 P.2d 190; Rhode v. Bartholomew (1949), 94 Cal.App.2d 272, 279, 210 P.2d 768 ["The allegations of the original complaint which were stricken stand as admissions of the facts alleged"]; Caccamo v. Swanston (1949), 94 Cal.App.2d 957, 969, 212 P.2d 246.)[1]

It is also to be noted that defendant in its original answer denied "each and every allegation contained in Paragraphs IX, X and XI" of the complaint, but the exhibits attached to the stipulation of facts appear to establish beyond question the truth of plaintiffs' averments in paragraph X ("That said transportation charges were separately stated from the purchase price to said purchasers and from the gross receipts from said sales") and the falsity of defendant's denial thereof.

The exhibits and the pleadings establish beyond question that plaintiffs had their office in San Francisco, California; that the coke which was the subject of the sales was purchased by the General Metals Corporation of Oakland, California; that such coke was purchased through Pickands Mather & Co. of Cleveland, Ohio, as agent for Interlake Iron Corporation of South Chicago, Illinois; that the coke was ordered for delivery to and was shipped to the "General Metals Corporation Iron Plant at 701—105th Ave., Oakland 3, California"; that it was shipped on through bill of lading "From the Interlake Iron Corporation (Chicago Coke Oven Plant) * * * Consigned to General Metals Corp. Iron Plant * * * Oakland," and, consequently, that the purported denials of a portion of paragraph VIII in the amendment to the answer insofar as they deny that the sales were to purchasers in California are obviously false.

There is no evidence whatsoever that the plaintiffs ever had either actual possession or the right of possession of the involved coke or that any of the parties to the transactions ever intended that plaintiffs should take possession of or use the coke or act in any capacity in relation to it except to negotiate the sale and delivery thereof, through conventional business channels and by customary business methods, from the producer in Chicago through its Cleveland agent to the consumer in California.

It is, of course, a matter of common knowledge that brokers speak of making sales and of acting as sellers or buyers when they are acting as brokers for the accounts of others. Even where property is placed in the possession of a broker for sale and it is agreed that the compensation of the broker shall be a certain percentage of the selling price or a sum added to the net price to be paid the seller, the transaction does not necessarily at any time vest title in the broker. He does not become a retailer merely because he arranges a sale for an owner or negotiates a purchase for a buyer. And speaking of the transaction as a "sale" or a "purchase" made by the person acting as broker certainly does not change the status of the broker or alter the character of such transaction. (See generally, 9 Cal.Jur.2d 137, § 4.)

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[1] On the other hand, "It has been held that when an original pleading contained an admission against interest, the filing of an amended pleading superseded the original one and that the original pleading could not be used as evidence or be considered by the court." (Jackson v. Pacific Gas & Electric Co., (1949), 95 Cal. App.2d 204, 209, 212 P.2d 591.) Cases so holding are Mecham v. McKay, (1869), 37 Cal. 154, 165; Ponce v. McElvy, (1876), 51 Cal. 222; Osment v. McElrath, (1886), 68 Cal. 466, 470, 9 P. 731; Wheeler v. West, (1886), 71 Cal. 126, 128, 11 P. 871; Ralphs v. Hensler, (1896), 114 Cal. 196, 198–199, 45 P. 1062; Miles v. Woodward, (1896), 115 Cal. 308, 316, 46 P. 1076.) But those cases suggest no sound reason why an admission in a superseded pleading should not be evidence, like any other admission, if it is brought home to the party. Here defendant makes no point of the fact that the admission was in a pleading signed by the Attorney General rather than by defendant itself.

In view of the fact that the evidence amply establishes that there was no "sale" to or by the plaintiffs as defined by the Sales and Use Tax Law—no "transfer of title or possession" (Rev. & Tax.Code, § 6006, par. (a)) to or by them—the judgment should be affirmed upon this ground and it is unnecessary to discuss further findings of the trial court.

For the reasons stated the judgment should be affirmed.

SHENK and CARTER, JJ., concur.

Rehearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.

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42 Cal.2d 246

PEOPLE v. ASHLEY.

Cr. 5421.

Supreme Court of California.
In Bank.
Feb. 19, 1954.

Rehearing Denied March 17, 1954.

Defendant was convicted in the Superior Court, Los Angeles County, William B. Neeley, J., on four counts of grand theft, and he appealed. The Supreme Court, Traynor, J., held, inter alia, that the evidence sustained the conviction.

Affirmed.

Schauer and Carter, JJ., dissented in part.

Prior opinion, 251 P.2d 747.

1. Larceny ⇨14(1)

"Larceny by trick and device" is the appropriation of property, the possession of which was fraudulently acquired. Pen. Code, § 484.

See publication Words and Phrases, for other judicial constructions and definitions of "Larceny by Trick and Device".

2. False Pretenses ⇨1

Obtaining property by "false pretenses" is the fraudulent or deceitful acquisition of both title and possession. Pen. Code, §§ 484, 532.

See publication Words and Phrases, for other judicial constructions and definitions of "False Pretenses".

3. False Pretenses ⇨1
Larceny ⇨14(1)

The crime of larceny by trick and device and the crime of obtaining property by false pretenses have been consolidated by statute into single crime of theft, but their elements have not been changed by the consolidation. Pen.Code, §§ 484, 532.

4. False Pretenses ⇨1
Larceny ⇨14(1)

The purpose of statute consolidating crimes of larceny by trick and device, and of obtaining property by false pretenses, into single crime of theft was to remove technicalities that existed in pleading and proof of the consolidated crimes at common law. Pen.Code, §§ 484, 532, 951, 952.

5. Criminal Law ⇨881(1)

Juries need no longer be concerned with technical differences between several types of theft, in view of statute consolidating larcenous crimes into single crime of theft, but can return general verdict of guilty if they find that unlawful taking has been proved. Pen.Code, §§ 484, 532, 951, 952.

6. Criminal Law ⇨1172(1)

In prosecution for grand theft, wherein defendant contended that there had been no unlawful taking of any sort, defendant was not prejudiced by instruction relating to larceny by trick and device though evidence showed that type of theft, if any, was that of obtaining property by false pretenses. Pen.Code, §§ 484, 532, 951, 952.

7. False Pretenses ⇨4

To support conviction of theft for obtaining property by false pretenses, it must be shown that the defendant made a false pretense or representation with intent to defraud owner of his property, and that owner was in fact defrauded, but it is not necessary to prove that defendant benefitted personally from the fraudulent acquisition. Pen.Code, §§ 484, 532.

8. False Pretenses 🔑9

To support conviction of theft for obtaining property by false pretenses, the false pretense or representation must have materially influenced owner to part with his property, but false pretense need not have been the sole inducing cause. Pen.Code, §§ 484, 532.

9. False Pretenses 🔑49(3)

Where conviction for grand theft consisting of obtaining property by false pretenses rests primarily upon testimony of single witness that false pretenses were made, making of pretenses must be corroborated. Pen.Code, §§ 484, 532, 1110.

10. False Pretenses 🔑7(5)

A promise made without intention to perform is a misrepresentation of a state of mind, and thus a misrepresentation of existing fact, and is a "false pretense" within larceny chapter of Penal Code. Pen. Code, §§ 484, 532.

11. False Pretenses 🔑49(3)

Proof of non-performance alone is not sufficient to support conviction in criminal prosecution based on false promises. Pen. Code, §§ 484, 532.

12. Criminal Law 🔑561(1)

The state in criminal prosecution must prove its case beyond reasonable doubt.

13. False Pretenses 🔑5

In prosecution for obtaining property by false pretenses, it must be proved that any misrepresentations of facts alleged by the People were made knowingly and with intent to deceive. Pen.Code, §§ 484, 532.

14. False Pretenses 🔑5

Misrepresentation of facts, made innocently or inadvertently, cannot form basis for prosecution for obtaining property by false pretenses. Pen.Code, §§ 484, 532.

15. False Pretenses 🔑49(2), 52

Whether pretense upon which prosecution for obtaining property by false pretenses is based is a false promise or a misrepresentation of fact, defendant's intent must be proved in both instances by something more than mere proof of nonperformance or actual falsity, and defendant is entitled to have jury instructed to that effect. Pen.Code, §§ 484, 532.

16. Conspiracy 🔑30

Within statute denouncing conspiracy to obtain property by "false pretenses" or by "false promises", the first quoted phrase includes the latter. Pen.Code, §§ 182, 484, 532.

See publication Words and Phrases, for other judicial constructions and definitions of "False Promises".

17. False Pretenses 🔑7(5)

Fact that statute making it a crime to conspire to obtain property by false pretenses also makes it a crime to obtain property by false promises does not indicate that legislature did not regard false promises as "false pretenses" within larceny and false pretense statutes. Pen.Code, §§ 182, 484, 532.

18. Criminal Law 🔑741(1), 742(1)

In criminal prosecution, it was for jury to sift the true from the false, and to determine credibility of witness and weight to be given testimony of individual witness, even if such witness' testimony were inconsistent.

19. False Pretenses 🔑20

Where defendant allegedly obtained money by false pretenses in exchange for note, and thereafter, while persuading victim to exchange note for new note, placed gun upon desk, the crime of theft had already been committed at time of gun episode and such episode did not indicate that victim had not relied upon defendant's representation, and the offense was theft, not extortion. Pen.Code, §§ 484, 532.

20. False Pretenses 🔑49(1)

Evidence supported conviction for grand theft consisting of obtaining money by false pretenses. Pen.Code, §§ 484, 532.

21. Criminal Law 🔑1159(2)

It is the duty of court reviewing judgment of conviction for obtaining property by false pretenses to examine evidence to determine whether corroboration required has been proved. Pen.Code, §§ 484, 532, 1110.

22. False Pretenses 🔑51

The weight to be given corroborating evidence in prosecution for obtaining property by false pretenses is for the jury. Pen. Code, §§ 484, 532, 1110.

23. False Pretenses 🔑49(1)

In prosecution for obtaining money by false pretenses in that defendant had told victim that he owned designated property and that he needed money so as to erect theater thereon and that he would give victim first trust deed on other property, wherein defendant contended that money had constituted an unsecured loan, testimony that defendant had told witness that he owned such designated property and that witness had been sent to architect for plans of theater to be built thereon, and evidence showing that victim had been given second trust deed on property other than that as to which promise for first trust deed related, fully corroborated victim's testimony. Pen. Code, §§ 484, 532, 1110.

24. False Pretenses 🔑49(3)

In prosecution for obtaining money by false pretenses in that defendant had represented that he intended to purchase theater, testimony of various witnesses and opening of escrow for purchase of such theater clearly corroborated victim's testimony that defendant had promised to buy such theater. Pen.Code, §§ 484, 532, 1110.

25. False Pretenses 🔑49(1)

Fact that defendant has made the same or similar representation to one other than victim of crime of obtaining property by false pretenses, although made at different time and place, is a corroborating circumstance. Pen.Code, §§ 484, 532, 1110.

26. False Pretenses 🔑49(1)

In prosecution for having obtained money by false pretenses from two different women, where defendant in obtaining money in each instance had made similar representation, representation made to one woman could be used as corroborating evidence of representations made to other woman. Pen.Code, §§ 484, 532, 1110.

27. False Pretenses 🔑49(3)

In prosecution for grand theft by obtaining money by false pretenses, in absence of showing that certain person, who might be expected to support defendant's views, had knowledge that would have thrown light on whether representations had been made, defendant's failure to call such person as a witness could not be considered corroboration of state's evidence as to the representations. Pen.Code, §§ 484, 532, 1110.

28. Criminal Law 🔑317

Defendant's failure to take stand to deny or explain evidence presented against him in criminal prosecution, when it is in his power to do so, may be considered by jury as tending to indicate truth of such evidence, and as indicating that among inferences that may reasonably be drawn therefrom, those unfavorable to defendant are the more probable, but such failure to testify will not supply a lacuna in prosecution's proof.

29. Criminal Law 🔑317

In criminal cases, after prosecution has made prima facie case, failure of defendant to testify is not affirmative evidence of any fact, and any inference that can, in the circumstances, be justly drawn therefrom is persuasive rather than probative.

30. Criminal Law 🔑317

Where corroborative evidence of grand theft consisting of obtaining money by false pretenses was sufficient to allow case to go to jury, jury could then consider defendant's failure to deny or explain such evidence in determining weight it was to be given, but defendant's failure to testify, in itself, was not corroborative of such evidence. Pen.Code, §§ 484, 532, 1110.

31. Criminal Law 🔑959

Where daily transcript of trial was available, and three continuances of hearing on motion for new trial were granted at defendant's request, and defense counsel argued motion and stated at time of argument that he needed time to secure signatures to affidavits to support other parts of motion, and no details as to contents of affidavits were furnished, granting of further continuance was within discretion of trial court and granting of such continuance upon condition that there would be no further oral arguments, which defense counsel had indicated he would not make as to remaining portions of motion, was proper.

32. Criminal Law ⚷959

Where trial court misconceives or refuses to do its duty with reference to motion for new trial and denies reasonable opportunity for oral argument on the motion, new trial must be granted.

33. Criminal Law ⚷959

Where record showed that trial judge had carefully read and considered affidavits presented in support of motion for new trial and had called for originals of document mentioned in affidavits, which were in effect oral arguments presented in written form, movant was given fair and impartial hearing on the motion, though trial judge denied additional oral argument and remarked that the unnecessarily long affidavit tried his patience.

34. Criminal Law ⚷918(1)

Trial court did not abuse discretion in denying motion for new trial sought on ground that evidence had been withheld from jury.

35. Criminal Law ⚷662(8)

The right of confrontation of witnesses can be waived. Pen.Code, § 686.

36. Criminal Law ⚷698(1)

Where defendant did not object to introduction of exhibit, he could not thereafter successfully complain because he had not been permitted to cross-examine person whose name appeared thereon as to validity of her signature in attempt to impeach her testimony which was given at preliminary hearing and which was read at the trial because such person was not available to testify. Pen.Code, § 686.

37. Constitutional Law ⚷266

Even if confrontation of witnesses is guaranteed under due process clause of 14th Amendment to Federal Constitution, the substance of constitutional protection is preserved to defendant in advantage he has once had of seeing witness face to face and of subjecting him to ordeal of cross-examination, so that where defendant had opportunity to cross-examine witness at preliminary hearing, reading of such witness' testimony, given at preliminary hearing, at trial did not deprive defendant of right to confront witness. U.S.C.A.Const. Amend. 14; Pen.Code, § 686.

38. Criminal Law ⚷539(1)

Where transcript of testimony given at preliminary hearing was examined and inadmissible portions eliminated and trial court passed upon admissibility of controverted parts of such testimony before it was read to jury, fact that transcript contained testimony relating to charge other than one for which defendant was tried did not invalidate testimony given on preliminary examination. U.S.C.A.Const. Amend. 14; Pen.Code, § 686.

39. False Pretenses ⚷7(1)

Where proof in given case is sufficient to show existence of fraudulent intent or purpose on part of accused to obtain property from another by false or fraudulent representation, the making of the first false representations which moved or induced the person to whom they were made to part with his property does not immunize the defrauding person from punishment for subsequently obtaining from such person other property which was parted with under influence of fraudulent representation which was still operating upon mind of defrauded person at time he passed his property into hands of defrauding person. Pen.Code, §§ 484, 532.

40. Criminal Law ⚷29

Where victim, because of defendant's false representation, had given defendant money on two occasions, defendant was guilty of two offenses of grand theft, rather than one. Pen.Code, §§ 484, 532.

41. Criminal Law ⚷1202(1)

Prior conviction for conspiracy to use mails to defraud is a "prior conviction" within prior conviction statute. Pen.Code, §§ 969b, 3024(c).

See publication Words and Phrases, for other judicial constructions and definitions of "Prior Conviction".

42. Criminal Law ⚿1201

Fact that minimum term of sentence is increased by statute providing for enhancement of punishment for prior convictions does not render such statute unconstitutional. Pen.Code, §§ 969b, 3024(c).

43. Criminal Law ⚿1202(1)

Defendant, who had been convicted of conspiracy to use mails to defraud, was chargeable with prior felony conviction. Pen.Code, §§ 969b, 3024(c).

44. Criminal Law ⚿661

It is not only the right, but the duty, of a trial judge to so supervise and regulate the course of trial that truth shall be revealed insofar as it may be within established rules of evidence.

45. Criminal Law ⚿1166½(12), 1170½(5)

Record in prosecution for grand theft in obtaining money by false pretenses showed that trial judge had so conducted the trial as to fully safeguard defendant's rights and afforded no basis for defendant's contention that trial judge had deprived him of fair trial by limiting cross-examination, acting as prosecutor, or slyly hinting to prosecutor how to lead a witness. Pen. Code, §§ 484, 532.

46. Criminal Law ⚿730(1)

In prosecution for grand theft by obtaining money by false pretenses, district attorney's argument that victim was "robbed" was not misconduct, in view of fact that jury was aware that no charge to that effect was involved and that the quoted word was used in the colloquial, rather than the legal, sense, and defendant was not prejudiced thereby, in view of fact that jury was properly cautioned.

47. Criminal Law ⚿1023(10)

Verdicts of guilty were not appealable.

◆

George H. Ashley, in pro. per., and Benjamin D. Brown, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant was convicted of four counts of grand theft under section 484 of the Penal Code. He "appeals from the verdicts and judgments as to each count," and from the order denying his motion for a new trial.

The first two counts charged that defendant feloniously took $13,590 from Mrs. Maude Neal on June 19, 1948, and $4,470 from her on August 3, 1948. The remaining two counts charged that he feloniously took $3,000 from Mrs. Mattie Russ on November 19, 1948 and $4,200 from her on December 4, 1948.

Defendant was the "business manager" of "Life's Estate, Ltd.," a corporation chartered for the purpose of "introducing people." Although defendant did run, and had full authority to run the affairs of the corporation, its capital stock was owned by Mrs. Edith Wingrave, defendant's sister-in-law, and Mr. and Mrs. Leo Butts, defendant's son-in-law and daughter. Mrs. Wingrave and the Buttses were also the officers and directors of the corporation.

In the latter part of 1948 Mrs. Russ, then about seventy years of age, visited the offices of Life's Estate at 1537 North La Brea Avenue in Hollywood. She was introduced to defendant, who persuaded her to join the "Life's Estate Philosophical Society." On November 18, 1948, in response to a telegraphic invitation, she returned to the La Brea offices and was offered a position as matron and hostess at a salary of $100 a month with a rent-free apartment on the property. She accepted the offer. As defendant was driving Mrs. Russ to her home in Long Beach, he went by a lot on Sunset Boulevard on which stood two sheet-metal buildings. Defendant told her that "he owned that property and they also owned the La Brea property at 1537." As they drove on, defendant asked Mrs. Russ if she had any ready cash. When she told him that she had $3,000 he explained that he was building a theater on the Sunset property and needed money to proceed with the construction. He offered her interest at the rate of six percent and security in the form of a first mortgage or trust deed on the La Brea property. Mrs. Russ agreed to make the loan and to go with defendant to her bank the following morning. When they arrived at the bank, defendant refused to go in with Mrs. Russ. She entered alone and secured $3,000 in currency from a safe deposit box. Defendant then took her in his automobile to a bank in Westchester, a suburb of Los Angeles. On arrival at this bank she turned the money over to defendant in reliance on his representations that she would get a first mortgage on the La Brea property and that the money would be used in the construction of a theater on the Sunset Boulevard lot, which she believed he owned. Defendant gave her a receipt for the money, which stated that she was to receive a first trust deed on the La Brea property. The money was deposited to the account of Life's Estate at the Westchester Branch of the Security-First National Bank. The corporation's books show that on that day the cash account was subject to an overdraft of $4,151.93.

After this transaction was completed, defendant took Mrs. Russ to the offices of Life's Estate and later to dinner. At dinner he told her that he needed more money to complete the theater building and asked her to make an additional loan. She said that she had a note, secured by a trust deed and a chattel mortgage, worth $4,200 that she had acquired from the sale of the home in which she had previously lived. She agreed to transfer these documents to defendant. This loan and the previous one of $3,000 were to be consolidated, and he agreed to give her a first mortgage for the full amount against the La Brea property. On November 20, 1948 defendant drove Mrs. Russ once again to her bank, which held the documents and acted as her agent for the collection of installments. Again defendant insisted that she enter the bank alone. After securing the documents, Mrs. Russ suggested that they return to the bank and have the bank's employees prepare the transfer, but defendant insisted that the necessary papers could be prepared in his office. The transfer was made that day. It was stipulated that the note secured by the trust deed and chattel mortgage was sold by defendant and the proceeds of the sale deposited to the account of Life's Estate. They were used for the operating expenses of the corporation.

On November 25, 1948 Mrs. Russ moved into an apartment at the La Brea property and undertook the duties of matron and hostess. She testified that her many requests for the promised first mortgage were unavailing and that she returned to defendant her receipt for the $3,000, when he told her that she would receive the mortgage if she did so. After frequent quarrels over the failure to deliver the mortgage and over the tasks assigned her, Mrs. Russ left the employ of Life's Estate on March 31, 1949. At this time she received a note of the corporation secured by a second trust deed on unimproved property in Nichols Canyon owned by the corporation. Mrs. Russ testified that, although this security was worthless to her, she took it because defendant had told her to "take that or nothing."

It was proved that the Sunset property was owned by the corporation and that no theater was ever built thereon. The La Brea property was owned by Dr. Louis Phillips, who had leased the property to Mrs. Wingrave for a period of five years. He had not authorized any one to place an encumbrance on this property.

Mrs. Russ testified that she did not receive a note prior to the one accompanying the second deed of trust on the Nichols Canyon property. When shown a letter, signed by her, acknowledging receipt of the note and second deed of trust and agreeing to cancel and return a prior note, she refused to admit that the signature was hers, because of the reference to the prior note. It was stipulated that the signature was genuine.

Thereafter, Mrs. Russ made a number of smaller loans to defendant. She testified that the loans were made in response to appeals that they were necessary to maintain public utility service and the like. All of these loans were repaid. In payment of the loans of $3,000 and $4,200 Mrs.

Russ received four postdated checks drawn by Life's Estate. After it had become clear that these checks would not be paid, defendant drove Mrs. Russ to a high point in Nichols Canyon and asked for an extension of time. Mrs. Russ was frightened by their proximity to the edge of a steep embankment. Earl Farnsworth, an employee of Life's Estate, met them on the road as defendant had instructed him to do. He testified that he delivered an envelope to defendant, who opened it and gave Mrs. Russ the contents, a promissory note payable six months from date. She finally agreed to an extension but said that she wanted the time shortened. After pleading that he couldn't raise the money in any shorter length of time, defendant finally agreed to change the term of the note from six to four months. He made the change, gave the note to Mrs. Russ and told Farnsworth to return and pick up his remains. Mrs. Russ testified that she consented to the extension because she was frightened by defendant's driving so near to the edge of a sheer slope and by his threats to take his own life so that she might be paid from the proceeds of his life insurance policies.

In support of the two counts charging defendant with grand theft from Mrs. Maude Neal the People introduced the testimony of Mrs. Neal at the preliminary hearing, since she had returned to her North Carolina home and was not available at the time of the trial.

Mrs. Neal became interested in Life's Estate through a newspaper advertisement and Leo Butts called to sell her a membership. She later went to the La Brea office, where Mrs. Wingrave introduced her to defendant. After some preliminary conversation he asked her if she owned any property. She replied that she owned $17,500 worth of war bonds. He learned that the bonds were kept in a lock-box in Mrs. Neal's home in North Carolina. Defendant then introduced Mrs. Neal to Dr. Ulyses Meyer, a psychologist associated with Life's Estate. After some further talk, Mrs. Neal signed a note for $40 and became a member.

Between March and June of 1948, defendant and Mrs. Neal had a number of conversations regarding her money. She was offered a position as matron and hostess with an apartment rent-free if she would let him have all her money. He stated that he wanted her money to take up an option that he had to buy the El Patio Theater for $165,000, which he said was worth $500,000. Defendant said that he would give Mrs. Neal a note of Life's Estate and a trust deed on the theater building. She was unable to decide whether to make the loan, but offered to have her bonds mailed to her. Defendant insisted that this method was too slow and prevailed upon her to telephone her daughter to send the bonds by airmail. After receiving the bonds, Mrs. Neal went to the office of Life's Estate and talked to defendant. When she reintroduced the subject of security, he flew into a rage, saying that she talked as though she did not trust him. She called on Dr. Meyer, told him of the conversation, and then left with her bonds. At 10 o'clock that night, Leo Butts called for her and she went with him to the offices at La Brea, where she met defendant. He said that Dr. Meyer had told him that she was afraid to let them have her money, and that he was sorry if he had given her the impression that they were not honest. He again told her that she would have good security for her loan because the corporation was worth a half-million dollars and had $125,000 worth of equipment in the building alone. After some further conversation she agreed to make a loan.

On the next day, June 19, 1948, defendant called for Mrs. Neal and drove her to the Inglewood branch of the Security-First National Bank. Some of the bonds were not redeemable at a bank, so Mrs. Neal obtained only $13,590 at this time. She purchased a cashier's check for the amount, endorsed it and gave it to defendant, who endorsed it and deposited it to the account of Life's Estate on the same day. Mr. Nelson of the Security-First National Bank testified that he had a conversation with defendant and Mrs. Neal at this time, and they told him that the money was needed to make a down payment on the El Patio Theater. Mrs. Neal was then taken to a bank in Westchester, to which she moved her bank account at defendant's request. The remaining bonds were turned over to this bank to be forwarded to the Department of the Treasury for redemption. Mrs. Neal testified that she had never agreed to lend the money that was to be realized from these bonds.

Mrs. Neal received a note from Life's Estate for $13,500, but did not receive the deed of trust. An escrow for the purchase by Life's Estate of the El Patio Theater was opened at the Westchester Branch of the Security-First National Bank with a deposit of $5,000 on June 23, 1948. The escrow was closed and the deposit was withdrawn on July 13, 1948. Defendant's attorney testified that the purchase was cancelled by agreement, after defendant had unsuccessfully attempted to secure a reduction in the purchase price, because the motion picture projection booth would have to be remodelled to conform to fire regulations, and because of encroachments and easements that would be exempted from the policy of title insurance.

Mrs. Neal testified that, so far as she knew, the purchase had taken place when she went to the La Brea office of Life's Estate on August 3, 1948. There she found a check for $4,470, naming her as payee, which had been sent to the La Brea address in payment for the bonds transmitted through the Westchester bank. Mrs. Neal endorsed the check, but did not take possession of it. It was subsequently deposited to the account of Life's Estate. After waiting until the offices were empty, defendant said that he wished to speak to her in his office. He offered her a new note for $17,500, but she said that she did not want to give him the rest of her money because she might need it to buy a car or to make a down payment on a home. After she had refused an offer of a car as a token of appreciation, defendant took a gun from a drawer, placed it on the desk, and said, "Now look here, Mrs. Neal. I don't want no monkey business out of you. Do you understand that?" Frightened by defendant's demeanor and the presence of the gun, Mrs. Neal picked up the new note and returned the $13,500 note.

Some time after the events just related, defendant told Mrs. Neal that the theater building had been condemned and that the deal had fallen through. The record also discloses that Mrs. Neal consulted an attorney, but no action was taken. She had received only $649.49 in interest on her loans at the time of trial.

Witnesses for the defense presented a completely different version of the facts. Leo Butts testified that each of the women had voluntarily offered to make unsecured loans to the corporation. The offers were made to the corporation's officers, who accepted them. It was stipulated that Mrs. Butts would testify similarly. There was also testimony that Mrs. Russ must have known that the La Brea property was owned by Dr. Phillips, that Mrs. Neal had advised cancellation of the El Patio purchase in the early part of July and had refused an offer to return her money, and that she had been so eager to lend the proceeds from her bonds that she called Leo Butts to take her to the office at 9:30 p.m., whereupon he took her there, and the transaction was completed in his presence.

There is little evidence concerning the financial standing of the corporation or defendant's participation in the profits. The incorporation took place in December of 1947, when there were only 100 members. Capital stock of a face value of $25,000 was issued, but the corporation did not receive all of this amount in cash. Extensive improvements on the leased office property were paid for by the corporation. Leo Butts testified that the membership had increased to approximately 2,000 at the time the loans were made, but that only $40 was charged for each membership, an insufficient amount in view of the high expenses. Thereafter the fees were raised to a maximum of $100. Butts also testified that the corporation could not afford to pay defendant a salary, and that he donated "his business knowledge to our small organization." Butts admitted, however, that defendant drove a Lincoln automobile bought by the corporation, and had received and cashed numerous checks for expenses. The fact that the postdated checks given to Mrs. Russ in payment of one of her loans could not be met, and that the loans of both Mrs. Russ and Mrs. Neal were used to meet overdrafts or for the current operating expenses of the corporation, indicates that the corporation was having financial difficulties.

The case went to the jury with instructions relating to larceny by trick and device and obtaining property by false pretenses. The jurors were instructed that all would have to agree on the type of theft, if any, that was committed. Defendant contends that the evidence is insufficient to support a conviction of either type of theft, that the general verdict of guilty was unlawful, and that the trial court erred in denying his motion for a new trial on these grounds.

[1–6] Although the crimes of larceny by trick and device and obtaining property by false pretenses are much alike, they are aimed at different criminal acquisitive techniques. Larceny by trick and device is the appropriation of property, the possession of which was fraudulently acquired; obtaining property by false pretenses is the fraudulent or deceitful acquisition of both title and possession. See People v. Delbos, 146 Cal. 734, 736–737, 81 P. 131; 12 Cal.Jur., "False Pretenses", § 13. In this state, these two offenses, with other larcenous crimes, have been consolidated into the single crime of theft, Pen.Code, § 484, but their elements have not been changed thereby. People v. Myers, 206 Cal. 480, 483–485, 275 P. 219; People v. Jones, 36 Cal.2d 373, 376–377, 224 P.2d 353; People v. Selk, 46 Cal.App.2d 140, 147, 115 P.2d 607. The purpose of the consolidation was to remove the technicalities that existed in the pleading and proof of these crimes at common law. Indictments and informations charging the crime of "theft" can now simply allege an "unlawful taking." Pen.Code, §§ 951, 952. Juries need no longer be concerned with the technical differences between the several types of theft, and can return a general verdict of guilty if they find that an "unlawful taking" has been proved. People v. Plum, 88 Cal.App. 575, 581-582, 263 P. 862, 265 P. 322; People v. Myers, 206 Cal. 480, 484, 275 P. 219; People v. Fewkes, 214 Cal. 142, 149, 4 P.2d 538; see also, Peopel v. Palmer, 92 Cal.App. 323, 326, 268 P. 417. The elements of the several types of theft included within section 484 have not been changed, however, and a judgment of conviction of theft, based on a general verdict of guilty, can be sustained only if the evidence discloses the elements of one of the consolidated offenses. People v. Nor Woods, 37 Cal.2d 584, 586, 233 P.2d 897. In the present case, it is clear from the record that each of the prosecuting witnesses intended to pass both title and possession, and that the type of theft, if any, in each case, was that of obtaining property by false pretenses. Defendant was not prejudiced by the instruction to the jury relating to larceny by trick and device. Indeed, he requested instructions relating to both larceny by trick and device and obtaining property by false pretenses. Moreover, his defense was not based on distinctions between title and possession, but rather he contends that there was no unlawful taking of any sort.

[7–9] To support a conviction of theft for obtaining property by false pretenses, it must be shown that the defendant made a false pretense or representation with intent to defraud the owner of his property, and that the owner was in fact defrauded. It is unnecessary to prove that the defendant benefitted personally from the fraudulent acquisition. People v. Jones, 36 Cal.2d 373, 377, 381, 224 P.2d 353. The false pretense or representation must have materially influenced the owner to part with his property, but the false pretense need not be the sole inducing cause. People v. Chamberlain, 96 Cal.App.2d 178, 182, 214 P.2d 600 and cases there cited. If the conviction rests primarily on the testimony of a single witness that the false pretense was made, the making of the pretense must be corroborated. Pen.Code, § 1110.

The crime of obtaining property by false pretenses was unknown in the early common law, see Young v. The King, 3 T.R. 98, 102 [1789], and our statute, like those of most American states, is directly traceable to 30 Geo. II, ch. 24, section 1 (22 Statutes-at-Large 114 [1757]).[1] In an early Crown Case Reserved, Rex v. Goodhall, Russ. & Ry. 461 (1821), the defendant obtained a quantity of meat from a merchant by promising to pay at a future day. The jury found that the promise was made without intention to perform. The judges concluded, however, that the defendant's conviction was erroneous because the pretense "was merely a promise of future conduct, and common prudence and caution would have prevented any injury arising from it." Russ. & Ry. at 463. The correctness of this decision is questionable in light of the reasoning in an earlier decision of the King's Bench, Young v. The King, supra—not mentioned in Rex v. Goodhall. By stating that the "promise of future conduct" was such that "common prudence and caution" could prevent any injury arising therefrom, the new offense was confused with the old common law "cheat." The decision also seems contrary to the plain meaning of the statute,[2] and was so interpreted by two English writers on the law of crimes. Archbold, Pleading and Evidence in Criminal Cases 183 [3rd ed., 1828]; Roscoe, Digest of the Law of Evidence in Criminal Cases 418 [2d Amer. ed., 1840]. The opinion in Rex v. Goodhall, supra, was completely misinterpreted in the case of Commonwealth v. Drew, 1837, 19 Pick. 179, at page 185, 36 Mass. 179, at page 185, in which the Supreme Judical Court of Massachusetts declared by way of dictum, that under the statute "naked lies" could not be regarded as "false pretences." On the basis of these two questionable decisions, Wharton formulated the following generalization: "* * * the false pretense to be within the statute, must relate to a state of things averred to be at the time existing, and not to a state of things thereafter to exist." Wharton, American Criminal Law 542 [1st ed., 1846]. This generalization has been followed in the majority of American cases, almost all of which can be traced to reliance on Wharton or the two cases mentioned above. Chaplin v. United States, 81 U.S.App.D.C. 80, 157 F.2d 697, 168 A.L.R. 828; People v. Karp, 298 N.Y. 213, 81 N.E. 2d 817; Steely v. Commonwealth, 171 Ky. 58, 186 S.W. 883 [but see Commonwealth v. Murphy, 96 Ky. 28, 27 S.W. 859]; State v. Ferris, 171 Ind. 562, 564–565, 86 N.E. 993, 41 L.R.A., N.S., 173; People v. Orris, 52 Colo. 244, 121 P. 163, 41 L.R.A., N.S., 170; State v. Shevlin, 81 N.H. 121, 123 A. 233; State v. Knott, 124 N.C. 814, 32 S.E. 798; Spriggs v. Craig, 36 N.D. 160, 162, 161 N.W. 1007; State v. Howd, 55 Utah 527, 533, 188 P. 628; Frank v. State ex rel. Meiers, 244 Wis. 658, 12 N.W.2d 923; State v. Higgins, 148 Tenn. 609, 256 S.W. 875; Commonwealth v. Moore, 99 Pa. 570, 574; State v. Alick, 62 S.D. 220, 252 N.W. 644; Wharton on Criminal Law § 1439 (12th ed., 1932); Clark and Marshall on Crimes § 359 (5th ed., 1952); 168 A.L.R. 835–837. The rule has not been followed in all jurisdictions, however. Some courts have avoided the problems created by the rule by blurring the distinctions between larceny by trick and device and obtaining property by false pretenses. See generally, Pearce, "Theft by False Promises," 101 U. of Pa. L. Rev. 967; and see the development in the following New York cases: Loomis v. People, 67 N.Y. 322; Zink v. People, 77 N.Y. 114; People v. Miller, 169 N.Y. 339, 349–355, 62 N.E. 418; People v. Noblett, 244 N.Y. 355, 358–365, 155 N.E. 670; People v. Karp, 273 App.Div. 779, 75 N.Y.S.2d 169, 170. However, the decision in People v. Karp, supra, holding that "[i]rrespective of the promissory nature of the representation * * *, it was a larceny", was reversed on appeal. The old distinctions were re-established, and obtaining property by false promises was held not indictable. People v. Karp, 298 N.Y. 213, 81 N.E.2d 817. A development similar to that in the New York cases took place in a series of decisions of the Texas Court of Criminal Appeals. See Rundell v. State, 90 Tex.Cr.R. 410, 235 S.W. 908; Contreras v. State, 118 Tex Cr.R. 626, 39 S.W.2d 62; De Blanc v. State, 118 Tex.Cr. R. 628, 37 S.W.2d 1024; Whitehead v. State, 148 Tex. Cr.R. 190, 185 S.W.2d 725. Cf. People v. Weibert, 18 Cal.App.2d 457, 462–464, 64 P.2d 169. Other courts have repudiated the majority rule, State v. McMahon, 49 R.I. 107, 108, 140 A. 359; Commonwealth v. Morrison, 252 Mass. 116, 122, 147 N.E. 588; Commonwealth v. McKnight, 289 Mass. 530, 546–547, 195 N.E. 499; Commonwealth v. McHugh, 316 Mass. 15, 22, 54 N.E.2d 934; Commonwealth v. Green, 326 Mass. 344, 348, 94 N.E.2d 260 [see Pearce, supra, 101 U. of Pa. L. Rev. 967, 983–987]; State v. Singleton, 85 Ohio App. 245, 254–261, 87 N.E.2d 358; see also State v. Healy, 156 Ohio St. 229, 244, 102 N.E.2d 233,[3] and it has been changed by legislative enactment (Neb.Rev.Stat., ch. 28, § 28–1207 [Cum.Supp.1947]), by drawing an analogy to the civil action for deceit, State v. Nichols, 1 Houst.Cr.Cas., Del., 114, 115; State v. McMahon, supra, 49 R.I. 107, 108, 140 A. 359, and by construing a promise as a representation of the "ability" or "intent" of the promisor to perform, People v. Cohn, 358 Ill. 326, 333, 193 N.E. 150; Smith v. Fontana, D.C., 48 F.Supp. 55, 59–60; Hameyer v. State, 148 Neb. 798, 801, 29 N.W. 2d 458; The Queen v. Gordon, [1889] L.R. 23 Q.B.D. 354, 359, 360; Rex v. Bancroft, [1909] 3 Cr.App.Cas. 16, 21; Rex v. Alexandra, 26 Crim.App.R. 116 [1937]; cf. Rex v. Asterley, 7 Car. & P. 191, 173 Eng.Rep. 84 [1835].

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[1] This statute provided, in part, that "all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons of the same * * * shall be deemed offenders against law and the publick peace * * *." (Cf. Pen.Code, § 532.)

[2] The word "pretence" in the middle of the eighteeenth century was apparently a synonym for the words "purpose" and "intention," as well as the words (more common today) "pretext" or "misrepresentation." See 8 The Oxford English Dictionary 1326, col. 1 (1933). See also Webster's New International Dictionary 1959, col. 1 (2d ed., 1948).

[10–12] In California, the precedents are conflicting. Early decisions of the district courts of appeal follow the general rule as originally formulated by Wharton, People v. Green, 22 Cal.App. 45, 48, 133 P. 334; People v. Kahler, 26 Cal.App. 449, 452, 147 P. 228; People v. Reese, 136 Cal. App. 657, 663–665, 29 P.2d 450; People v. Downing, 14 Cal.App.2d 392, 395, 58 P.2d 657; People v. Jackson, 24 Cal.App.2d 182, 203–204, 74 P.2d 1085; People v. Daniels, 25 Cal.App.2d 64, 72, 76 P.2d 556; see also People v. Walker, 76 Cal.App. 192, 205, 244 P. 94; but see People v. Morphy, 100 Cal. 84, 34 P. 623, but more recently it has been held, and the holdings were approved by this court in People v. Jones, 36 Cal.2d 373, 377, 224 P.2d 353 that a promise made without intention to perform is a misrepresentation of a state of mind, and thus a misrepresentation of existing fact, and is a false pretense within the meaning of section 484 of the Penal Code. People v. Ames, 61 Cal.App.2d 522, 531–532, 143 P.2d 92; People v. Gordon, 71 Cal.App.2d 606, 624–625, 163 P.2d 110; People v. Chamberlain, 96 Cal.App.2d 178, 182, 214 P.2d 600; People v. Davis, 112 Cal.App. 2d 286, 289, 298–300, 246 P.2d 160; People v. Frankfort, 114 Cal.App.2d 680, 698, 251 P.2d 401; see also People v. Bratten, 137 Cal. App. 658, 31 P.2d 210; People v. Mason, 86 Cal.App.2d 445, 449–450, 195 P.2d 60; People v. Staver, 115 Cal.App.2d 711, 716–720, 252 P.2d 700; People v. Silva, 119 Cal.App. 2d 863, 260 P.2d 251. These decisions, like those following the majority rule, were made with little explanation of the reasons for the rule. The Court of Appeals for the District of Columbia has, however, advanced the following reasons in defense of the majority rule: "It is of course true that then, [at the time of the early English cases cited by Wharton, supra] as now, the intention to commit certain crimes was ascertained by looking backward from the act and finding that the accused intended to do what he did do. However, where, as here, the act complained of—namely, failure to repay money or use it as specified at the time of borrowing—is as consonant with ordinary commercial default as with criminal conduct, the danger of applying this technique to prove the crime is quite apparent. Business affairs would be materially incumbered by the ever present threat that a debtor might be subjected to criminal penalties if the prosecutor and jury were of the view that at the time of borrowing he was mentally a cheat. The risk of prosecuting one who is guilty of nothing more than a failure or inability to pay his debts is a very real consideration. * * *

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[3] The majority rule was also rejected by the United States Supreme Court in the construction of the federal mail fraud statute, 17 Stat. 283, 323. See Durland v. United States, 161 U.S. 306, 313, 16 S.Ct. 508, 40 L.Ed. 709. On the basis of the Durland case, the statute was amended to include specifically false promises. 35 Stat. 1130, 18 U.S.C. § 1341 (1946). See Pearce, supra, 101 U. of Pa.L.Rev. 967, 978–980.

"If we were to accept the government's position the way would be open for every victim of a bad bargain to resort to criminal proceedings to even the score with a judgment proof adversary. No doubt in the development of our criminal law the zeal with which the innocent are protected has provided a measure of shelter for the guilty. However, we do not think it wise to increase the possibility of conviction by broadening the accepted theory of the weight to be attached to the mental attitude of the accused." Chaplin v. United States, 81 U.S.App.D.C. 80, 157 F.2d 697, 698–699, 168 A.L.R. 828; but see the dissenting opinion of Edgerton, J., 157 F.2d at pages 699–701. We do not find this reasoning persuasive. In this state, and in the majority of American states as well as in England, false promises can provide the foundation of a civil action for deceit. Civ.Code, §§ 1572, subd. 4, 1710, subd. 4; see 125 A.L.R. 881–882. In such actions something more than nonperformance is required to prove the defendant's intent not to perform his promise. Newman v. Smith, 77 Cal. 22, 26, 18 P. 791; Berkey v. Halm, 101 Cal.App.2d 62, 69, 224 P.2d 885 and cases there cited; Rest.Torts, § 530, comment c. Nor is proof of nonperformance alone sufficient in criminal prosecutions based on false promises. See, for example, People v. Gordon, supra; People v. Chamberlain, supra; People v. Frankfort, supra; People v. Davis, supra; Rex v. Kritz, [1949] 1 K.B. 82. In such prosecutions the People must, as in all criminal prosecutions, prove their case beyond a reasonable doubt. Any danger, through the instigation of criminal proceedings by disgruntled creditors, to those who have blamelessly encountered "commercial defaults" must, therefore, be predicated upon the idea that trial juries are incapable of weighing the evidence and understanding the instruction that they must be convinced of the defendant's fraudulent intent beyond a reasonable doubt, or that appellate courts will be derelict in discharging their duty to ascertain that there is sufficient evidence to support a conviction.

[13–15] The problem of proving intent when the false pretense is a false promise is no more difficult than when the false pretense is a misrepresentation of existing fact, and the intent not to perform a promise is regularly proved in civil actions for deceit. Specific intent is also an essential element of many crimes.[4] Moreover, in cases of obtaining property by false pretenses, it must be proved that any misrepresentations of fact alleged by the People were made knowingly and with intent to deceive. If such misrepresentations are made innocently or inadvertently, they can no more form the basis for a prosecution for obtaining property by false pretenses than can an innocent breach of contract. Whether the pretense is a false promise or a misrepresentation of fact, the defendant's intent must be proved in both instances by something more than mere proof of nonperformance or actual falsity, Cf. U. S. v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148, and the defendant is entitled to have the jury instructed to that effect. "[T]he accepted theory of the weight to be attached to the mental attitude of the accused" is, therefore, not "broadened," but remains substantially the same. Cf. Chaplin v. United States, supra, 157 F.2d 697, 699.

[16, 17] It has been contended that the express provision for obtaining property by false promises in section 182 of the

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[4] For example, arson, burglary, larceny, malicious mischief, and robbery. In prosecutions for attempted crimes, or for assault with intent to commit murder, robbery, rape, etc., the specific intent must also be proved.

Penal Code[5] indicates that the Legislature did not regard such promises as "false pretenses" within the meaning of sections 484 and 532 of the Penal Code. In support of this contention it is urged that if the obtaining of property by false promises with fraudulent intent not to perform such promises were regarded as a crime it was unnecessary to provide for such a crime in subdivision 4 of section 182. It is then concluded that since words of a statute cannot be regarded as superfluous, if a reasonable construction thereof will give effect to them and preserve all other words of the statute, the provision in section 182 for obtaining property by false promises can be given effect only on the theory that the Legislature did not regard the obtaining of property by such promises as a crime and therefore as being covered by subdivision 1. This argument proves too much. Subdivisions 2 and 3 provide for conspiracies to commit acts that would amount to perjury or subornation of perjury. Subdivision 4 provides for conspiracies to cheat or defraud any person of his property "by any means which are in themselves criminal," and to obtain property by false pretenses, a crime defined in sections 484 and 532 of the Penal Code. Subdivision 5 likewise includes acts that are criminal. Since these provisions describe many acts that are undoubtedly crimes, and thus included in the broad language of subdivision 1, they were probably added by the Legislature out of an abundance of caution to insure the carrying out of its purpose to include all such acts within the scope of the section. The same abundance of caution is evidenced in subdivision 4 by the inclusion of both "false pretenses" and "false promises" even though the former includes the latter. The omission of a comma after "false pretenses" also indicates that the Legislature did not set the one off from the other as a separate class of crime but regarded them as the same kind of crime.

If false promises were not false pretenses, the legally sophisticated, without fear of punishment, could perpetrate on the unwary fraudulent schemes like that divulged by the record in this case and those described in People v. Davis, supra, People v. Gordon, supra, People v. Frankfort, supra, and People v. Chamberlain, supra. To hold that false promises are not false pretenses would sanction such schemes without any corresponding benefit to the public order. The inclusion of false promises within sections 484 and 532 of the Penal Code will not "materially encumber" business affairs.[6] "Ordinary commercial defaults" will not be the subject of criminal prosecution, for the essence of the offense of obtaining property by false pretenses is (as it has always been) the fraudulent intent of the defendant. This intent must be proved by the prosecution; a showing of nonperformance of a promise or falsity of a representation will not suffice.

[18] In contending that the evidence is insufficient to support his conviction for obtaining property by false pretenses, defendant argues that the testimony of Mrs.

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[5] Section 182: "If two or more persons conspire: 1. To commit any crime; 2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime; 3. Falsely to move or maintain any suit, action or proceeding; 4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises; 5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws. They are punishable as follows: * *."

[6] As shown above, to obtain property by false promises has been an indictable offense in a number of states for many years. Our attention has not been directed to a judgment of conviction in any of those states that is based on a transaction remotely resembling an "ordinary commercial default." One scholar reports that inquiries directed to the Better Business Bureaus in the leading cities of those states received entirely negative answers. The business community does not seem to be aware of an "ever present threat" of criminal prosecutions for breach of contract. See Pearce, supra, 101 U. of Pa.L.Rev. 967, 1007.

Russ and Mrs. Neal was not only contradicted, but was inconsistent and self-contradictory, and thus incapable of belief. It was for the jury to sift the true from the false, to determine the credibility of the witnesses and the weight to be given the testimony of an individual witness, even if it was inconsistent. People v. White, 115 Cal.App.2d 828, 831, 253 P.2d 108; People v. Frankfort, 114 Cal.App.2d 680, 700, 251 P.2d 401; People v. Moulton, 71 Cal.App.2d 195, 197, 162 P.2d 317. Defendant points to Mrs. Russ' testimony that defendant told her that "they" owned the La Brea property and to her later testimony that the loan was made directly to defendant, that the corporation "was not brought into this at all," and that she relied on his representation of ownership of the La Brea property. Mrs. Russ was seventy-one years of age at the time of trial. It is possible that the pronouns were interchanged owing to knowledge later acquired, a slip of the tongue, or to the fact that defendant and the corporation he represented had become one in her mind. These matters were for the jury to consider in determining the weight to be given the testimony; they do not, as is contended, destroy the testimony. The same holds true with respect to Mrs. Russ' refusal to admit her signature to the letter acknowledging receipt of the note and trust deed from the corporation. It is apparent that this letter, typewritten on the stationery of Life's Estate, was not written by her, and that she refused to acknowledge the letter or her signature because the letter stated that she had received a note prior to the one whose receipt was acknowledged in the letter. After trial, a note dated January 5, 1949 was produced, which is presumably the one to which reference was made. Even if there was such a note, it does not follow that Mrs. Russ received it or that she realized what the contents of the letter were when she signed it. Even if she received the note and returned it as indicated in the letter, and thereafter forgot or concealed this fact, the matter is not material to the main issue and goes merely to credibility.

[19] In the case of Mrs. Neal, defendant contends that the gun episode completely negates reliance on the representations, and that her testimony was so contradictory as to be inherently improbable. Mrs. Neal testified that she had never agreed to lend the $4,470 that was to be realized on the bonds not redeemable at a bank. This testimony reflects a strong inability to make up her mind. Mrs. Neal took all her bonds to the bank in the first instance; thereafter she allowed the proceeds of the bonds not then cashed to be sent to her at the La Brea address; and finally she endorsed the check but did not take possession of it. The jury could reasonably conclude that she intended to make a loan of the money represented by the check at that time, in reliance upon the representations previously made. Thereafter, the gun episode occurred. It accomplished no more than an exchange of promissory notes, giving an outward appearance of regularity to the transaction. Defendant's contention that if any crime were proved in connection with his transactions with Mrs. Neal, it was extortion and not theft, must therefore be rejected. Defendant did not forcibly take Mrs. Neal's money in the gun episode. He had already acquired it, and the crime of theft had already been committed.

[20] The evidence justified the implied finding that the money had been acquired with felonious intent. The jury could reasonably conclude that defendant was the true head of this organization, and had deliberately set out to acquire the life savings of his victims, one a woman nearing seventy and the other a woman of little education and rural background, and both with little or no business experience. The women were won over by flattering offers of positions in the organization and false promises of security for their loans, and thereafter held in line by importunate and then menacing supplications. The lure of an ambitious theater project was held before the eyes of each, a project that was never realized. The evidence was sufficient to sustain the implied finding that defendant never intended to acquire or build such a theater, and, indeed, the financial situation revealed by the evidence made the acquisition or building of such a theater illusory. The money acquired was needed and used

for the running expenses of the corporation within a short time of its receipt.

[21, 22] Defendant also contends that the necessary proof of "corroborating circumstances" is lacking. It is the duty of the reviewing court to examine the evidence to determine whether the corroboration required by the statute has been proved; the weight to be given such evidence is for the jury.

[23, 24] The testimony of Mrs. Russ was fully corroborated. The witness Farnsworth testified that defendant had told him that the Sunset property belonged to defendant, and that Farnsworth had been sent to an architect for plans of a theater to be built thereon. It was also shown that Mrs. Russ was given a second trust deed on the Nichols Canyon property. Mrs. Russ testified that she had been promised a first mortgage on the La Brea property; the defense maintained throughout that the loan was to be unsecured. The giving of the trust deed was indicative of a prior promise to give security. The testimony of various witnesses and the opening of the escrow clearly corroborate Mrs. Neal's testimony about defendant's promises to buy the El Patio theater.

[25, 26] In addition, the fact that a defendant has made the same or a similar representation to another, although at a different time and place, is a corroborating circumstance. People v. Jones, 36 Cal.2d 373, 379, 224 P.2d 353; People v. Chait, 69 Cal.App.2d 503, 516, 159 P.2d 445; People v. McCabe, 60 Cal.App.2d 492, 497, 141 P.2d 54; People v. La France, 28 Cal.App.2d 152, 156, 82 P.2d 465; People v. Fisher, 116 Cal.App. 243, 246, 2 P.2d 564; People v. Whiteside, 58 Cal.App. 33, 41, 208 P. 132. In the present case, essentially similar representations were made to each of the women. There is not only the similarity in express representations, but in basic approach, offers of employment, and repeated supplications. They may therefore corroborate each other. People v. Jones, supra.

[27] The attorney general contends that additional corroboration may be found in the fact that defendant did not call Mrs. Wingrave, the president of the corporation, as a witness. As the record does not disclose that Mrs. Wingrave had any knowledge that would have thrown light on whether the representations had or had not been made, the failure to call her as a witness can have no bearing on this issue.

[28–30] It is also contended that defendant's failure to testify is corroborative. A defendant's failure to take the stand "to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." People v. Adamson, 27 Cal.2d 478, 489, 165 P.2d 3, 9. But the failure to testify will not supply a lacuna in the prosecution's proof. People v. Zoffel, 35 Cal.App.2d 215, 221, 95 P.2d 160; People v. Adamson, 27 Cal.2d 478, 489–490, 165 P.2d 3; People v. Sawaya, 46 Cal.App.2d 466, 471, 115 P.2d 1001; People v. Cox, 102 Cal.App.2d 285, 287, 227 P.2d 290. The rule is analogous to that in civil cases where the failure to produce evidence on the part of the defendant may not be considered until a prima facie case has been made by the plaintiff. Girvetz v. Boys' Market, Inc., 91 Cal.App.2d 827, 830, 206 P.2d 6; Breland v. Traylor Engineering, etc., Co., 52 Cal.App.2d 415, 425–426, 126 P.2d 455. In criminal cases, after the prosecution has made a prima facie case, the failure of the defendant to testify is not affirmative evidence of any fact, and any inference that can, in the circumstances, be justly drawn therefrom is persuasive rather than probative, lending weight to the evidence presented by the prosecution. In the present case the corroborative evidence adduced by the state was sufficient to allow the case to go to the jury, which could then consider defendant's failure to deny or explain that evidence in determining the weight it was to be given.

[31] Defendant contends that he was denied a fair hearing on his motion for a new trial and that the trial court abused its discretion in failing to grant a new trial on the ground of newly discovered evidence.

Despite the fact that a daily transcript of the trial was available, three continuances of the hearing on the motion for new trial were granted at the request of defendant's counsel. The hearing was then set for July 20th upon the definite understanding that the motion was to be heard and decided then. On that day counsel argued the motion at length and announced that other parts of the motion were in the process of preparation by defendant who needed time to secure signatures to affidavits. No details as to the contents of the affidavits were furnished, nor did defendant's counsel state that defendant wished to argue. Counsel indicated that he would not argue the remaining part of the motion. A continuance was granted upon the condition that there would be no further oral argument. Neither the state nor the defense objected to this ruling. It was not until several more continuances had been granted, owing to the late filing of affidavits and the need to prepare counter-affidavits, that the motion was submitted and decided. It was within the discretion of the trial court to refuse any continuance on July 20th. People v. Winthrop, 118 Cal. 85, 92, 50 P. 390; People v. Mayes, 78 Cal.App.2d 282, 291–292, 177 P.2d 590. The granting of a continuance upon the conditions and under the circumstances indicated, was proper.

When defendant's affidavit was filed, the trial judge commented upon the fact that documents were set forth three and four times therein, that it contained irrelevant statements, and that it was repetitious and argumentative. He commented that such an unnecessarily long (78 pages) affidavit tried not only the patience of the trial court, but that if it should go before an appellate court, "it would try their patience to the extent that it well deserves that saying of seeing how far it will fly up the stairs when you throw it."

[32, 33] Defendant contends that the attitude of the trial court, as reflected by the denial of additional oral argument and its remarks, denied a fair and impartial hearing on the motion for new trial. If the trial court misconceives or refuses to do its duty with reference to a motion for a new trial and denies reasonable opportunity for oral argument, a new trial must be granted. People v. Sarazzawski, 27 Cal.2d 7, 15, 17–18, 161 P.2d 934. The record shows, however, that despite his remarks, the trial judge carefully read and considered the affidavits presented and called for the originals of the documents mentioned therein. The affidavits filed by defendant were in effect the oral argument presented in written form. It is clear that a fair and impartial hearing on the motion was had.

The newly discovered evidence consisted of documents allegedly withheld and suppressed by the district attorney and of affidavits relating to testimony that would show that Mrs. Neal had committed perjury. The documents were allegedly among the files of the corporation seized by the district attorney and not returned until such time that they could not be found and presented during the trial. This charge is a serious one. If true, it tends to show a deliberate attempt to convict on perjured testimony with full knowledge of its falsity. The facts, however, refute the charge.

An affidavit of a Miss Bartholomew, and an affidavit of defendant, averred that full access to the files of Life's Estate had not been given; that Mr. McClure, an investigator in the district attorney's office, had refused full access to the files. The truth of the averments therein was denied by counteraffidavits of the assistant district attorney and of Mr. McClure. An unverified affidavit of Miss Bartholomew told of threats to her made by the assistant district attorney relating to her foregoing affidavit.

[34] There was more, however, than the mere denial of the charges and the implications therein. The only document that was material and that would almost certainly have produced a different result had it been authentic was one that purported to be the receipt that Mrs. Russ testified had been given her by defendant and later returned to him. This document, which bears the signature of Mrs. Russ, is singularly complete; it states that an agreement had been reached between Mrs. Russ and the board

of directors of Life's Estate, that the loan was to be unsecured, that the loan was to be used for "the purpose of paying on bills and other general expenses of Life's Estate, Ltd., and or at it's sole option, for maintaining and or improving the leased property at 1537 N. La Brea, which is leased from a Dr. Phillips, and or the property owned by the corporation at 7051 Sunset Boulevard, upon which an office and ballroom are now being constructed," and that Mrs. Russ was making the loan strictly upon her own investigation and reliance on the future possibilities of the business. The document contradicts every incriminating item of Mrs. Russ' testimony. Mr. Clark the signature was that of Mrs. Russ and that in his opinion it was a carbon impression of an original signature in pencil. In an affidavit, Mrs. Russ averred that she had never seen the document, that she had signed for a package of chocolates sent by a person who did not enclose a card or make himself known. The manager of the apartment house in which Mrs. Russ lived stated in an affidavit that a messenger had come to deliver the package, but refused to accept the manager's signature for it. It thus appears that the document had not been in the files held by the district attorney, but was manufactured, and that the signature thereon was procured by stratagem. Another such document, purporting to be the agreement of Mrs. Neal to the cancellation of the escrow and mentioning that her loan was unsecured, was filed with the appellate court almost a year after the files had been returned. That part of the document where Mrs. Neal's signature might have been, was torn off. The other matter presented as newly discovered evidence was cumulative, denied by counteraffidavits, and came from unreliable sources. The court did not abuse its discretion in denying the motion for a new trial.

Mrs. Neal's testimony at the preliminary hearing was read at the trial. Mrs. Neal was in North Carolina at the time of trial, and was unable to come to this state. Section 686 of the Penal Code provides that a defendant has the right to be confronted with the witnesses against him in the presence of the court but that the deposition of a witness may be read if he is dead, insane, or cannot be found within the state, and if the charge has been examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant who has himself or through counsel cross-examined or had the opportunity to cross-examine.

[35, 36] At the preliminary hearing, a cashier's check for $13,590 payable to Mrs. Neal and endorsed by her was introduced in evidence, along with a bank deposit slip of the same date showing a deposit of the same amount to the account of Life's Estate. Mrs. Neal testified that she had endorsed this check to defendant and had given it to him. At the trial, the People introduced a second cashier's check of the same date and amount, payable to Life's Estate and endorsed for deposit by defendant. It appears that Mrs. Neal endorsed the first cashier's check back to the bank which then issued the second cashier's check payable to Life's Estate. Defendant contends that he was denied the opportunity to cross-examine Mrs. Neal about the validity of her signature on the second cashier's check and to impeach her testimony at the preliminary hearing. This contention is without merit. The right of confrontation can be waived, People v. Wallin, 34 Cal.2d 777, 781, 215 P.2d 1, and defendant did not object to the introduction of the second cashier's check. Furthermore, the error in Mrs. Neal's testimony about the first cashier's check is apparent on the face of the second check. The issue was thus presented to the jury, and the trial court did not err in admitting the second cashier's check in evidence.

[37] Defendant contends that the reading of Mrs. Neal's testimony at the trial deprived him of the right of confrontation in violation of the United States Constitution. Even if this right is guaranteed under the due process clause of the Fourteenth Amendment to the United States Constitution as contended by defendant, see Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674, there is no merit in the contention. "The substance of the constitutional protection is preserved to the

prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." Mattox v. United States, 156 U.S. 237, 244, 15 S.Ct. 337, 340, 39 L.Ed. 409. Defendant had that advantage at the preliminary hearing.

[38] Although a count of criminal conspiracy was also involved at the preliminary hearing, that fact does not invalidate Mrs. Neal's testimony. Counsel examined the transcript and eliminated testimony that was inadmissible at the trial. The admissibility of controverted parts of the testimony was passed upon by the trial court before it was read to the jury.

[39, 40] The claim of error is predicated upon the denial of a motion to have the prosecution elect between the two counts charging defendant with grand theft from Mrs. Neal, and between the two counts charging him with grand theft from Mrs. Russ. It is contended that only one theft was committed as to each of the prosecuting witnesses. "Where the proof in a given case is sufficient to show the existence of a fraudulent intent or purpose on the part of an accused to obtain property from another by false or fraudulent representations, the making of the first false representations which moved or induced the person to whom they were made to part with his property does not immune the defrauding person from punishment for subsequently obtaining from said person other property which was parted with under the influence of the fraudulent representation, which was still operating upon the mind of the defrauded person at the time he passed his property into the hands of said designing person." People v. Rabe, 202 Cal. 409, 413, 261 P. 303, 305. This rule has been consistently followed in this state. People v. Scott, 112 Cal.App.2d 350, 351, 246 P.2d 122; People v. Howes, 99 Cal.App.2d 808, 818, 222 P.2d 969; People v. Miles, 37 Cal. App.2d 373, 378–379, 99 P.2d 551; People v. Ellison, 26 Cal.App.2d 496, 498–499, 79 P.2d 732.

[41–43] Defendant contends that he could not be charged with a prior felony conviction. He admitted conviction of conspiracy, a felony, and the serving of a term therefor in a federal penitentiary. For the first time on appeal, it is revealed that the crime was a conspiracy to use the mails to defraud, and it is contended that such a conviction is not a prior conviction within our statutes. It is. Penal Code, §§ 969b, 3024(c). The fact that the minimum term of sentence is thereby increased does not render the law unconstitutional. People v. Dutton, 9 Cal.2d 505, 507, 71 P.2d 218; People v. Dunlop, 102 Cal.App.2d 314, 316–317, 227 P.2d 281; 25 Am.Jur., Habitual Criminals, §§ 3–8.

[44, 45] Defendant contends that the trial judge deprived him of a fair trial by limiting cross-examination, acting as prosecutor, slyly hinting to the prosecutor how to lead a witness. We find no basis in the record for these conclusions. "It is not only the right but the duty of a trial judge to so supervise and regulate the course of a trial that the truth shall be revealed insofar as it may be, within the established rules of evidence." People v. Mendez, 193 Cal. 39, 46, 223 P. 65, 68; People v. Martinez, 38 Cal.2d 556, 564, 241 P.2d 224. That duty was performed and the trial judge so conducted the trial as to fully safeguard defendant's rights.

[46] Finally, defendant contends that the district attorney was guilty of misconduct in his argument to the jury, particularly when he said that Mrs. Russ was "robbed" of the security of her second trust deed at a later time. The jury was aware that no charge to that effect was involved, and that the word was used in the colloquial rather than the legal sense. The jury was properly cautioned.

[47] The purported appeals from the verdicts are dismissed as nonappealable. The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the judgment solely on the ground that the evidence establishes, with ample corroboration, the making by the defendant of false representations as to existing facts. On that evidence the convictions should be sustained pursuant to long accepted theories of law.

It is unnecessary on the record to make of this rather simple case a vehicle for the revolutionary holding, contrary to the weight of authority in this state and elsewhere, that a promise to pay or perform at a future date, if unfulfilled, can become the basis for a criminal prosecution on the theory that it was a promise made without a present intention to perform it and that, therefore, whatever of value was received for the promise was property procured by a false representation. Accordingly, I dissent from all that portion of the opinion which discusses and pronounces upon the theories which in my view are extraneous to the proper disposition of any issue actually before us.

The majority opinion strikes down a rule of law, relating to the character and competence of proof of crime, which has been almost universally respected for two hundred years—and the reasoning which has been advanced for the innovation is that creditors, grand jurors, and prosecutors must not be expected to institute any criminal charges against innocent people, and that even if they do the intelligence of trial jurors and the wisdom of appellate judges can be depended upon to right the wrong, hence the time honored rule may be scrapped. The unreality of this reasoning and the wisdom of the old rule become obvious on reflection.

In a prosecution for obtaining property by the making of a false promise, knowingly and with intent to deceive, the matter to be proved, as to its criminality, is purely subjective. It is not, like the specific intent in such a crime as burglary, a mere element of the crime; it is, in any significant sense, all of the crime. The proof will necessarily be of objective acts, entirely legal in themselves, from which inferences as to the ultimate illegal subjective fact will be drawn. But, whereas in burglary the proof of the subjective element is normally as strong and reliable as the proof of any objective element, in this type of activity the proof of such vital element can almost never be reliable; it must inevitably (in the absence of confession or something tantamount thereto) depend on inferences drawn by creditors, prosecutors, jurors, and judges from facts and circumstances which by reason of their nature cannot possibly exclude innocence with any certainty, and which can point to guilt only when construed and interpreted by the creditor, prosecutor or trier of fact adversely to the person charged. Such inferences as proof of the alleged crime have long been recognized as so unreliable that they have been excluded from the category of acceptable proof.

As a basis for overturning the rule that proof of the mere making of a promise to perform in the future and of subsequent failure to perform is not proof of a false pretense, the majority opinion first purportedly adheres to the rule by stating that "proof of nonperformance alone [is not] sufficient in criminal prosecutions based on false promises," then argues that "Any danger, through the instigation of criminal proceedings by disgruntled creditors, to those who have blamelessly encountered 'commercial defaults' must, therefore, be predicated upon the idea that trial juries are incapable of weighing the evidence and understanding the instruction that they must be convinced of the defendant's fraudulent intent beyond a reasonable doubt, or that appellate courts will be derelict in discharging their duty to ascertain that there is sufficient evidence to support a conviction." This doctrine, if universally applied, would eliminate all rules governing the quality and sufficiency of proof. The credence to be placed in the testimony of accomplices, or other complaining witnesses, would be left entirely to the sagacity of jurors and the presumed omniscience of appellate judges. I am unwilling to accept as a premise the scholastic redaction of the majority that rules of proof may be set aside because appellate judges will always know when a jury has been misled and the proof is not sufficient. The most important function which courts have to perform in respect to criminal law is not to make easier the conviction of alleged miscreants; it is the protection of the innocent against false conviction. The highest duty which this court has to perform in the cause of justice is to protect the individual person against the power of the state; the most grievous injury it can do to the people is to assist in building a super-state by countenancing encroachments on the rights of individuals and whittling away at the rules which protect them.

The suggestion in the majority opinion that it is inconceivable "that trial juries are incapable of weighing the evidence [impliedly, with omniscient accuracy however inconclusive it be] and understanding the instruction that they must be convinced of the defendant's fraudulent intent beyond a reasonable doubt, or that appellate courts will be derelict [less than omniscient] in discharging their duty" affords no substantial basis for striking down a rule of proof. The opinion naively continues: "If * * * misrepresentations are made innocently or inadvertently, they can no more form the basis for a prosecution for obtaining property by false pretenses than can an innocent breach of contract" !

The tragic part of the above quoted philosophy is that the very declaration of it as a rule of law makes it false in fact. It becomes false in fact because when published as a rule of law it cuts the heart out of a pertinent safeguard which the accumulated wisdom of at least two centuries has found to be necessary to prevent the conviction of the innocent who have met with commercial misfortune.

With the rule that the majority opinion now enunciates, no man, no matter how innocent his intention, can sign a promise to pay in the future, or to perform an act at a future date, without subjecting himself to the risk that at some later date others, in the light of differing perspectives, philosophies and subsequent events, may conclude that, after all, the accused *should* have known that at the future date he could not perform as he promised—and if he, as a "reasonable" man from the point of view of the creditor, district attorney and a grand or trial jury—*should* have known, then, it may be inferred, he did know. And if it can be inferred that he knew, then this court and other appellate courts will be bound to affirm a conviction.

A trial by jury, under circumstances easily to be foreseen, would offer but hazardous protection in such a case. I have faith—great faith—in our jury system as now constituted. But I have developed that faith through seeing it operate under wise and time-tested regulations and limitations as to the essential characteristics of proof which do not unrealistically assume that any human—whether a district attorney or a grand juror or a trial juror or a judge or justice of a court—is beyond error.

The far reaching and revolutionary ruling of the majority opinion made under the circumstances shown, indicates to me not so much a desire to enforce law as a fervor to declare new law; the criticized ruling is not necessary to an affirmance in this case. Defendant here did more than merely make a promise, with or without a present intention to perform, to pay his victims in the future and fail to perform that promise. There is evidence from which it could be found that Mrs. Russ was induced to deliver property to defendant through reliance in a material degree on his knowingly false representations that he owned the La Brea property, on which he would give her a first mortgage,[1] whereas the property was in fact owned by Dr.

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[1] Defendant was accused in two separate counts of feloniously taking $3,000 in money from Mrs. Russ on or about November 19, 1948, and of feloniously taking $4,200 in money from her on or about December 4, 1948.

The People's evidence as to these counts shows the following: On November 18, 1948, defendant told Mrs. Russ that he owned the Sunset and the La Brea property, asked her if she had any cash, and when she replied that she had $3,000 stated that he would give her a first mortgage on the La Brea property if she would lend him the money. Later on the 18th defendant asked Mrs. Russ if she had any real or personal property and she told him that she had a first trust deed and a chattel mortgage.

On November 19 defendant drove Mrs.

Phillips, who had leased it to an officer and stockholder of Life's Estate and had not authorized its encumbrance. There is evidence from which it could be found that a material element in the inducement of Mrs. Neal to deliver property to defendant was his knowingly false representation that she would have good security for her loan because Life's Estate was worth half a million dollars,[2] whereas it was in fact in financial difficulty. These false representations as to existing matters of fact would support the conviction. It has been consistently held in this state that even though there is but one misrepresentation there are separate offenses of theft through false pretenses if property is obtained on separate occasions, because the crime is not complete until defendant obtains possession of the property.[3]

Russ to the bank and, induced by and in reliance on the misrepresentations, she delivered $3,000 in cash to him.

Defendant thereafter repeated his misrepresentations as to the La Brea property and his inquiries as to whether Mrs. Russ owned any other property, and stated that in exchange for the first trust deed she could have a first mortgage on the La Brea property. Either "four or five days" after the cash transaction, or on November 20, defendant again drove Mrs. Russ to the bank and she obtained and turned over to him the trust deed and chattel mortgage. Defendant told her he would "cash" these evidences of indebtedness.

Shortly thereafter Mrs. Russ sold her trailer for $1,580 and turned this sum over to defendant, again in reliance on his representations as to the La Brea property.

About January 15, 1949, defendant sold the trust deed to a broker for $3,000.

[2] Defendant was accused in two separate counts of feloniously taking from Mrs. Neal $13,590 on or about June 19, 1948, and $4,470 on or about August 3, 1948.

The People's evidence as to these counts shows the following: In March, 1948, defendant met Mrs. Neal and asked her whether she had any property. She told him that she had $17,500 in "war bonds." He learned by further questioning that the bonds were in North Carolina, discussed with her the making of a loan, and induced her to have the bonds sent to her.

After Mrs. Neal obtained possession of the bonds she inquired as to security and defendant replied that the security would be "good," that Life's Estate was worth half a million dollars, that there was $125,000 worth of equipment in the La Brea building alone, and "a lot of other property." On June 19, 1948, the day after defendant made the last mentioned representations, he drove Mrs. Neal to a bank where she cashed $13,590 of the bonds and endorsed and delivered to defendant the check for that amount which she received from the bank.

At defendant's instructions the remaining bonds, which could not be cashed directly by a bank, were mailed for cashing with directions that the check therefor be mailed to defendant. Defendant thereafter received a check dated August 2 payable to Mrs. Neal for $4,470. She endorsed this check on August 3 and defendant cashed it on August 4.

[3] The situation here is substantially similar to that in People v. Rabe (1927), 202 Cal. 409, 417, 261 P. 303, relied on by the majority. There defendant was charged in three counts with obtaining from one person by false pretenses $1,250 on August 2, $4,000 on August 5, and a deed to real property of the value of $11,000 on August 15. Each sum was in payment for stock in a corporation which defendant said would be, but which was not, thereafter incorporated. The false representations were that certain assets had been acquired for and certain persons had agreed to act as officers of the proposed company. Defendant contended that one crime had been split into three parts. It was held, "[202 Cal. page 413, 261 P. page 305]. Where the proof in a given case is sufficient to show the existence of a fraudulent intent or purpose on the part of an accused to obtain property from another by false or fraudulent representations, the making of the first false representations which moved or induced the person to whom they were made to part with his property does not immune the defrauding person from punishment for subsequently obtaining from said person other property which was parted with under the influence of the fraudulent representations which were still operating upon the mind of the defrauded person at the time he passed his property into the hands of said designing person. * * * [202 Cal. page 414, 261 P. page 305] [T]he crime is accomplished when an accused receives into his possession property which he had planned to fraudu-

Evidence Constituting Corroboration.

The requirement of section 1110 of the Penal Code that the false pretenses, if proved by the testimony of only one witness, be corroborated is met by evidence of similar pretenses made to another. (People v. Whiteside (1922), 58 Cal.App. 33, 41, 208 P. 132; People v. Munson (1931), 115 Cal.App. 694, 697, 2 P.2d 227; People v. McCabe (1943), 60 Cal.App.2d 492, 497, 141 P.2d 54.)

Here the representations of existing facts made to each of the victims, Mrs. Russ and Mrs. Neal, were similar; they were misrepresentations as to the existing ownership of property by defendant or Life's Estate which would constitute security for any loan they might make. The similarity of defendant's scheme in each case is shown also by the representations as to the use to which any loan would be put. Even though the representations as to things to be done in the future are not sufficient in themselves to support a conviction, they constitute a part of the fraudulent scheme and their similarities furnish additional corroboration. The employe of the bank who arranged for the cashing of Mrs. Neal's bonds testified that when defendant and Mrs. Neal came to the bank they stated that the proceeds of the bonds were to be used in a real estate transaction involving a theatre. Also one Farnsworth, an employe of Life's Estate who was not a victim, testified that defendant told him that defendant owned the Sunset property.

Generally corroborative is the following evidence: Farnsworth testified that after Mrs. Russ had delivered her property to defendant she asked him for repayment at a time sooner than defendant was willing to agree to; that defendant, as well as Mrs. Russ, appeared to be excited; and that defendant said, "it will ruin me, and how am I going to raise the money." An investigator for the district attorney testified that he went to defendant's home and the offices of Life's Estate on April 17, 1950, and told defendant's wife and officers and employes of Life's Estate that he had a warrant for defendant's arrest; that on this occasion and on two other occasions when the investigator returned they did not disclose defendant's whereabouts; that after defendant was finally apprehended in Long Beach in August, 1950, he said that he had gone east in an attempt to raise funds, that he had known for some time that a warrant for his arrest had been issued, and that he had not yet surrendered because he wished to straighten out his affairs. Mrs. Shepard, a woman not shown to be a victim, testified that on April 15, 1950, she had a telephone conversation in which defendant told her that he was going out of the city for a few days to raise some money, that he would arrange that her money be returned, and that "I can't talk any longer * * * I am being watched."

The testimonies of Mrs. Russ and Mrs. Neal as to the circumstances under which they turned over their properties to defendant and as to subsequent circumstances are in some respects confused, but the jury may well have concluded that this confusion, rather than casting doubt on the essential portions of their testimonies as to the false representations, indicated an aspect of their characters which made defendant select them as victims.

On the subject of the nature of the representation necessary to constitute the crime (whether a "false promise" is a mis-

lently gain. So in the instant case, while a general intent to defraud may have been formed in the mind of the accused at the time of or before he completed the first offense, the other crimes charged were completed as separate and distinct offenses on the days that he unlawfully took possession of the property described in the several counts of the indictment."

The theory in false pretenses cases is somewhat similar to that in embezzlement cases where each act of fraudulent appropriation of a portion of property with which defendant is entrusted is a separate crime (People v. Stanford (1940), 16 Cal.2d 247, 251, 105 P.2d 969) rather than that in larceny cases where the taking of property on different occasions and even from different owners pursuant to a general plan is treated as a single offense (People v. Dillon (1934), 1 Cal.App.2d 224, 229, 36 P.2d 416).

representation of past or existing fact), the jury were instructed as follows:

> "To constitute the crime of theft by obtaining money by false pretense, the false pretense used must be a fraudulent representation of an existing or past fact * * *
>
> "A mere expression of opinion or a statement concerning the future is not such a fraudulent representation * * *
>
> "You are instructed that if you find that the statements made by the defendant were true when made, that a subsequent change in conditions, which made it impossible to carry out the statements as made would not make them a false representation * * *
>
> "[A] promise is the expression of the present intent and is a fact. Therefore if a promise is unconditionally made and is made without intention of performance, it is a fraud. The secret intention of a contracting party not to perform a promised act which induces contractees to execute their agreement is an essential feature of his representation. Whether a promise made to effect a transaction by subverting the will and judgment of a promisee, was dishonest, is a matter for the jury to determine from all of the evidence in the case."

The last quoted instruction is in accord with certain dicta in People v. Gordon (1945), 71 Cal.App.2d 606, 624, 163 P.2d 110 [actually the false pretense upon which the conviction depended was not a mere promise; it was a misrepresentation as to the character and value of land and the stage of its development for oil production[4]], and People v. Mason (1948), 86 Cal.App.2d 445, 449, 195 P.2d 60 [here, likewise, the false pretense depended not on a mere promise; it was a misrepresentation as to existing facts pertinent to the value of oil stock, the drilling project of the company, its financial status, and the purpose of the defendant in letting the victim "get in because she was a friend of Enders"], cited by this court in People v. Jones (1950), 36 Cal.2d 373, 377, 224 P.2d 353, for the proposition (also interjected by way of dictum and entirely unnecessary to the decision) that "a promise, if unconditional and made without present intention of performance, will constitute actionable fraud." In the Jones case the actual misrepresentations are stated by the court as follows: "It appears from the testimony * * * that defendant induced their [the complaining witnesses'] advancements of money upon the following representations: That the business was 'a gold mine,' was 'making nothing but money,' and 'there wasn't a chance of losing'; that the equipment of the firm 'was all paid for'; and that more money was needed to secure new equipment." All of such representations obviously related to alleged existing facts, and were false. There are similar wholly unnecessary expressions in People v. Ames (1943), 61 Cal.App.2d 522, 531–532, 143 P.2d 92 [the actual holding was that "Because a false statement of a present fact is coupled with a false promise of a future act, it does not overcome the effect of the false pretense concerning the present fact"], and People v. Chamberlain (1950), 96 Cal.App.2d 178, 182, 214 P.2d 600 [a positive statement as to ownership of a horse]. All the cases cited in this connection are, of course, out of line with the traditional view that proof of a false promise does not establish the crime. They do not attempt to explain or disapprove, but simply ignore, those many other California cases which hold in considered opinions that a false promise is not a false pretense upon which a conviction of theft can be based.

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[4] The true ground of the holding of the District Court of Appeal and the peculiar sense in which it used the word "promises" is evident from the following expression (page 624 of 71 Cal.App.2d, page 123 of 163 P.2d): "The 'assurances' and 'guarantees' of immediate profitable sales or leases for the vendees were of the nature of promises. If a promise is unconditional and is made without intention of performance it is actionable fraud * * * If the jury determined that defendants knew or had good reason to believe that the acres they were selling were outside of the productive limits of an oil field or that they had no belief that the land sold was underlain with oil in commercial quantities * * * then they were warranted in finding that defendants had committed theft by false pretense."

The Weight of Authority.

The traditional view that the representation must be of a present or past fact, and that a mere promise to perform an act in the future will not support a conviction, is expressed in the following cases: People v. Wasservogle (1888), 77 Cal. 173, 174, 19 P. 270; People v. Green (1913), 22 Cal. App. 45, 48, 51, 133 P. 334 [conviction reversed because defendant's statements which induced victim to part with property were promises, not misrepresentations of fact]; People v. Kahler (1915), 26 Cal. App. 449, 452, 147 P. 228 [same]; In re James (1920), 47 Cal.App. 205, 206, 190 P. 466; People v. Mace (1925), 71 Cal.App. 10, 21, 234 P. 841; People v. Walker (1926), 76 Cal.App. 192, 205, 244 P. 94; People v. Moore (1927), 82 Cal.App. 739, 746, 256 P. 266; People v. White (1927), 85 Cal.App. 241, 250, 259 P. 76; People v. Cale (1930), 106 Cal.App.Supp. 777, 780, 288 P. 430 [conviction reversed because representations were in form of promises]; People v. Robinson (1930), 107 Cal.App. 211, 221, 290 P. 470; People v. Reese (1934), 136 Cal.App. 657, 663, 29 P.2d 450 [conviction reversed because representations were as to future use to be made of money]; People v. Downing (1936), 14 Cal.App.2d 392, 395, 58 P.2d 657; People v. Jackson (1937), 24 Cal.App.2d 182, 204, 74 P.2d 1085 [conviction reversed because representations related only to the future]; People v. Daniels (1938), 25 Cal.App.2d 64, 71, 76 P.2d 556; see also People v. Cravens (1947), 79 Cal.App.2d 658, 664, 180 P.2d 453 [conceding that representation must be of present or past fact; unnecessary to rely on theory that making a promise without intent to perform is a false representation of a present fact, the promisor's state of mind].

According to an annotation in 168 A.L.R. 833, 835, "The rule is well established in most jurisdictions that the criminal offense of obtaining money or other valuable thing by false pretense is not predicable upon the present intention of the defendant not to comply with his promises or statements as to his future acts." The annotation also collects the comparatively few cases which take the view that a false promise is a misrepresentation as to the present fact of the promisor's state of mind.

Although I would follow the traditional rule supported by the great weight of authority both in California and elsewhere, rather than that innovated or suggested by way of dicta in the mentioned cases, I do not believe that here the giving of the instruction to the effect that a promise may be a false pretense requires a reversal. The representations of defendant as to existing facts and as to future matters were inextricably interwoven; it may confidently be inferred that the jury believed that all such representations were made; the conviction can be upheld on the basis of the factual misrepresentations and the promissory statements can be considered simply as corroborative; they are in truth but a part of the res gestae. On no reasonable view of the evidence, and the instructions read together, can it be said that there has been a miscarriage of justice.

I think that the judgment should be affirmed but that the highly controversial discussion which is unnecessary to the decision and is aimed at establishing a new rule in California, contrary to the weight of authority here and generally elsewhere, should be eliminated.

CARTER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

42 Cal.2d 338

PEOPLE v. WEITZ.

Cr. 5460.

Supreme Court of California.
In Bank.
Feb. 26, 1954.
Rehearing Denied March 25, 1954.

Prosecutions for grand theft, conspiracy to commit grand theft, forgery, and violations of Corporate Securities Act provisions relating to issuance of securities in nonconformity with commissioner's permit, and relating to making of false statements to commissioner in proceedings before him. The Superior Court, San Joaquin County, George F. Buck, J., entered judgment of conviction on all counts except that of conspiracy, and entered an order denying defendant a new trial, and defendant appealed. The Supreme Court, Gibson, C. J., held, inter alia, that the evidence supported the convictions.

Affirmed.

Schauer and Carter, JJ., dissented in part.

Prior opinion, 255 P.2d 40.

1. False Pretenses 🔑9

In order to convict for grand theft consisting of obtaining property by false pretense, the false pretense or representation must have materially influenced owner to part with his property, but false pretense need not be the sole inducing cause and defendant need not have been benefited personally from the fraudulent acquisition. Pen.Code, § 484.

2. False Pretenses 🔑49(3)

Where conviction for grand theft by obtaining property through false pretenses rests primarily on testimony of single witness that false pretense was made, the making of the pretense must be corroborated. Pen.Code, §§ 484, 1110.

3. False Pretenses 🔑49(3)

In grand theft prosecutions for obtaining property by false pretenses, testimony of each victim as to promises made by defendant was corroborated by other victims who testified to similar dealings with defendant. Pen.Code, §§ 484, 1110.

4. False Pretenses 🔑49(1)

Evidence relating to false pretenses consisting of contractual promises without intent to perform sustained convictions for grand theft. Pen.Code, § 484.

5. Criminal Law 🔑369(2), 371(3)

In prosecutions for grand theft in obtaining money as deposits from retailers with promise that if stores were not established and machinery furnished as promised, deposits would be refunded, testimony of various retailers whose dealings with defendant were not involved in the prosecutions was admissible to show defendant's criminal intent and to corroborate evidence of false pretenses, inasmuch as the testimony related to transactions similar in material elements to the ones forming bases of prosecutions. Pen.Code, §§ 484, 1110.

6. Criminal Law 🔑824(8)

Defendant could not complain on appeal that jury was not instructed that evidence was to be used only for limited purpose for which it was admissible where he had not requested such an instruction.

7. Embezzlement 🔑2

Provision of Penal Code defining collector as an agent or person as defined in provision of Penal Code making any trustee, banker, etc., or person, who appropriates to his own use property within his control, guilty of embezzlement was intended to amplify and explain the latter provision, and the two provisions are not inconsistent. Pen.Code, §§ 506, 506a.

8. Criminal Law 🔑810

In prosecutions for grand theft, instruction defining word "collector" in statutory language as including every person who collects, or has in his possession or under his control, property or money for use of any other person was not inconsistent with instruction summarizing embezzlement statute and stating that misappropriation of money by various classes of persons, including an agent or "collector," would constitute embezzlement. Pen.Code, §§ 484, 506, 506a.

9. Embezzlement 🔑48(1)

The statutory definition of "collector" may properly be given to jury in any case where instruction on embezzlement by trustee, banker, etc., is appropriate. Pen.Code, §§ 506, 506a.

10. Forgery ⚿35

The signing of a person's name without authority, at least where the instrument has been uttered, is sufficient to imply intent to defraud. Pen.Code, § 470.

11. Forgery ⚿14

Alleged fact that no person was actually injured by forgeries presented no defense to forgery charges. Pen.Code, § 470.

12. Forgery ⚿44

Evidence that defendant had directed another to sign third person's signature to conditional sales contract and that he had done so with intent to defraud sustained forgery convictions. Pen.Code, § 470.

13. Criminal Law ⚿1172(1)

In forgery prosecutions defendant was not prejudiced by instruction which allegedly emphasized fact that one of the essential elements of forgery was knowingly signing name of another without authorization. Pen.Code, § 470.

14. Criminal Law ⚿1166½(6)

Where record in criminal prosecutions did not indicate what defendant's religious affiliation might be, and no religious issue was involved, defendant was not prejudiced by voir dire examination of jurors as to whether they were members of certain church. Const. art. 1, § 4.

15. Licenses ⚿42(4)

Evidence sustained convictions for violations of corporate code provisions relating to issuance of securities in nonconformity with commissioner's permit and relating to making of false statements to commissioner in proceedings before him. Corporations Code, § 26104(a, b).

O'Gara & O'Gara and Paul P. O'Gara, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., Chester E. Watson, Dist. Atty. (San Joaquin), William Biddick, Jr., Deputy Dist. Atty., Stockton, and Richard B. Daley, Deputy Dist. Atty., San Diego, for respondent.

GIBSON, Chief Justice.

Defendant Reuben B. Weitz was indicted on ten counts of grand theft, one count of conspiracy to commit grand theft, two counts of forgery and two counts of violation of the Corporate Securities Act. Corporations Code, § 25000 et seq. The jury returned a verdict against him on all counts except that of conspiracy, and he has appealed from the judgment of conviction and from an order denying him a new trial. The principal questions relate to the sufficiency of the evidence to support the convictions of grand theft and forgery.

In April 1949 Weitz was instrumental in forming a California corporation called Zesto Dairy Products, Inc. The proposed plan of operation was to establish and license retail ice cream stores to be operated by private individuals. At the time of incorporation Weitz was vice president and one of three directors, the others being Henry Nelson, who was president, and Walter D. Golding, who was secretary-treasurer.[1] When permission for issuance of stock was sought, the Commissioner of Corporations notified Weitz that the stock would have to be held in escrow if he were to remain an officer of the corporation. On May 20, 1949, Weitz filed a statement to the effect that he was resigning as vice president and director and that he was waiving all right, claim or interest in the corporation, and a permit to issue stock was granted because of his statement of withdrawal. About that time O. A. McCarty, a friend of Weitz, was ostensibly substituted as vice president and director in his place. There is evidence that McCarty did not attend any directors' meetings prior to 1950, although the minutes state that he was present at a number of meetings and participated in the action taken. He was present at two meetings in January or February of 1950. The minutes originally showed Weitz as making or seconding various motions, but they were subsequently rewritten at his request to substitute McCarty's name for his. Weitz claimed to be acting for McCarty and told Nelson that McCarty's name had to appear because Weitz was not an officer.

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[1] Nelson was charged in the indictment with conspiracy, but the charge was dismissed as to him prior to trial. Golding was charged with conspiracy and with the ten counts of grand theft, and he was acquitted as to all counts. Alice Weitz, wife of Reuben, was charged with conspiracy and the two counts of forgery. She was convicted under the forgery counts but acquitted of conspiracy. She has not appealed.

After the granting of a permit to sell stock one hundred and thirty shares were issued, of which one hundred were in the name of McCarty and fifteen each were in the names of Nelson and Golding. Nelson paid $500 for five shares of stock, and there is evidence that this was the only actual capital contributed by stockholders and that the rest of the stock was paid for by money which in fact belonged to the corporation and which came from sales of subdistributorships or from deposits made by prospective retailers. Although no stock was issued in the name of Weitz, he claimed to have furnished the money for most, if not all, of the McCarty shares. He stated that he controlled that stock by proxy, and he apparently exercised control over the corporation in that manner. While he did not appear of record as an officer, he told auditors from the Commissioner of Corporations, some months after the company was formed, that he was the president or the vice president, and he signed some checks as president and signed others in McCarty's name as vice president. He handled sales and negotiated for locations and operations, and he stated that he had "about all duties" and "did about everything that come along." Under all the evidence it seems clear that he had actual control and management of Zesto.

Weitz also controlled and operated through other persons the F. A. W. Sales Company. Most of its stock was issued in the name of McCarty and the balance in the name of Sloan, neither of whom invested any money in the corporation. Weitz also operated the Plains Distributing Company and the Plains Oil Company, which he testified were his own individual companies.

Zesto held an exclusive franchise from the Taylor Freezer Corporation, a nationwide manufacturer of automatic ice cream making machines, to sell the machines in several western states, including California. According to Weitz, the plan of Zesto was to sell a "package deal" to prospective operators of retail ice cream outlets, and he did most of the actual selling for Zesto. The "package" consisted of the lease or sub-lease from Zesto of a specially designed building at a satisfactory site, the sale and installation of one of the ice cream machines and related equipment, a license to use the machine for ten years, and the sale of raw materials and other products as directed and supplied by Zesto. A person desiring to become a retailer made a down payment of about $2,500 on the purchase price of the equipment to be installed, the total price of which was about $11,000. In many instances he made an additional deposit, usually $1,500, for rental to be paid for the lot and the building. As will be discussed hereinafter, various promises, which were not kept, were made by Weitz on behalf of Zesto with respect to establishing stores or refunding the deposits. The corporation entered into from 100 to 200 preliminary agreements and accepted deposits thereunder. Total receipts of the corporation were over $500,000, but only 25 or 30 stores were built and equipped, and only five or six of the store buildings were constructed with funds supplied by Zesto. Although Weitz and Golding testified, and the books of Zesto showed, that over $65,000 was refunded to depositors, only a few instances of small refunds appear to be substantiated by other evidence.

In September 1950 the Taylor company cancelled Zesto's franchise. At the end of that month Zesto signed a petition for reorganization under the bankruptcy laws of the United States, and the accompanying schedules stated that the assets were $98,461.56 and that the debts amounted to

$201,133.75. In December a petition for involuntary bankruptcy was filed by Zesto's creditors, and it was declared bankrupt.

Grand Theft

Weitz was convicted of grand theft under section 484 of the Penal Code. This section provides in part that any person who shall by "any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property * * * is guilty of theft."

[1, 2] The People contend that the convictions of grand theft may be supported upon the theory that the evidence shows that Weitz took money from prospective retailers with no intention to perform the promises which he made on behalf of Zesto. We have recently held that a promise made with intent not to perform it is a "false or fraudulent representation or pretense" within the meaning of the statute. People v. Ashley, Cal.Sup., 267 P.2d 271. It was also pointed out there that in order to support a conviction in such a case "it must be shown that the defendant made a false pretense or a representation with intent to defraud the owner of his property, and that the owner was in fact defrauded. It is unnecessary to prove that the defendant benefitted personally from the fraudulent acquisition. [Citation.] The false pretense or representation must have materially influenced the owner to part with his property, but the false pretense need not be the sole inducing cause. [Citation.] If the conviction rests primarily on the testimony of a single witness that the false pretense was made, the making of the pretense must be corroborated. Pen.Code, § 1110."

The procedure of Weitz, in the sale negotiations, was to exhibit a sales kit which pictured in detail an ice cream store with its necessary equipment. The kit also contained a chart estimating probable profits and a copy of the standard operating agreement. Deposits made by prospective retailers were acknowledged by means of a uniform printed receipt which stated, in part, that Zesto would diligently endeavor to find a location and that the deposit money would be refunded if no suitable location was found within a specified time. From the evidence it appears that the usual transaction involved not only an express promise by Zesto to refund the deposits if a suitable location was not found within the specified time, but also an implied promise, conditioned on the finding of such a location and the execution by the retailer of the standard operating agreement and the standard form of lease, that the necessary equipment would be delivered at that location and installed in a store building which Zesto would obtain and lease to the retailer.

The transactions involved in the ten counts of grand theft took place in the usual manner, and, in addition to the promises noted above, Weitz also orally promised five of the retailers that their stores would be ready within a specified time. Eight of the transactions were handled by Weitz personally and the remaining two by persons who acted under his direction. In each of the ten instances the promises to find locations and furnish stores and equipment were performed only partly or not at all, and none of the complainants received an ice cream machine. Further, no refunds were made in most of the ten transactions, and in the others there were only partial refunds.

There was evidence that there had been a very extensive "kiting" operation and that the money withheld from Zesto by this method "could be ten thousand or a hundred thousand" dollars. In a number of cases it appears that funds which came from retailers other than the persons named in the ten counts, and which actually belonged to Zesto, went instead to F. A. W. and were shown on the books of F. A. W. as having been received from McCarty for the purchase of stock and as having been disbursed by F. A. W. for the purchase of materials, such as automotive parts, from the Plains Distributing Company. F. A. W. checks made out to the Plains company for these purchases were endorsed by that company and by Weitz and then cashed. Some of these checks found their way into the books of Zesto and were shown as credits for the purchase of Zesto stock by Golding, Nelson or McCarty. As indicated above, however, McCarty bought no stock of either F. A. W. or Zesto.

By another operation termed a "parallel check transaction" about $4,000 of Zesto funds were transferred to F. A. W. and recorded on the books of that company as used for the purchase of its stock by McCarty. During the early months of 1949 two series of checks, identical as to dates and amounts, were drawn against the Zesto bank account, but only one set was listed in the Zesto books. In the first set each check was payable to a specific creditor, endorsed by the payee and collected. In the second set all checks were made to cash and endorsed by Weitz. Most of them were deposited in the F. A. W. bank account, and the rest were cashed.

With respect to the amount of money transferred to F.A.W. by some such method the records of that company showed total deposits of $58,968.84, which purported to include capital contributions of $49,000 by McCarty and $1,000 by Sloan who, as we have seen, did not personally contribute any money to that company. With two exceptions the entries relating to stock purchases by McCarty were "supported" by invoices showing that F.A.W. had purchased equipment from Plains Distributing Company.

In another transaction a check for $2,083 given as a deposit by a retailer was placed in the Plains Oil Company bank account, and Weitz then drew a check on this account for $2,000 which he deposited in an account kept by him and his wife in the name of his married daughter. Immediately thereafter he withdrew $1,976.50 from the latter account to pay for an automobile which he gave to his daughter. About two months later funds were placed in a Zesto account and were shown as having come from the retailer who made the deposit in question. Weitz stated that he had the money in his pocket all the time, but the jury could disbelieve him and conclude that it came from a subsequent deposit by another retailer.

There is evidence that fourteen subdistributorships were sold by Zesto for $1,500 each, and that, although the moneys belonged to Zesto, Weitz divided them with Nelson and Golding. In this connection he stated, "All corporation money I considered was ours and we split it." Weitz testified that he also received "kickbacks" of $500 each from the contractors who constructed six stores and that the money was "divided three ways."

In another instance a deposit of $7,718.66 placed in a Zesto bank account consisted entirely of checks drawn upon the Zesto company itself. A certified public accountant who examined the books testified that this constituted a way of building up "paper deposits" in the company, that the records would not reflect what actually took place and that he considered it a "deceptive practice." During other portions of his testimony the accountant characterized the books of Zesto as not complete, as inadequate, and as not showing what certain cash receipts or deposits were for. In certain instances "the receipts showed a different entry than what the actual deposit was for," and in a great many cases checks were coded to one account but posted to another. Quite a number of the checks were missing. The accountant concluded that Weitz took money belonging to Zesto.

The evidence is clearly sufficient to permit the following inferences and conclusions: Weitz, from the inception of the Zesto corporation, engaged in various methods of diverting substantial funds of the corporation into cash which was not accounted for and was apparently used for purposes other than the benefit of the corporation, and the books were falsified in an attempt to cover up the diversions. Although the record does not show the exact time when the corporation actually became insolvent, it seems to have been in an unsatisfactory financial condition from the beginning. The $500 paid by Nelson for the first issue of five shares of stock to him is probably the only real capital contribution by a stockholder, since there is evidence that all of the remaining shares were indirectly paid for by money belonging to the company which came from deposit payments by retailers and subdistributors. There is no satisfactory explanation how sufficient profits could have come to the corporation from the operation of stores to offset the large diversions or enable the company to meet its growing obligations to retailers and creditors. The obligations increased as deposits were made, and the corporation was forced to cease operations entirely as soon as new deposits were shut off as a result of the termination of the Taylor company's franchise to Zesto. All but one of the deposits involved in the ten counts of grand theft were made during the last half of the company's operation, and the remaining deposit was accepted after a number of diversions had been made. The jury could conclude that Weitz then knew that the company could not succeed in view of the extensive diversions of funds for improper purposes. Even though the business might have succeeded if it had been honestly conducted, Weitz must have known from the beginning that it could not hope to succeed if substantial sums were wrongfully diverted. The fact that he nevertheless made diversions, coupled with the further fact that he falsified the books, justifies the implied finding that the promises to the ten complainants were made without intent to perform them.

[3] Weitz contends that the evidence of his false pretenses was not corroborated as required by section 1110 of the Penal Code[2] which provides in substance that a defendant cannot be convicted of this type of grand theft unless the false pretense or a memorandum thereof is in writing subscribed by the defendant or unless the pretense is proved by the testimony of two witnesses or of one witness and corroborating circumstances. We need not determine whether the written receipt given to each of the ten complainants is a memorandum within the meaning of this section since the testimony of each victim as to the promises made by Weitz was corroborated by other victims who testified to similar dealings with him. People v. Ashley, Cal.Sup., 267 P.2d 271; People v. Jones, 36 Cal.2d 373, 378–379, 224 P.2d 353.

[4] Under all the circumstances, the evidence must be held sufficient to support the convictions under the ten counts of grand theft.

[5, 6] It is argued that the trial court erroneously admitted the testimony of various retailers whose dealings with Weitz and Zesto were not involved in the indictment. This testimony was to the effect that their deposits were not refunded and that they had not received stores or equipment. Inasmuch as the evidence related to transactions similar in material elements to the ones forming the basis of the indictment, it was admissible to show defendant's criminal intent and to corroborate the evidence of false pretenses. People v. Gordon, 71 Cal.App.2d 606, 632, 163 P.2d 110; People v. Robinson, 107 Cal.App. 211, 224, 290 P. 470; cf. People v. Jones, 36 Cal.2d 373, 378–379, 224 P.2d 353. Nor can Weitz now complain that the jury was not instructed that the evidence was to be used only for a limited purpose, since he did not request such an instruction. People v. Northey, 77 Cal. 618, 631, 19 P. 865, 20 P. 129; People v. Collins, 48 Cal. 277, 279; People v. James, 40 Cal.App.2d 740, 746, 105 P.2d 947; cf. People v. Fowler, 178 Cal. 657, 663, 174 P. 892.

[7–9] The court instructed the jury that it must determine which type of theft was committed and, in summarizing the provisions of section 506 of the Penal Code, stated that misappropriation of money by various classes of persons, including an agent or "collector," would constitute embezzlement. Immediately thereafter the court gave an instruction which defined the word "collector" in the language of the second paragraph of section 506a.[3] Weitz does not complain of the giving of the first instruction which referred to a collector, but he argues that the second instruction which defined that term was inconsistent with the first one and therefore should not have been given. Although not entirely clear, his theory apparently is that the definition of "collector" contained in section 506a is broader than the meaning of the word as it is used in section 506 and would improperly permit the jury to treat appellant as one who can be guilty of embezzlement. The first paragraph of section 506a,[4] however, provides that any person who, "acting as collector," violates section 506, shall be deemed to be an "agent or person" as defined in section 506 and subject to prosecution in accordance with that section, and it is obvious that section 506a was intended to amplify and explain section 506, that the statutes are not inconsistent and that the legislative definition of "collector" in section 506a could properly be given to the jury in any case where an instruction on section 506 is appropriate.

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[2] Section 1110 of the Penal Code reads: "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any labor, money, or property, whether real or personal, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section does not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying, or receiving any money or property."

Forgery.

The next question is whether the evidence is sufficient to support the conviction of Weitz on the two counts of forgery. Each count charged Weitz and his wife with forging, uttering and passing a conditional sales contract with the intent to defraud Zesto, its creditors and Fred A. Wertz, the brother of Mrs. Weitz. Section 470 of the Penal Code,[5] so far as relevant here, provides that a person is guilty of forgery if, with intent to defraud, he signs the name of another person to any contract knowing that he has no authority to do so or if he passes such a forged instrument as genuine with intent to defraud any person and with knowledge that it is forged. Under section 31 of the Penal Code[6] any person is a principal in a crime, although he does not directly commit the act constituting the offense, when he aids in its commission or, not being present, advises and encourages its commission.

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[3] The instruction reads as follows: The word collector herein set forth shall also include and be held to mean every such person who collects, or who has in his possession or under his control property or money for the use of any other person, whether in his own name or mixed with his own property or money, or otherwise, or whether he has any interest, direct or indirect, in or to such property or money, or any portion thereof, and who fraudulently appropriates to his own use, or the use of any person other than the true owner, or person entitled thereto, or secretes such property or money, or any portion thereof, or interest therein not his own, with a fraudulent intent to appropriate it to any use or purpose not in the due and lawful execution of his trust.

[4] The first paragraph of section 506a of the Penal Code provides: "Any person who, acting as collector, or acting in any capacity in or about a business conducted for the collection of accounts or debts owing by another person, and who violates the provisions of section five hundred six of the Penal Code, shall be deemed to be an agent or person as defined in said section five hundred six of the Penal Code, and subject for a violation of the provisions of said section five hundred six of the Penal Code, to be prosecuted, tried, and punished in accordance therewith and with law."

[5] Section 470 of the Penal Code reads as follows: "Every person who, with intent to defraud, signs the name of another person, * * * knowing that he has no authority so to do, to * * * any * * * contract, * * * or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; * * * is guilty of forgery."

[6] Section 31 of the Penal Code reads as follows: "All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed."

The contracts upon which the two counts of forgery are based relate to a purported sale by Zesto to Wertz of the equipment in two Zesto stores. Weitz testified that the instruments were prepared by the office manager of Zesto and that they were signed by Mrs. Weitz with the name of Wertz. Someone connected with Zesto took one of the contracts to a bank and the other to a finance company, and they were assigned for a valuable consideration.

[10-12] There is evidence that Weitz directed and handled all phases of the purported sale to Wertz. Weitz testified in detail as to what was done, and a memorandum of the transaction in his handwriting was found among the records of Zesto. He admitted that he fixed the sales price and furnished part of the cash that went into the transaction, but he claimed that it was a loan to Wertz. The office manager drew a bill of sale covering one of the two stores at the request of Weitz, who gave him a bank deposit receipt for checks placed in the corporation's bank account and told him that it represented a deposit for Wertz on that store. Both Weitz and his wife testified that Wertz gave her authority to sign his name to the contracts. Wertz, however, denied that he had given any one authority to sign these contracts or anything else connected with Zesto. He further stated that Weitz attempted to obtain his signature on a conditional sales contract for one of the stores and that they had a conference with Wertz' attorney, but the contract was not signed. The evidence indicates that Weitz knew that his wife had no authority to sign the contracts for Wertz and that he nevertheless directed the entire transaction, including the unauthorized signing and passing of the instruments. The signing of a person's name without authority, at least where the instrument has been uttered, is sufficient to imply an intent to defraud. People v. Horowitz, 70 Cal.App.2d 675, 687, 161 P.2d 833; People v. Baender, 68 Cal. App. 49, 59, 228 P. 536. Accordingly, although Weitz did not personally sign the instruments, it can be inferred, from the fact that he directed the entire transaction, that he acted with intent to defraud. His assertion that no person was actually injured by the forgeries, even if true, presents no defense. People v. Turner, 113 Cal. 278, 281, 45 P. 331; People v. West, 34 Cal.App. 2d 55, 60, 93 P.2d 153; People v. Kuhn, 33 Cal.App. 319, 320, 165 P. 26.

[13] It is asserted that instructions by the court unduly emphasized the fact that one of the esssential elements of forgery is knowingly signing the name of another without authorization. Instead of operating to the prejudice of defendant, however, the instructions would seem to have benefited him by stressing to the jury an element of the crime without which he could not be convicted and concerning which there was conflicting testimony. Moreover, the court cautioned the jury that no emphasis was intended by the court or to be inferred by the jury if the instructions stated any rule or idea in varying ways.

Asserted Misconduct of the Prosecution.

[14] Weitz claims that the People were guilty of prejudicial misconduct in the voir dire examination of jurors. Twenty of the prospective jurors, including six who ultimately served on the jury, were asked whether they were members of the Seventh Day Adventist Church, and all answered that they were not. Weitz asserts that this questioning amounted to a violation of the right to free exercise and enjoyment of religious profession and worship. Cal. Const. art. I, § 4. The record, however, does not indicate what his religious affiliation might be, no religious issue was involved in the case, and it does not appear how he could have been prejudiced.

Corporate Securities Act.

[15] Weitz was also convicted under two counts which charged violations of subdivisions (a) and (b) of section 26104 of the Corporations Code. He makes no contentions with respect to these counts, however, and the evidence appears to be sufficient to support the convictions.

The judgment and the order denying a new trial are affirmed.

SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the judgment insofar as it affirms the convictions on the two counts of forgery and the two counts of violation of the Corporate Securities Act.

As to the ten counts of grand theft, inasmuch as the majority see fit to rest their affirmance of conviction upon the recently innovated rule of People v. Ashley (1954), Cal.Sup., 267 P.2d 271, I dissent upon the grounds and for the reasons elaborated in the concurring and dissenting opinion in that case. Because it would serve no useful purpose here I do not consider or discuss the sufficiency of the evidence to support the convictions of grand theft without reliance upon the Ashley rule.

CARTER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

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42 Cal.2d 448

ARMENTA et al. v. CHURCHILL et al.

L. A. 22902.

Supreme Court of California.
In Bank.
March 5, 1954.

Action was brought against driver and owner of dump truck for death of workman on road paving job, who was fatally injured when truck backed over him. The Superior Court of Los Angeles County, Benjamin J. Scheinman, J., entered judgment adverse to plaintiffs, and they appealed. The Supreme Court, Spence, J., held that it was prejudicial error to reject plaintiffs' offer in evidence of construction safety order of Administrative Code providing that trucks used to haul dirt, rock, concrete or other construction materials shall be equipped with a horn, bell, or whistle on both front and rear ends, or with horn capable of emitting sound audible under normal operating conditions from distance of not less than two hundred feet in rear of truck, provided that warning will be sounded while truck is backing up.

Judgment reversed.

Schauer, J., dissented.

Prior opinion 258 P.2d 861.

1. Appeal and Error ⇨110

Order denying motion of plaintiffs in death action for new trial was not appealable, and appeal therefrom was required to be dismissed. Code Civ.Proc. § 963.

2. Master and Servant ⇨107(2)

The repair and resurfacing of a highway come within phrase "other structures" appearing in title of Administrative Code entitled construction safety orders applicable to excavation, construction, alteration, repairing, renovating, removal or wrecking of buildings or "other structures." Labor Code, §§ 6312, 6500.

See publication Words and Phrases, for other judicial constructions and definitions of "Other Structures".

3. Automobiles ⇨7

Construction safety order providing that trucks used to haul dirt, rock, concrete or other construction materials shall be equipped with horn, bell, or whistle on both front and rear ends, or with a horn capable of emitting a sound audible under normal operating conditions from distance of not less than two hundred feet in rear of truck, provided that warning will be sounded while truck is backing up, is not unreasonably discriminative because it applies only to trucks hauling certain materials. Labor Code, §§ 6312, 6500.

4. Administrative Law and Procedure ⇨390
Automobiles ⇨151

Construction safety order providing that trucks used to haul dirt, rock, concrete or other "construction materials" shall be equipped with certain warning devices, is not too vague and uncertain, in its reference to "construction material," to enable a person to know what is thereby included, since, under doctrine of ejusdem generis, words "other construction material" take color from preceding listing and are limited to substances ordinarily associated in that same class. Civ.Code, § 3534.

5. Administrative Law and Procedure ⚷412

Construction safety order issued by Division of Industrial Safety in conformity with Labor Code must be reasonably interpreted and should be given, so far as possible, a construction which will render it valid rather than void. Labor Code, §§ 6312, 6500; Civ.Code, § 3542.

6. Criminal Law ⚷13

Not even a penal statute, to be valid, is required to have that degree of exactness which inheres in a mathematical theorem.

7. Automobiles ⚷9

Construction safety order that trucks used to haul dirt, rock, concrete or other construction materials shall be equipped with certain safety devices is not invalid, on ground that it invades field of legislation preempted by section of Vehicle Code providing that driver of motor vehicle, when reasonably necessary to insure safe operation, shall give audible warning with horn, since safety order is complementary to, rather than inconsistent with, section of Vehicle Code. Vehicle Code, § 671(b).

8. Appeal and Error ⚷1056(1)
Automobiles ⚷243(1)

In action against driver and owner of dump truck loaded with paving material for death of workman on road paving job, who was fatally injured when truck backed over him, court committed prejudicial error in rejecting construction safety order providing that trucks used to haul dirt, rock, concrete or other construction materials shall be equipped with a horn, bell, or whistle on both front and rear ends, or with a horn capable of emitting a sound audible under normal operating conditions from distance of not less than two hundred feet in rear of truck, provided that warning will be sounded while truck is backing up. Labor Code, §§ 6312, 6500.

9. Evidence ⚷46

Supreme Court would take judicial notice of construction safety order issued by Division of Industrial Safety in conformity with Labor Code. Labor Code, §§ 6312, 6500.

10. Automobiles ⚷169

Construction safety order of Administrative Code providing that trucks used to haul dirt, rock, concrete or other construction materials shall be equipped with a horn, bell, or whistle on both front and rear ends, or with horn capable of emitting a sound audible under normal operating conditions from a distance of not less than two hundred feet in rear of truck, provided that warning will be sounded while truck is backing up, establishes a minimum standard of care in safe operation of backing truck. Labor Code, §§ 6312, 6318, 6500.

11. Automobiles ⚷169

Violation of construction safety order of Administrative Code providing that trucks used to haul dirt, rock, concrete or other construction materials shall be equipped with a horn, bell, or whistle on both front and rear ends, or with horn capable of emitting a sound audible under normal operating conditions from distance of not less than two hundred feet in rear of truck, provided that warning will be sounded while truck is backing up, constitutes negligence per se. Labor Code, §§ 6312, 6500.

12. Automobiles ⚷245(53)

In action against driver and owner of dump truck for death of workman on road paving job, who was fatally injured when truck backed over him, question whether negligence of owner and driver of truck in failing to comply with construction safety order dealing with horn, bell, or whistle on truck proximately contributed to accident was one of fact for jury. Labor Code, §§ 6312, 6500.

13. Appeal and Error ⚷1067
Trial ⚷241

In action against driver and owner of dump truck for death of workman on road paving job, who was fatally injured when truck backed over him, court's refusal to give requested instruction in language of statute that no person shall start a vehicle stopped, standing, or parked on highway or shall back vehicle on highway unless and until such movement can be made with reasonable safety was prejudicial error. Vehicle Code, § 543.

14. Automobiles ⚿243(1)

Where first count of complaint in death action charged negligence on part of truck driver, acting as agent and employee of owner, and within scope of employment, and second count incorporated all allegations of first count and alleged that owner was herself negligent in entrusting truck to driver because she had actual knowledge that he was a careless, negligent, and reckless driver, and defendants in their answer admitted agency and scope of employment of driver, court properly sustained objection to admission of plaintiffs' evidence that driver had been found guilty of some 37 traffic violations, including conviction of manslaughter and that owner had knowledge of such facts.

15. Automobiles ⚿243(1)

In action against driver and owner of dump truck which weighed, unladen, 13,900 pounds, for death of workman on road paving job, who was fatally injured when truck backed over him, court did not err in refusing to admit into evidence certified copy of chauffeur's license, which authorized truck driver to operate motor vehicle of not over 6,000 pounds, where there was no causal relation between accident and fact that truck had unladen weight of 13,900 pounds. Vehicle Code, §§ 265, 272, 273.

16. Evidence ⚿359(2)

In death action, refusal to admit into evidence photograph taken of deceased during his lifetime, was not error.

Victor C. Rose and Alfred M. Klein, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee and Raymond G. Stanbury, Los Angeles, for respondents.

SPENCE, Justice.

[1] Plaintiffs, the widow and children of Amador Armenta, Sr., brought this action to recover damages for his wrongful death. The deceased, while working on a road-paving job, was killed when a dump truck backed over him. The truck was operated by defendant Dale Churchill, whose wife and co-defendant, Alece Churchill, was the registered owner. The jury found for defendants and judgment was entered in their favor. From such judgment and the order denying their motion for a new trial, plaintiffs have appealed. Since the order is not appealable, Code Civ.Proc. § 963; Pipoly v. Benson, 20 Cal.2d 366, 368, 125 P.2d 482, 147 A.L.R. 515, plaintiffs' appeal therefrom must be dismissed.

There is no dispute as to the facts. Plaintiffs contend, however, that the trial court committed prejudicial error in instructing the jury and in excluding certain evidence. Their objections are in part well taken; and accordingly the judgment must be reversed.

The fatal accident happened on Tyler Avenue, a county highway in Los Angeles County, where an 8-foot strip of the street was being resurfaced with "black top," an asphaltic pavement. A mobile machine known as a "Barber-Greene" was used to distribute the paving material. This machine, in continuous motion, moves forward about 25 feet per minute and needs to be fed a constant supply of paving material. Several trucks were required to bring the necessary supply from a distance of about six miles. According to the customary procedure, each truck, taking its turn, would be placed in position so that its rear would face the front of the Barber-Greene, towards which the truck would then back and deposit the paving material. Dale Churchill, driving one of the trucks down Tyler Avenue, passed the Barber-Greene facing in that same direction and stopped 75 to 100 feet in front of it. At that time there was another truck unloading. As the Barber-Greene advanced slowly, Churchill kept his truck moving so as to be 75 to 100 feet in front of it, and when the other truck left, he commenced backing toward the Barber-Greene at about two miles per hour. The deceased was a "stringman," whose duty was to stretch a cord in front of the Barber-Greene as a guide for laying out the pavement in a straight course. He was so engaged, standing with his back to Churchill's moving truck, when he was struck and run over at a point some 30 to 40 feet in front of the Barber-Greene and

4 feet from the edge of the paving area. At the time Churchill was partly sitting in the driver's seat of the truck, with his right foot on the throttle and his left on the running-board, guiding the truck and looking to the rear. From such position he could not see the right rear of the truck, which was the part that struck and ran over the deceased. The Barber-Greene was then operating with a great deal of noise, considerably more than that produced by the truck. Churchill at no time blew his horn while backing his truck.

Plaintiffs first contend that the court erred by refusing to receive in evidence, and to include in its instructions to the jury, Construction Safety Order 1753(b) of the Administrative Code. Said order reads: "Trucks used to haul dirt, rock, concrete or other construction material shall be equipped with a horn, bell or whistle on both the front and rear ends, or with a horn capable of emitting a sound audible under normal operating conditions from a distance of not less than two hundred feet (200′) in the rear of the truck, *provided the warning will be sounded while the truck is backing up.*" (Emphasis added.) Plaintiffs maintain that Churchill's violation of this safety order through failure to sound his horn as he backed the truck constituted negligence *per se* and so was material evidence bearing on the issue of defendants' liability. Defendants argue that the regulation was properly excluded from the jury's consideration for these reasons: (1) It is unreasonably discriminative in that it applies only to trucks hauling certain materials; (2) it is fatally uncertain in that it does not define the term "construction material"; and (3) it invades the field of legislation which is preempted by section 671(b) of the Vehicle Code. There is no merit in these objections.

[2, 3] Safety Order 1753(b) is contained in Title 8 of the Administrative Code, entitled "Construction Safety Orders," applicable to "the excavation, construction, alteration, repairing, renovating, removal or wrecking of buildings *or other structures.*" (Emphasis added.) Admin. Code, Title 8, art. 2, § 1506. The repair and resurfacing of a highway would come within the phrase "or other structures" State ex rel. West Virginia Sand & Gravel Co. v. Royal Indemnity Co., 99 W.Va. 277, 128 S.E. 439, 443, 43 A.L.R. 552; State for Use of E. I. Du Pont de Nemours & Co., 103 W. Va. 676, 138 S.E. 324, 328; City of Rock Island v. Industrial Commission, 287 Ill. 76, 122 N.E. 82, 83, as a construction project affixed to real property. See Rae v. California Equipment Co., 12 Cal.2d 563, 567–568, 86 P.2d 352. The order was issued by the Division of Industrial Safety in conformity with the provisions of sections 6312 and 6500 of the Labor Code, being a measure for the protection and safety of workmen in their places of employment. It is directed to trucks in their hauling of construction materials and recognizes the need for specific rules to cover their operations on jobsites. Workmen, as they pursue their assigned tasks amid noisy surroundings, cannot be expected to keep constantly on the lookout for backing trucks. All trucks used for the specified purposes are subject to the terms of the safety order with regard to the prescribed equipment and required use of a horn, bell or whistle while backing. The constitution does not prohibit legislative classification. "[T]he mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition." People v. Western Fruit Growers, 22 Cal.2d 494, 506, 140 P.2d 13, 20. There is nothing unreasonable or arbitrary in this safety order which would require us to hold unconstitutional such classification. Martin v. Superior Court of Sacramento County, 194 Cal. 93, 100–101, 227 P. 762.

[4–6] Nor is Safety Order 1753(b) in its reference to "construction material" too vague and uncertain to enable a person to know what is thereby included. See In re Peppers, 189 Cal. 682, 688, 209 P. 896. The order must be reasonably interpreted, Civ. Code, § 3542; 23 Cal.Jur. § 104, p. 722, and, so far as possible, given a construction which will render it valid rather than void. 23 Cal.Jur. § 132, p. 757; Medical Finance Ass'n v. Wood, 20 Cal.App.Supp.2d 749, 753, 63 P.2d 1219. It is a regulation expressly applying to trucks hauling "dirt, rock, concrete or other construction material," an enumeration of particular items commonly identified with heavy, substantial building operations. Under the doctrine of *ejusdem generis,* the concluding words "other construction material" would take color from the preceding listing and be limited to substances ordinarily associated in that same class. Civ.Code, § 3534; 23 Cal.Jur. § 130, p. 755; Treasure Island Catering Co. v. State Board of Equalization, 19 Cal.2d 181, 188, 120 P.2d 1. As was said in Smulson v. Board of Dental Examiners of State of California, 47 Cal. App.2d 584, at page 587, 118 P.2d 483, at page 484: "It is not required that even a penal statute, to be valid, have that degree of exactness which inheres in a mathematical theorem." So here the safety order may be readily understood, and no difficulty should be encountered in its practical application.

[7] Section 671(b) of the Vehicle Code provides: "The driver of a motor vehicle *when reasonably necessary to insure safe operation* shall give audible warning with his horn. Such horn shall not otherwise be used." (Emphasis added.) Defendants argue that this section covers the entire subject of the necessity for sounding of a horn when traveling on a highway, leaving no room for any additional regulation in that field. In support of their position they cite Pipoly v. Benson, 20 Cal.2d 366, 373, 125 P.2d 482, 486, 147 A.L.R. 515, where a local ordinance which entered "a field intended to be occupied fully by the state legislation" was held invalid. But the situation here is clearly distinguishable. Sections 6312 and 6500 of the Labor Code expressly recognize the need for safety measures for the protection of workmen at their places of employment; and pursuant to the express authority found in those sections, the Division of Industrial Safety issued Safety Order 1753(b) regulating truck backing operations and declaring, in effect, that the sounding of the warning was "reasonably necessary to insure safe operation" during such backing. The codes must be regarded as blending into each other and forming a single statute. 23 Cal.Jur. § 169, p. 791; In re Porterfield, 28 Cal.2d 91, 100, 168 P.2d 706, 167 A.L.R. 675. The safety order was but a more specific safety requirement imposed under the authority of the cited sections to take care of the exigencies of a particular situation; and it was complementary to, rather than inconsistent with, section 671(b) of the Vehicle Code. Government Code, § 11374; 2 Cal. Jur. 2d § 71, p. 143, et seq.

[8–12] Plaintiffs therefore must be sustained in their contention that the trial court committed prejudicial error in rejecting their offer in evidence of Safety Order 1753(b) and in refusing to instruct the jury thereon. The safety order, of which courts take judicial notice, Martin v. Food Machinery Corporation, 100 Cal.App.2d 244, 251, 223 P.2d 293, established a minimum standard of care in the safe operation of defendants' backing truck, Labor Code, § 6318; Campbell v. Fong Wan, 60 Cal.App. 2d 553, 558, 141 P.2d 43; its violation would constitute negligence per se, Hopper v. Bulaich, 27 Cal.2d 431, 435, 164 P.2d 483; Pierson v. Holly Sugar Corporation, 107 Cal.App.2d 298, 302, 237 P.2d 28; and the question of whether such negligence proximately contributed to the deceased's death would be one of fact for the jury. Rae v. California Equipment Co., supra, 12 Cal.2d 563, 570, 86 P.2d 352.

[13] The court likewise erred in failing to instruct the jury in the terms of section 543 of the Vehicle Code, as requested by plaintiffs. That section provides: "No person shall start a vehicle stopped, standing or parked on a highway nor shall any person back a vehicle on a highway unless and until such movement can be made with reasonable safety." As one of their theories of negligence, plaintiffs maintained that defendant driver Churchill should not have backed the truck at the jobsite unless and until he could do so "with reasonable safety." It is true that the jury was instructed that the driver of a motor vehicle must sound the horn "when reasonably necessary to insure safe operation". Vehicle Code, § 671(b). But that did not cover the point of plaintiffs' position that regardless of whether or not the horn was sounded, the truck should not have been moved at all unless it could be done "with reasonable

safety." The general tenor of the instructions assumed that the accident happened on a highway, and this term was defined in the instructions in the language of section 81 of the Vehicle Code. Section 543 was relevant to the disputed issue of negligence in the backing of the truck at such place, Wood v. Moore, 64 Cal.App.2d 144, 148, 148 P.2d 91; Smith v. Harger, 84 Cal.App. 2d 361, 371, 191 P.2d 25. It placed upon the driver Churchill the duty of ascertaining whether or not it was reasonably safe to back the truck under all the circumstances. Churchill, according to his own testimony, could not see what was behind the right rear of the truck, which was the part that struck the deceased, and he made no attempt to investigate the situation before backing. Under all the circumstances, it became a question of fact for the jury to determine whether Churchill backed the truck at a time when it was reasonably safe to do so; and if not, whether his action was the proximate cause of the accident. Accordingly, section 543 vitally affected plaintiffs' claim of negligence in Churchill's operation of the truck, and it was prejudicial error for the court to refuse plaintiffs' instruction covering the provisions of that section.

Before considering further points discussed by the parties, it is necessary to note the state of the pleadings and the issues thereby presented. The amended complaint was drawn in two counts. The first charged negligence on the part of Dale Churchill as driver of the truck, acting as agent and employee of his wife, Alece Churchill, and within the scope of his agency and employment. The second incorporated all the allegations of the first count, and contained the added allegations that Alece Churchill was herself negligent in entrusting the truck to her husband, she having actual knowledge that he was a careless, negligent and reckless driver. As to the first count, defendants admitted in their answer the agency and scope of employment of Dale Churchill; but as to the second count, they denied the added allegations. During the trial plaintiffs offered, in support of the added allegations of the second count, evidence to show that Dale had been found guilty of some 37 traffic violations, including a conviction of manslaughter, and that Alece had knowledge of these facts. Defendants objected to the offered evidence because it was directed to an issue which had been removed from the case by the pleadings. After the objection was sustained, defendant Alece Churchill again admitted her liability for all damages sustained by plaintiffs in the event that her husband was found to be liable.

Plaintiffs contend that the offered evidence should have been admitted. Defendants insist that the objection was properly sustained upon the authority of Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752. That was an action by the parents for the death of minor sons. Defendant admitted liability in his answer. Nevertheless plaintiffs, over defendant's objection, were permitted to prove the circumstances of the accident, including the facts that defendant was intoxicated and that the children were thrown 80 feet by the force of the impact. In an action for wrongful death of minor children, the manner in which the accident occurred, the force of the impact, and the intoxication of defendant could have no bearing on the issue of damages. In disapproving the admission of such evidence, the court said: "Evidence which is not pertinent to the issues raised by the pleadings is immaterial, and it is error to allow the introduction of such evidence." Fuentes v. Tucker, supra, 31 Cal.2d at page 4, 187 P.2d at page 754. Therefore the question presented here is whether there was any material issue remaining in the instant case to which the offered evidence of some 37 traffic violations, including a manslaughter conviction, would be relevant.

[14] It is true that defendant Alece Churchill's admission of vicarious liability as the principal for the tort liability, if any, of her husband was not directly responsive to plaintiffs' added allegations of fact contained in the second count relating to her personal negligence. But the only proper purpose of the allegations of either the first or second count with respect to Alece Churchill was to impose upon her the same legal liability as might be imposed upon

Dale Churchill in the event the latter was found to be liable. Plaintiffs could not have recovered against Alece Churchill upon either count in the absence of a finding of liability upon the part of Dale Churchill; and Alece had admitted her liability in the event that Dale was found to be liable. Plaintiffs' allegations in the two counts with respect to Alece Churchill merely represented alternative theories under which plaintiffs sought to impose upon her the same liability as might be imposed upon her husband. Upon this legal issue concerning the liability of Alece Churchill for the tort, if any, of her husband, the admission of Alece Churchill was unqualified, as she admitted that Dale Churchill was her agent and employee and that he was acting in the course of his employment at the time of the accident. Since the legal issue of her liability for the alleged tort was thereby removed from the case, there was no material issue remaining to which the offered evidence could be legitimately directed. We therefore conclude, upon the authority of the Fuentes case, that the trial court properly sustained defendants' objection to the offered evidence. Cases cited by plaintiffs involving the right to plead inconsistent causes of actions, e. g. Martinelli v. Luis, 213 Cal. 183, 185, 1 P.2d 980; Horstman v. Krumgold, 55 Cal.App.2d 296, 297, 130 P.2d 721; Wells v. Brown, 97 Cal.App.2d 361, 364, 217 P.2d 995, or to introduce evidence in the light of an ambiguous or confused admission, Martin v. Miqueu, 37 Cal.App.2d 133, 135–136, 98 P.2d 816, are not in point.

[15] There was no error in the court's refusal to admit into evidence a certified copy of Dale Churchill's chauffer's license, which authorized him to operate a motor vehicle of not over 6,000 pounds, unladen weight. The truck involved here weighed, unladen, 13,900 pounds. The Department of Motor Vehicles is empowered to issue either a general chauffer's license or a restricted chauffer's license, the latter indicating the type of vehicle or combination of vehicles the licensee is licensed to operate. Vehicle Code, §§ 272, 273. The applicant "may state the type of vehicle or combination of vehicles he desires to operate", Ibid, § 265, and the department shall issue to an applicant found to be entitled thereto an operator's or chauffer's license "as applied for", § 272. Plaintiff's contend that the fact that Churchill held a license to operate a vehicle with an unladen weight of only 6,000 pounds is evidence of a determination by the Department of Motor Vehicles that it would be unsafe for him to operate a vehicle of greater weight, and that such supposed ruling by the department would be some evidence of negligence.

Preliminarily it should be noted that this contention is based upon an assumption of fact which is not justified. There was no evidence, and no offer to prove, that Churchill was not issued exactly the type of license for which he applied, or that the department had restricted him in any way contrary to his request. But regardless of such erroneous assumption, we find no merit in plaintiffs' contention. In Strandt v. Cannon, 29 Cal.App.2d 509, at page 518, 85 P.2d 160, at page 164, it was said that "the operator's negligence is to be determined by the facts existing at the time of the accident, and whether the operator had a license to operate an automobile under the laws of this state is immaterial unless there is some causal relationship between the injuries and the failure to have a license * * *." Like the total absence of any license, a restricted license is material to the issue of negligence only in the event that there is a causal connection between the fact of such restriction and the happening of the accident. Poe v. Lawrence, 60 Cal.App.2d 125, 131, 140 P.2d 136; cf. Roos v. Loeser, 41 Cal.App. 782, 786, 183 P. 204. No such causal relationship appears here. There is no possibility that this accident would not have happened regardless of the type of license which might have been issued to Churchill. It occurred while a truck was being backed at a speed of two miles per hour. It is therefore apparent that the restriction as to weight is not here material to the issue of Churchill's negligence, if any, as he backed his truck into the deceased.

[16] Finally there appears to be no prejudicial error in the court's refusal to

admit into evidence a photograph of the deceased, taken during his lifetime. Westberg v. Willde, 14 Cal.2d 360, 371, 94 P.2d 590.

As the record has been above reviewed, the court's error in the refusal of the noted instructions and in the rejection of evidence of the safety order prejudiced plaintiffs in the presentation of their case to the jury, constituting cause for reversal of the judgment. Const. art. VI, § 4½.

The purported appeal from the order denying a new trial is dismissed. The judgment is reversed.

GIBSON, C. J., and SHENK, and TRAYNOR, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of reversal and generally with the reasoning of the majority opinion, but I wish to point out that the holding therein that evidence showing that Dale Churchill had been guilty of some thirty-seven traffic violations including a conviction of manslaughter was inadmissible because defendant Alece Churchill had admitted her liability for all damages sustained by plaintiff in the event that her husband was found to be liable, is directly contrary to the holding of the majority of this court in Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910, decided October 9, 1952, where it was held that the issues of liability and damages were inseparable and that the judgment should be reversed with directions that the case be retried on the issues of both liability and damages even though the trial court had granted a new trial to plaintiff on the issue of damages only. In my dissent in that case I pointed out that the holding of the majority was directly in conflict with Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752. It appears that the majority is now relying upon the last mentioned case without even citing the Hamasaki case. An analysis of the comparative reasoning in the Fuentes case and the case at bar with the Hamasaki case makes it clear that the rule for which the majority stand is that where evidence of liability might have the effect of bringing about or increasing an award of damages it is not admissible but if it has the effect of reducing or defeating an award of damages it is admissible. This line of reasoning is out of harmony with my concept of how the law should be administered to achieve equal justice.

SCHAUER, Justice (dissenting).

It is my view that the opinion prepared for the District Court of Appeal by Presiding Justice Shinn, and concurred in by Justices Wood (Parker) and Vallée, reported in Cal.App., 258 P.2d 861, adequately discusses and correctly resolves all issues of law presented by this appeal. For the reasons therein stated I would affirm the judgment.

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42 Cal.2d 296

GOWANLOCK et al. v. TURNER et al.

S. F. 18593, S. F. 18640.

Supreme Court of California.
In Bank.
Feb. 24, 1954.

Class suit by platform men and bus operators employed in operating department of municipal railway system for determination of a controversy over the interpretation and application of the city and county charter provision governing their hours of work and rates of pay. The Superior Court, City and County of San Francisco, rendered judgment favorable to petitioners and an appeal was taken. The Supreme Court, Edmonds, J., held that charter provision, defining basic work day as eight hours, to be completed within 10 consecutive hours, and providing overtime pay for all labor performed in excess of eight hours in any one day, did not guarantee either eight hours work per day or eight hours pay per day.

Judgment reversed.

Traynor, J., and Gibson, C. J., dissented, and Carter, J., dissented in part.

Prior opinion, 256 P.2d 662.

1. Municipal Corporations ⚷213

Municipal charter provision, defining basic work day for municipal bus operators as eight hours, to be completed within 10 consecutive hours, and providing overtime pay for all labor performed in excess of eight hours in any one day, did not guarantee either eight hours work per day or eight hours pay per day. St.1899, p. 364, § 33; St.1911, p. 1694, § 7b; St.1925, p. 1164, Amend. 21; St.1931, p. 3049, § 125, p. 3066, § 150; St.1947, p. 3266, § 151.3; Act Cong. June 25, 1868, 15 Stat. 77.

2. Statutes ⚷227

Declaration in statute is directory, not mandatory, unless means are provided for its enforcement.

3. Municipal Corporations ⚷213

Municipal charter provision establishing procedure by which compensation of city's street railway employees should be computed was a qualification upon charter provision empowering board of supervisors to fix compensation of city and county employees. St.1931, p. 3066, § 151; St.1947, p. 3266, § 151.3.

4. Municipal Corporations ⚷213

Under municipal charter provision that board of supervisors establish rates of pay for municipal railway employees, based upon average of two highest wage schedules in effect for similar employees in other cities in state, board was required only to establish compensation to be given per unit of work, and could not grant employees the benefit of minimum hour provisions in other wage schedules considered. St.1931, p. 3066, §§ 150, 151; St.1947, p. 3266, § 151.3; St.1950, p. 46, § 151.4; St.1951, p. 102, § 151.5.

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Dion R. Holm, City Atty., San Francisco, and A. Dal. Thomson, Public Utilities Counsel, San Francisco, for appellants.

Lamson, Jordan & Walsh, San Francisco, for intervener and appellant.

Tobriner & Lazarus, Mathew O. Tobriner and Stanley H. Neyhart, San Francisco, for respondents.

EDMONDS, Justice.

Several employees of the municipal railway of the City and County of San Francisco, on behalf of themselves and all other employees similarly situated, sued for writs of mandate and for declaratory relief. Named as defendants are the manager of utilities of the public utilities commission, the members of the civil service commission and its secretary, and the controller. Joseph Robinson, on behalf of the taxpayers of the city and county, has filed a complaint in intervention in opposition to the employees' complaint.

By this action, the employees principally seek to obtain a determination as to their right to have work for certain minimum hours. One theory of the complaint, based upon section 125 of the charter of the city and county, is that every operating employee is entitled to receive compensation for a minimum of eight hours of work in each working day. An alternative theory is that section 151.3 of the charter, which establishes a method of computing wages based upon the wage schedules of certain other street railway systems, requires the consideration of any minimum wage guarantees included in such schedules.

According to the stipulated facts, the street cars and coaches of the municipal railway are operated over designated routes on schedules arranged by the manager of utilities and approved by the public utilities commission. These schedules have "straight time" runs, which require the continuous services of an operator for a period which may be more or less than eight hours, and "split time" runs, during which there is a period when the operator is off duty. "Split time" runs vary in the number of hours worked as well as in their total elapsed time, termed "range time", which generally is less than 10 hours. Work assignments are made on the basis of selection by the employees, in order of seniority.

It is necessary from the standpoint of satisfactory operation of the municipal railway and a usual practice among street railways throughout the country to employ more operators than there are runs. Stand-by employees must be available in case of absences and to handle unforeseen demands for increased transportation facilities. The employees who supply these needs are those who, for one reason or another, do not have a regular run.

An extra employee is assigned to the division headquarters he selects. He is required to report at a designated time to a dispatcher who assigns him to the run of an absentee, or to a location at which he collects fares from passengers as they board a car or bus. In the event that no work is available, the dispatcher may designate a later report time, or he may dispense with the employee's services for that day.

An operator who is given no work on a particular day is entitled to compensation for the time he spent in reporting. Although some of the men on the extra list do not have work for eight hours each day, it is the policy of the manager of utilities to assign duties to the extent that, throughout a period of two weeks, each employee shall have received compensation equivalent to the wages he would have earned had he worked 40 hours per week.

The present action primarily concerns these extra men. However, the complaint indicates that it is intended to present the rights of some of the operators assigned to regular runs of less than eight hours per day.

Five causes of action were pleaded. Two of them were determined adversely to the employees in the trial court and they are no longer in issue.

In the first count, based upon section 125 of the city charter, the employees seek a writ of mandate to compel the manager of utilities to approve and transmit to the civil service commission payrolls crediting each employee with a minimum of eight hours of work for each working day. By the fourth count, they ask the court to compel the civil service commission to certify to the board of supervisors a wage schedule which guarantees minimum wages and hours of employment for the operating personnel. The fifth count reiterates the allegations of the preceding ones and seeks a declaratory judgment in accordance with them. The appeal of the city officials and the intervener is from a judgment in favor of the employees upon each of these causes of action.

The appellants take the position that section 125 of the charter provides only a formula for the payment of overtime and does not establish maximum or minimum hours of work. Furthermore, they argue, the judgment is too uncertain in its terms to be capable of enforcement. The respondent employees are without standing to bring this action, the appellants also assert, and the city officials named in the judgment are not the proper parties against whom such a judgment may be given.

Since 1925, St.1925, p. 1164, section 125 of the charter has read in part as follows: "Persons employed as platform men or bus operators in the operating departmetnt of the Municipal Railway system shall receive the following conditions of employment: The basic hours of labor shall be eight hours, to be completed within ten consecutive hours; there shall be one day of rest in each week of seven days; all labor performed in excess of eight hours in any one day or six days in any one week shall be paid for at the rate of time and one-half." According to the respondents, this provision guarantees the employees eight hours of work within a range of 10 hours upon six days of each week, with pay for eight hours even if the work assignment is for less than that time on any particular day. The city contends that the only purpose of section 125 is to specify the rate of pay for all hours in excess of eight within 10 hours and for those worked after the expiration of 10 hours in any one day.

[1] The charter provision does nothing more than to specify the basis of compensation for employees. It declares that overtime shall be paid for all work done after eight hours and also after the lapse of 10 hours of actual service. Labor performed in excess of six days in any one week must be paid for at the rate of time and one-half.

[2] The requirements of a statute are directory, not mandatory, unless means be provided for its enforcement. The charter

includes no means of enforcing the requirement that all labor performed in excess of eight hours in any one day, all labor performed after the span of 10 hours in any one day, and all labor performed in excess of six days in any one week "shall be paid for at the rate of time and one-half." No requirement is laid upon the city to pay for eight hours of work on a given day or 48 hours per week regardless of the duties performed.

The same construction was placed upon a federal statute which declared that "eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may be hereafter employed, by or on behalf of the government of the United States". Act of June 25, 1868, ch. 72, 15 Stat.L. 77. This legislation, said the court, constituted only a direction by the government to its agents, and not a prohibition of the making of contracts which fixed a different length of time for daily service; "the government officer is not prohibited * * * from agreeing, when it is proper, that a less number of hours than eight shall be accepted as a day's work". United States v. Martin, 94 U.S. 400, 403, 24 L.Ed. 128. A Massachusetts law was similarly interpreted. Woods v. City of Woburn, 220 Mass. 416, 107 N.E. 985.

The respondents rely upon Chatfield v. City of Seattle, 198 Wash. 179, 88 P.2d 582, 121 A.L.R. 1279; Goss v. Justice of District Court of Holyoke, 302 Mass. 148, 18 N.E.2d 546; and Graham v. City of New York, 167 N.Y. 85, 60 N.E. 331. The opinion in none of them states the language of the statute or ordinance being considered, and the court's conclusions necessarily were based upon the legislation before it.

In 1924 and 1925, when section 125 of the charter was amended, section 33 of article XVI declared: "No deputy, clerk, or other employé of the city and county shall be paid for a greater time than that covered by his actual service." [1] It is reasonable to conclude that if the purpose of the proponents of the amendment was to change that basic provision, the new section would have so stated in no uncertain terms. The failure to do so shows a legislative intent to specify a basis of compensation for railroad workers not in conflict with the existing mandate of the charter prohibiting payment for service not performed.

Another provision of the old charter provided for the wages and hours of labor of employees of railroads which operated under franchises granted by the city and county. It read: "Every franchise shall provide that employees of the person or company or corporation operating a street railroad shall be paid not less than three dollars a day and that eight hours shall be the maximum hours of labor in any calendar day, the same to be completed within ten hours; *provided,* that nothing in this section shall be construed to prohibit overtime employment, wages for such employment to be paid at one and one half times the said rate of wages proportionate to each hour of such extra service." [2] Art. III, ch. 2, § 7b. This section in clear and unmistakable terms specifies a minimum wage and maximum hours of work, overtime employment being allowed if paid for at time and one-half. With these requirements laid upon railways privately owned, the omission from the 1925 amendment of similar provisions in regard to the municipal railway may well be taken as evidence that the new proposal was not intended to guarantee either a particular amount of wages or a work day of a given number of hours.

The city officials in charge of the municipal railway consistently have operated it with an administrative interpretation of the charter as prescribing no guarantee of wages or hours of labor. At the time the amendment was adopted, the superintendent of the railway submitted a report to the board of public works, then in charge of its operations, giving an estimate of the railway's needs in terms of personnel and wages. Shortly thereafter, at the superintendent's request, the president of Local 518, one of the sponsors of the amendment, submitted a written analysis of it in which he described the enactment as providing only a basis for compensation.[3]

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[1] Section 33 was a part of the former charter from its inception, Statutes of 1899, ch. 2 of Res., p. 241, at p. 364, and continued therein, unchanged, until that charter was superseded by the new charter in 1932. It was carried into section 150 of the new charter, enlarged to include officers. Stats.1931, ch. 56 of Res., p. 2973, at p. 3066.

[2] Added to the charter by the Statutes of 1911, ch. 25 of Res., p. 1661, at p. 1694. It continued unchanged during the life of the former charter. It was a part of that charter in 1924 and 1925.

Following this correspondence, a number of conferences were held, attended by city officials and representatives of the men. At that time the city attorney rendered an opinion in which he said in part: "Most legislation limiting the hours of employees and restricting the number of days a week upon which labor may be performed, is adopted upon the theory that the shortening of time of labor promotes the health and comfort of the employe, and therefore, produces greater efficiency. But it is manifest from the very language of section 20 that it does not restrict the hours of labor for that reason. It creates a basic day and a basic week for the purpose of fixing compensation."

Shortly thereafter, the board of public works adopted a resolution directing the superintendent of the railway to arrange the schedules so that no platform man or bus operator would be employed on the seventh consecutive day (except men on the extra list who had worked less than 48 hours in six days; all work on the seventh day to be paid for at time and one-half); that a minimum of overtime would be required of an employee who worked eight hours in any given day; and to fix eleven hours as the maximum range to be used.

In 1932, the manager of the railway issued a bulletin which stated: "Commencing Monday, April 25, * * * no allowance will be made in the way of overtime for runs which extend beyond a range of ten (10) hours." This rule was revoked by a new bulletin issued in 1935 which allowed overtime "for runs which extend beyond a range of ten (10) hours".

William H. Scott, now general manager of the railway, testified that from 1917 until the creation of the present public utilities commission in 1932, he represented the railway in all labor negotiations. During that period of time, he said, he was never confronted with any demands based upon a guaranteed eight-hour day. The first time such a demand was made by any employee of the railway was in the spring of 1949.

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[3] "Our interpretation of the * * * [amendment] and also the opinion of legal minds with whom we have consulted is that the stipulations contained therein merely provide a basis of compensation and do not prevent the performance of any labor beyond the limitations described.

"Supplementary to our opinion we refer you to the Adamson Eight Hour Law for Trainmen which while not identical, is in many respects similar to Charter Amendment No. 21.

"We might also refer you to employment in many industries where the hours of labor must be stretched over a range that will supply the requirements of all concerned; in which event, the employer is subject to a penalty similar to that affixed by Amendment No. 21.

"As an illustration of our opinion as to how the law would apply were the ten hour limit as set forth in the Amendment has been exceeded * * * the crew working run [15A] shall be paid straight time for work actually performed * * * 7 hours and 5 minutes, and, for all work actually performed beyond the ten hours range, which [will be] * * * 47 minutes, they shall be paid at the rate of time and one-half of one hour and eleven minutes; making a total of 8 hours and 16 minutes.

"The other feature of the amendment relative to one day of rest in seven may be construed in this manner.

"You will note that the amendment establishes eight hours as being the basic day and that therefor an employee working less than eight hours in any one day is not subject to this portion of the Amendment and may be permitted to work on the seventh day at straight time.

"This may continue until such employee has worked 208 hours which is equivalent to 26 eight hour days, after which, the overtime rate shall prevail.

"Providing that the time consumed in putting in the 208 hours shall have exceeded 26 days in one month."

From 1932 to 1945, Edward G. Cahill was manager of utilities. In that capacity it was his duty to certify payrolls of the railway. He testified that the 1932 bulletin did not come to his attention until some time after its issuance, and late in 1934 he was approached by union representatives concerning it. After investigation he recommended to the public utilities commission that it be changed. The bulletin of 1935 was then issued.

During those discussions with the union representatives, Cahill said, no claim was made by them that the men were entitled to an eight-hour day by virtue of the charter provision. Henry S. Foley, employed by the municipal railway for approximately 33 years preceding 1951, was one of those representatives. According to his testimony, in 1946 the city and county controller notified the railway management they would have to discontinue paying for "dead time"; at that time operators whose runs finished within 15 minutes of eight hours were paid for the full eight hours. Subsequently, Foley requested reinstatement of the practice of allowing eight hours' pay for such runs.

William H. McRobbie, who has been an employee of the municipal railway for a number of years and a member of the same union as Mr. Foley, testified as to negotiations with city officials concerning the wage schedules. A committee of which he was a member met the mayor and the city attorney and discussed the question as to the legality of payment for work performed in excess of 10 consecutive hours. At that time, McRobbie said, the city attorney orally stated that, in his opinion, payment for such services was a legal charge against the city. Two weeks later the 1935 bulletin restoring range time was issued. Asked if at that meeting there was any assertion that the men, by virtue of the charter, were afforded a guarantee of eight hours a day, he said, "No, there was no assertion that * * * all the men would be guaranteed eight hours a day; however, we did contend that the regular runs should be eight hours and any work performed in excess of the ten hours spread should be paid for at the rate of time and a half; that was all that was discussed."

The employees attach some significance to two items which they suggest show an administrative interpretation in favor of an eight-hour guaranteed workday. In March, 1935, the superintendent of the municipal railway wrote a letter to the then Acting Mayor of San Francisco in regard to the provisions of the new amendment to the charter. In estimated costs for an average month, the superintendent included: "Cost for time allowed for runs under eight hours, $2,898.23. This item does not enter into Amendment 21." The city explains this statement as having reference to management's established practice prior to 1946 of paying a full eight hours' pay for a regular run of seven hours and 45 minutes. This seems to be the only reasonable inference that can be drawn from the statement in view of the low amount stated, and the interpretations of the amendment by the city attorney and by the president of Local 518 at about the same time.

The second item consists of an unsigned memorandum dated September 4, 1925, entitled "Municipal Railway, San Francisco, data re working conditions of platform men". This memorandum was prepared in response to a written request from another transit company and consists of a short summary of working conditions before and after the effective date of the amendment to the charter. The memorandum includes the following: "Previous to Charter amendment, schedules were made out on an eight hour day with no limits as to range, except that they were kept as near ten hours as possible. All *regular* runs under eight hours were paid full eight hours and time and one-half was paid for all time beyond eight hours and twenty minutes. Number of hours after Charter amendment 21? Conditions same as above, except that overtime is paid after eight hours instead of after eight hours and twenty minutes, and one [and one-] half time is also allowed after the ten hour range. * * *" (Emphasis added.) The statement concerning eight hours' pay for all regular runs should be read in the light of the practice then in force of treating a regular run of seven hours and 45 minutes as the equivalent of a full eight hours regular run. Certainly, this does not support the finding that the "administrative construction adhered to throughout the years of Section 125 of the Charter is not in contravention of petitioner's construction".

The respondents contend, however, that even if section 125 does not guarantee to them a minimum working day, they are entitled to it under section 151.3 [4] which requires that the wages of platform employees and bus operators of the municipal railway be fixed annually at the average of "the two highest wage schedules in effect on July 1st of that year for platform employees and bus operators of other street railway systems in the State of California". It is argued that "the average of the two highest wage schedules" includes the right to receive any guarantee of wages or hours included in such schedules.

[3] The whole of section 151.3 is a qualification of section 151, which empowers the board of supervisors "to fix by ordinance from time to time * * * all salaries, wages and compensations * * * of all officers and employees" of the city and county. According to section 151.3, where there is established "a rate of pay for * * * groups of crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco," the civil service commission must certify to the board of supervisors the prevailing rates. "The board of supervisors shall thereupon revise the rates of pay for such crafts or groups accordingly".

But the wages of the employees of the municipal railway cannot be fixed by that formula. For some years, nearly all of the public transportation service in San Francisco has been performed by the municipal railway, and, accordingly, there was no "prevailing rate of pay" established for street railway employees within the city and county. To set up a standard of wages, the second part of section 151.3 was added to provide a method of computing compensations based upon the average of the two highest wage schedules of other street railways in California. In effect, this portion of section 151.3 represents a further qualification of the general structure of wage and pay determinations, applicable to a specific group of employees of the city and county.

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[4] The portion of the section relating to municipal railway employees provides:

"Notwithstanding the provisions of section 151 or any other provisions of this charter the wages of platform employees and bus operators of the municipal railway shall be determined and fixed, annually, as follows:

"(A) On or before the second Monday of July of each year the civil service commission shall certify to the board of supervisors the two highest wage schedules in effect on July 1st of that year for platform employees and bus operators of other street railway systems in the State of California;

"(B) The board of supervisors shall thereupon fix wage schedules for platform employees and bus operators of the municipal railway which shall be the average of the two highest wage schedules so certified by the civil service commission; provided, if the average of the two highest wage schedules shall be less than the rates of pay fixed for such service in the salary standardization ordinance adopted by the board of supervisors on March 18, 1946, the board of supervisors shall fix wage schedules for such service which shall be the same as the rates fixed for such service in the said ordinance;

"(C) When, in addition to their usual duties, such employees are assigned duties of instructors of platform employees or bus operators they shall receive twenty (20¢) cents per hour above the rates of pay fixed for platform employees and bus operators as herein provided;

"(D) The rates of pay so fixed for platform employees and bus operators as herein provided shall be effective from July 1st of the fiscal year in which such rates of pay are certified by the civil service commission;

"(E) Platform employees and bus operators shall be paid one and one-half times the rate of pay fixed as herein provided for all work performed on six days specified as holidays by ordinance of the board of supervisors for such employees."

The appellants draw a distinction between the two portions of section 151.3 from the use of the term "rate of pay" in the earlier part, as distinguished from "wages" and "wage schedules" in the portion relating specifically to municipal railway employees. Although a distinction between those terms has been made, see Giannettino v. McGoldrick, 295 N.Y. 208, 66 N.E.2d 57, 59; Jung v. City of New York, Sup., 76 N.Y.S.2d 235, clearly it was not intended here. The provisions relating to municipal railway employees use both "rate of pay" and "wages", apparently interchangeably. (Cf. subsections B, C, D, and E.) Both parts are aimed at providing standards of compensation for particular groups of city and county employees, and vary only as to the methods used in determining them.

In Adams v. Wolff, 84 Cal.App.2d 435, 190 P.2d 665, the constitutionality of section 151.3 was upheld. There, the question before the court was whether, in determining prevailing rates of pay for groups and crafts, the civil service commission was required to include pay for holidays and premium pay for night work. It was argued by the city that the section contemplates only a basic rate of pay and was not intended to govern working conditions. The court said: "It is probably true that § 151.3 relates only to the 'basic' rate of pay and does not relate to 'working conditions.' But that in no way assists defendants. It is quite apparent that it was the intent of § 151.3 to give to the public employees of the type here involved the same take home pay received by private employees in the same industry. That means that when the public employees work on a night shift, or where a work week is interrupted by a holiday they are to receive the same pay that private employees would receive for work similarly performed. It is quite obvious that night shift pay and pay for holidays is a part of the 'basic' rate of pay, and is as much a part of the wage structure as the hourly wage itself." (84 Cal.App.2d at pages 444–445, 190 P.2d at page 671.)

Subsequently, in Adams v. City and County of San Francisco, 94 Cal.App.2d 586, 211 P.2d 368, 374, 212 P.2d 272, the court considered the question of whether, under the general provisions of section 151.3, the right of employees to vacations and to sick and disability leaves was to be governed by the prevailing " 'rate of pay' " of similar groups and crafts in the industry. It was held that the right to sick and disability leave was governed by other specific sections of the charter. But, on the authority of Adams v. Wolff, the court concluded that vacation pay too is an item of take home pay as defined in the earlier decision.

In both of the Adams cases, the court equated "basic rate of pay" with "take home pay", but did not attempt to define either of those terms. It was recognized, however, that the apparent purpose of the section is to provide a method of computing the monetary remuneration to an employee, as distinguished from "fringe benefits", or benefits derived from working conditions. The difficulty lies in deciding whether a particular item is to be deemed "pay" or some other type of benefit.

By the use of the word "rate", the charter specifies a wage schedule made up by the measurement of one item on the basis of a unit or quantity of another.[5] As applied to wages, it requires a computation of amount of compensation for a unit of work, in the case of municipal workers being an hourly wage.

It is unnecessary to decide whether the Adams cases were properly decided. Arguably, holiday pay and provisions for paid vacations might be considered to be items required to be included within a computation of "basic rate of pay", since ultimately, they have a bearing upon the amount of pay received for time actually worked, and sound accounting practice might require that they be so considered. However, at least insofar as municipal railway workers are concerned, specific provision for those items now is made by the charter. §§ 151.3 (E), 151.4, 151.5.

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[5] Webster's New International Dictionary (2d Ed. 1948) gives this definition of the word "rate": "3. Quantity, amount, or degree of a thing measured per unit of something else; * * * Amount of payment or charge based on some other amount, as in money obligations; as, the rate of wages per week; * * *."

[4] But a guarantee as to minimum hours of work does not affect the rate of an employee's pay, that is, the amount of compensation per unit of work. It deals only with the number of hours of work to which an employee may claim to be entitled. Such a provision is without the scope of a charter section establishing a method of computing a basic "rate of pay" for employees.

This conclusion is strengthened by consideration of the practical results of a contrary construction of the charter. By section 151.3, the wages of municipal railway employees must be computed annually on the basis of the two highest wage schedules of other street railways in California established as of July 1st of each year. By section 150, payments of wages for such guaranteed minimum hours may not be made to an employee who did not work for that amount of time. To pay each employee for a minimum of eight hours per day, it would be necessary to revise the entire operating schedule to provide work for such hours, and to revise it continually with every change in guaranteed hours of those wage schedules to which reference would be made. The evidence shows that, particularly in the case of extra men, such realignment of schedules would be extremely difficult and costly. Certainly there is no reasonable basis for holding that, in adopting the charter section, the people intended such a result.

The respondents suggest that, instead of attempting to effectuate any specific guarantee of hours, the city officials should assign a monetary value to such a benefit and average it with the wages stated in the schedules consulted. Although they recognize that such a process would require "considerable consideration before an average could be struck between diverse systems of guarantees and diverse wage provisions", they assert that if the sole purpose of the section were "to add two rates of pay, divide by two, and then establish the result as the 'hourly rate of pay' ", there would be no need to entrust that function to the board of supervisors, the highest administrative agency of the city and county.

But if this contention were sustained, under like principles, the board should place a money value upon all other benefits received by employees under such schedules, and also upon similar benefits guaranteed under the charter of the city and county, and fix the wage schedule for the municipal railway accordingly. Such a construction of the section would impose the vast, if not impractical or impossible, burden upon the board of evaluating an endless variety of benefits. It is not unreasonable to construe the charter as placing upon the board a simple averaging process. It has the sole authority to fix wages and salaries and, although it generally is vested with wide discretion in computing them, section 151.3 is a direct limitation upon that power. Moreover, in the first part of section 151.3, the board is directed to revise the rates of pay of groups of crafts in accordance with the rates certified to it by the civil service commission, under circumstances allowing no room for discretion.

In view of these conclusions, it is unnecessary to consider the points raised by the appellants in regard to procedural questions.

The judgment is reversed.

SHENK, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (concurring and dissenting).

I adopt as my concurring and dissenting opinion in this case the able and well reasoned opinion prepared by Justice Wood, which was concurred in by Justices Peters and Bray, when this case was before the District Court of Appeal, First Appellate District, Division One. 256 P.2d 662.

"The petitioners, permanent employees of the city and county of San Francisco, platform men and bus operators in the operating department of the municipal railway system, brought this action on their own behalf and on behalf of all other employees similarly situated, to determine a controversy over the interpretation and application of sections 125 and 151.3 of the city and county charter concerning hours of work and rates of pay of such platform men and bus operators.

"The action was brought against the manager of utilities of the public utilities commission of the city and county, members and the secretary of the civil service commission, and the controller of San Francisco. They were designated 'respondents,' below. Joseph Robinson, a taxpayer of San Francisco, intervened as a respondent on his own behalf, and on behalf of all taxpayers similarly situated.

"The complaint contains five counts. In the first four counts the petitioners seek writs of mandate; in the fifth count they pray for declaratory relief.

"The trial court found for the petitioners on counts one, four and five, and rendered judgment thereon in their favor. The respondents, including the intervener, have appealed from the judgment.[1]

"In addition to the major questions of interpretation, appelllants present these questions: Is the judgment uncertain and contradictory in its several provisions? Are the respondents in a position, have they the legal right, to raise the questions which they present? Is there a legal basis for viewing this as a class suit? We will consider the major questions first.

"(1) *In respect to hours of service and overtime, section 125 of the charter* states that 'Persons employed as platform men or bus operators in the operating department of the municipal railway system shall be subject to the following conditions of employment: The basic hours of labor shall be eight hours, to be completed within ten consecutive hours; there shall be one day of rest in each week of seven days; all labor performed in excess of eight hours in any one day, or six days in any one week, shall be paid for at the rate of time and one-half.' Stats.1931, ch. 56 of Res., p. 2973, at 3050.[2]

"This clause was first placed in the charter in 1925, by an amendment adding section 20 to article XII of the former charter. Stats.1925, ch. 10 of Res., p. 1159, at p. 1164. It then read as now except that in the introductory portion the words 'shall receive' appeared where the words 'shall be subject to' now appear.

"*Respondents interpret this clause* as prescribing for them a work day of eight hours within a range of ten hours, guaranteeing them eight hours of work in ten hours upon six days of each week, and awarding them pay for the full eight hours in ten each day even if the work assignment on a particular day covers a shorter period, such as three, four, or six hours.

"*Appellants interpret this clause* as a formula for the payment of overtime (not as a guarantee of eight hours of work within a spread of ten each day), that it simply prescribes overtime pay (time and one-half) for all hours worked in excess of eight within ten hours and for all hours worked after the expiration of the ten-hour range regardless of the number of hours worked within the ten-hour range.

"*The trial court found and declared that this clause provides* 'that each petitioner and employee similarly situated should receive and be paid for eight hours of work in each scheduled working day, said eight hours of work to be completed within ten consecutive hours after commencement of work, and * * * that all labor performed in excess of eight hours in any one day shall be compensated for at the rate of time and one-half the rate of pay for such work.' Finding IX, C.T. 71; Concl. of Law, (a) substantially the same, C.T. 85; that the 'purpose and intent of section 125 was to enable the employees of the Railway to complete a day of eight hours of work within ten hours.' Finding XX, C.T. 82; Concl. of Law, (k) C.T. 90.

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[1] "Hereafter in this opinion, we will refer to the respondents as 'appellants' and to the petitioners as 'respondents' unless otherwise indicated.

[2] "Subsequent amendments of § 125 have made no changes in this clause. See Stats.1941, p. 195, at 202; and p. 3250, at p. 3251.

"The judgment directs the issuance of a writ of mandate commanding appellant Turner, Manager of the Public Utilities Commission of San Francisco, to approve and transmit to the appellant civil service commission time rolls or pay rolls showing 'that each petitioner and employee similarly situated is credited for at least eight (8) hours of work on each scheduled workday, in which each petitioner and employee similarly situated: (a) reports for work, and (b) performs each and every street car, bus or operating assignment designated within ten hours after reporting for said work * * *' Judgment, (1) C.T. 94–95; follows Concl. of Law, (e), C.T. 86–87. The judgment also declares that 'each petitioner and employee similarly situated is entitled to wages for at least eight (8) hours of work performed by each petitioner and employee similarly situated on each scheduled work day, in which each petitioner and employee similarly situated: (1) has reported for work, and (2) has performed each and every street car, bus or operating assignment designated within ten hours after reporting for said work'. C.T. 95; follows Concl. of Law, C.T. 85.

"We do not find in this clause any guaranty of eight hours work per day, nor any guaranty of eight hours pay per day. It is neither a minimum nor a minimum-maximum hour or wage per day provision.

"This clause is so clear and cogent in its wording, we find it difficult to express its meaning in other words than those which it uses. It starts with the statement: 'The basic hours of labor shall be eight hours to be completed within ten consecutive hours'. Basic[3] for what? We may reasonably expect to find that out later on in the sentence. Without more, we have nothing but a formula: Eight hours in ten. Next it says, 'there shall be one day of rest in each week of seven days'. This, too, is a formula; one day in seven. Next comes the words that give significance to these formulae. They tell us the use we must make of these formulae: 'all labor performed in excess of eight hours in any one day or six days in any one week, shall be paid for at the rate of time and one-half.' These formulae are to be used in ascertaining what is overtime. Use of the first formula indicates that labor performed 'in excess of eight hours in any one day,' comprehends all work done after the lapse of ten hours as well as all work done after eight hours of actual service. The second formula operates in similar fashion. All labor performed 'in excess of * * * six days in any one week [all work done on the day of rest],' must be paid for at time and one-half. With this, each formula exhausts its function. The charter requires no further use of it.

"Let us make another approach. It is a familiar principle of statutory interpretation that a declaration in a statute is directory, not mandatory, unless means be provided for its enforcement. The only means of enforcement here provided is the requirement that all labor performed in excess of eight hours in any one day, all labor performed after the span of ten hours in any one day, and all labor performed in excess of six days in any one week (all work done on the day of rest) 'shall be paid for at the rate of time and one-half.' Nothing is said about paying for labor not performed if a person's hours of work on a given day fall short of eight hours or fall short of eight hours within a span of ten or are less than 48 hours upon six days of a given week. We can but conclude that this clause was not intended to require payment for labor not performed was not intended to guarantee eight hours of work per day, was not intended to guarantee eight hours of pay per day.

"Persuasive of this view is the interpretation made by the Supreme Court of the United States, of a federal statute which declared that 'eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may be hereafter employed, by or on behalf of the government of the United States'. Act of June 25, 1868, ch. 72; 15 Stat.L. 77. The court deemed this but a direction by the government to its agents and not a prohibition of the making of contracts which fixed a different length of time for a day's work. The court said 'the government officer is not prohibited * * * from agreeing, when it is proper, that a less number of hours than eight shall be accepted as a day's work.' United States v. Martin, 94 U.S. 400, at page 403 [24 L.Ed. 128]; following in 1915 by the Supreme Court of Massachusetts, in Woods v. City of Woburn, 220 Mass. 416 [107 N.E. 985, Ann.Cas.1917A, 492], interpreting a similar state statute. Respondents cite three cases in support of their interpretation of section 125. Chatfield v. City of Seattle, 198 Wash. 179 [88 P.2d 582, 121 A.L.R. 1279]; Goss v. Justice of District Court of Holyoke, 302 Mass. 148 [18 N.E. 2d 546]; and Graham v. City of New York, 167 N.Y. 85 [60 N.E. 331]. But those cases are not helpful. In none of them is the precise text of the significant provision of the salary and hours fixing statute or ordinance completely furnished. In the Goss case, none of it is furnished. In the Chatfield case [198 Wash. 179, 88 P.2d 589] only the hours per day feature ('Eight hours shall constitute a day's work'), not the wage feature, is given. The decision as printed does not give that portion of the ordinance which implemented this declaration concerning hours of work. This declaration, standing alone, unaided by an enforcement feature, would be directory, not mandatory. There must have been something in the ordinance which made it mandatory. In the Graham case the court did not quote the statute. It did say that 'The salary was $1,200 a year, payable in equal monthly installments.' That bears no similarity to our section 125.

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[3] "'Basic' means: Of or pertaining to the base or essence; fundamental; as, a basic fact; constituting a basis; as, a basic wage. Webster's New International Dictionary, 2d Ed.

"Let us also examine the city and county charter as it read in 1924 and 1925, during the time when this amendment to that charter was written, presented to the voters of San Francisco, and considered and approved by the Legislature of the state.

"We find one feature of the charter which was particularly significant. Section 33 of article XVI declared: 'No deputy clerk, or other employe of the city and county shall be paid for a greater time than that covered by his actual service.'[4]

"If the proponents of the 1925 amendment desired to require payment of eight hours of pay per day even though on a given day a fewer number of hours of labor be performed, they should have said so in no uncertain terms, in order to negative the prohibition of no pay 'for a greater time than that covered by his actual service' declared in section 33 of article XVI of the very charter being amended. The fact they did not do so is persuasive of the view that they harbored no intent to make such a requirement.

"Another provision of the old charter similarly serves as an aid to interpretation. We refer to section 7b of chapter 2 of article III. It was one of a number of sections which dealt with street railway franchises granted by the city and county. They were added to the charter in 1911. Section 7b declared: 'Every franchise shall provide that employees of the person or company or corporation operating a street railroad shall be paid not less than three dollars a day and that eight hours shall be the maximum hours of labor in any calendar day, the same to be completed within ten hours; *provided,* that nothing in this section shall be construed to prohibit overtime employment, wages for such employment to be paid at one and one half times the said rate of wages proportionate to each hour of such extra service.'[5]

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[4] "Section 33 was a part of the former charter from its inception, Statutes of 1899, ch. 2 of Res., p. 241 at p. 364, and continued therein, unchanged, until that charter was superseded by the new charter in 1932. It was carried into section 150 of the new charter, enlarged to include officers. Stats.1931, ch. 56 of Res., p. 2973, at p. 3066.

[5] "Added to the charter by the Statutes of 1911, ch. 25 of Res., p. 1661, at p. 1694. It continued unchanged during the

Here we have in clear and unmistakable terms a minimum wage and maximum hours provision followed by permission for overtime employment if paid for at time and one-half. With such a provision already in the charter, concerning street railways privately owned, its omission from the 1925 amendment, concerning street railways publicly owned, suggests that the sponsors of that amendment intentionally avoided, studiously avoided, writing into their proposal either a guaranteed wage or a guaranteed hours per day provision.

"Let us next consider the interpretation given this clause of the 1925 amendment by the officials charged with its administration, and by their legal adviser, before this controversy arose and this question reached the courts for consideration and determination.

"The concurrent resolution approving this amendment to the charter was filed with the Secretary of State, January 27, 1925, Stats.1925, p. 1159, and took effect on that date, Pol.Code,§ 324; now Gov.Code, § 9602.

"Meanwhile (January 16, 1925), Superintendent F. Boeken reported to the board of public works (then in charge of the municipal railway) that schedules for all lines had been practically completed to meet the requirements of the new charter amendment. He estimated that of the 980 platform men required, 348 would be extra men, and estimated that the earnings of the latter would be reduced from $153 to $90 per month.

"Frank B. Halling, during that period, was president of Local 518 of the Amalgamated Street Railway Employees of America. March 10 1925, he wrote Superintendent Boeken, at the latter's request, giving his interpretation of the new amendment.[6] He said in part 'Our interpretation of the foregoing [§ 20 of art. XII of the charter] and also the opinion of legal minds with whom we have consulted is that the stipulations contained therein merely provide a basis of compensation and do not prevent the performance of any labor beyond the limitations described.

" 'Supplementary to our opinion we refer you to the Adamson Eight Hour Law for Trainmen which while not identical, is in many respects similar to Charter Amendment No. 21.

" 'We might also refer you to employment in many industries where the hours of labor must be stretched over a range that will supply the requirements of all concerned; in which event, the employer is subject to a penalty similar to that affixed by Amendment No. 21.

" 'As an illustration of our opinion as to how the law would apply where the ten hour limit as set forth in the Amendment has been exceeded we present a few examples where runs exceed said limit:

" 'Run 15–A, reports at 7:49 A.M. relieved at 11:19 A.M. first part; reports for second part at 2:14 P.M. and finishes at 6:36 P.M.

" 'Here you will find that from 7:49 A.M. until 5:49 P.M. is the ten hour range.

" 'The law provides that the crew working said run shall be paid straight time for work actually performed therein; which is in this instance, 7 hours and 5 minutes, and, for all work actually performed beyond the ten hour range, which in this particular case is 47 minutes, they shall be paid at the rate of time and one-half or one hour and 11 minutes; making a total of 8 hours and 16 minutes.

" 'Tripper runs would be treated in the same manner.

" '36–J, reports at 6:20 A.M. off at 8:37 A.M., reports for second part at 3:09 P.M. off at 6:03 P.M.

" '6:20 A.M. to 4:20 P.M. being the ten hour range, straight time prevails for all labor performed therein; which is 3 hours and 36 minutes, and the overtime rate prevails for labor performed between 4:20 P.M. and 6:03 P.M., which is 1 hour and 43 minutes; computed at the overtime rate

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life of the former charter. It was a part of that charter in 1924 and 1925.

[6] "The parties stipulated that the San Francisco Labor Council was one of the sponsors of the 1925 amendment.

is 2 hours and 34 minutes, making a total for this run of 6 hours and 11 minutes.

" 'The other feature of the amendment relative to one day of rest in seven may be construed in this manner.

" 'You will note that the amendment establishes eight hours as being the basic day and that therefor(e) an employee working less than eight hours in any one day is not subject to this portion of the Amendment and may be permitted to work on the seventh day at straight time.

" 'This may continue until such employee has worked 208 hours which is equivalent to 26 eight hour days, after which, the overtime rate shall prevail.

" 'Providing that the time consumed in putting in the 208 hours shall have exceeded 26 days in one month.'

"During March and the early part of April a number of conferences, attended by Superintendent Boeken and other city officials and representatives of the men, were held in an endeavor to work out a satisfactory method of operation under the new amendment. April 15, 1925, in response to a series of questions propounded by the board of public works, the city attorney rendered an opinion in which he said in part: 'Most legislation limiting the hours of employes and restricting the number of days a week upon which labor may be performed, is adopted upon the theory that the shortening of time of labor promotes the health and comfort of the employe, and therefore, produces greater efficiency. But it is manifest from the very language of section 20 that it does not restrict the hours of labor for that reason. It creates a basic day and a basic week for the purpose of fixing compensation. It is expressly declared:

" ' "The basic hours of labor shall be eight hours, to be completed within ten consecutive hours; there shall be one day of rest in each week of seven days; all labor performed in excess of eight hours in any one day, or six days in any one week, shall be paid for at the rate of time and one-half."

" 'Therefore, it was manifestly the intention of the framers of this section of the charter that the men should be allowed to work in excess of the basic hours, but that in the event that they did work they should receive extra compensation. It is meaningless to provide a restriction upon the hours of actual labor when in the same sentence, it is expressly declared that all labor performed in excess of eight hours in any one day or six days in any one week shall be paid for at the rate of time and one-half. The act forbidding females to work more than eight hours in twenty-four is direct and positive with no provision for the payment of any overtime and prescribes a penalty for its violation. Statutes 1911, page 437. So are all similar acts prescribing the limitations upon the right to labor.'

"He was further of the opinion that the provision that 'the basic hours of labor shall be eight hours, to be completed within ten consecutive hours' did not prevent the persons referred to from performing their work within a period of time in excess of ten hours; also, that it would be lawful for a platform man who had worked 8 hours a day for six consecutive days, to work on the seventh day, and that the same was true of a man who worked less than 48 hours during that six day period; and that 'the employe is entitled under the said section to time and one-half for any and all time after the period of ten consecutive hours has elapsed during which time he has actually worked,' and 'the employe who works on the seventh day is entitled to time and one-half.'

"April 24, 1925, the board of public works adopted a resolution directing the superintendent of the railway to so arrange the schedules that no platform man or bus operator be employed on the seventh consecutive day (except men on the extra list who had worked less than 48 hours in six days; all work on the seventh day to be paid for at time and one half); to so arrange the schedules that a minimum of overtime would be required of an employee who worked eight hours in any given day; and to fix eleven hours as the maximum range to be used. In that resolution the board recited in part that 'the City Attorney in answer to the inquiries of this Board expresses as his opinion that the terms of the charter amendment recently ratified by the Legislature pertaining to the Municipal Railway, do not prohibit the employment of platform men or bus operators on the seventh consecutive day, nor in excess of eight hours in any given day, nor beyond a range of ten hours in any given day, provided that in case said employee is employed on said seventh day, or in excess of said eight hours, or outside a range of the said ten hours, he must be paid time and one-half therefor' and that 'the amendment referred to was drafted and presented by the members of Division No. 518 of the Amalgamated Street Railways Employees of America, who were particular to have incorporated therein the following: "There shall be one day of rest in each week of seven days."'

"Thus, it appears that at the very beginning of operations under the new charter amendment in 1925, the officials charged with its administration and enforcement, their legal adviser, and the representatives of the platform men and bus operators interpreted its provisions substantially the same as do the appellants herein.

"Has there been any material change in that interpretation, over the years, upon the part of the administrative officials? The evidence indicates there has been no such change. At the trial, the parties entered into a stipulation setting forth the significant facts concerning the establishment of routes for the operation of street cars and motor coach or trolley coach lines, the working schedule, runs necessary to service the routes, the 'general sign-up,' 'extra lists' of men, and other related matters, descriptive of the method of operating this railway as of the time of trial. The facts so stipulated reflect no change of administrative interpretation from that adopted early in 1925. The stipulation is too long for inclusion in this opinion. The following excerpt will serve to illustrate the administrative interpretation which the facts recited reflect: '(10) At the Geneva and Ocean Avenue Headquarters, all of the employees on the extra list are required to remain on report time, and during a time when a run is not yet available, and are paid for said period of time at the straight time rate for not less than two hours and for such additional time at said rate as may be required by the Dispatcher for report time. * * * [Similar provisions concerning other headquarters] * * * On occasions, it occurs that a man on the extra list at one Headquarters is needed at another, in which event said man is sent by Management from the former to the latter, with his traveling time compensated for at the legal rate; (11) Some of the men on the extra list are not afforded an opportunity by the Municipal Railway to work eight hours a day. The management of said Railway, including Respondent Turner and the Public Utilities Commission of the City and County of San Francisco, have, for some time last past, maintained and now pursue the policy of providing for work for men upon the extra list to the extent that each man thereon obtains a minimum, throughout a period of two weeks, of pay representing forty hours per week, although said man (referring to "some of the men," as above stated in line 23), are ready and desirous of working eight hours a day.'[7]

"Concerning the continuity of administrative interpretation over the years, 1925–1951, some evidence was adduced at the trial. April 23, 1932, Fred Boeken, manager of the municipal railway, issued a bulletin which stated: 'Commencing Monday, April 25, 1932, no allowance will be made in the way of overtime for runs which extend beyond a range of ten (10) hours.' April 29, 1935, these provisions were revoked by a new bulletin issued by the manager, reading as follows: 'Commencing Wednesday, May 1, 1935, overtime will be allowed for runs which extend beyond a range of ten (10) hours.' William. H. Scott, now general manager of the municipal railway (from 1913 to 1935 he was auditor) produced the record which contained these bulletins. He testified that from 1917 until the creation of the present public utilities commission in 1932, he represented the municipal railway in all labor negotiations. Mr. Bullock represented the board of supervisors and Mr. Hammond the board of public works. That was before and after 1925. During that period of time he was never confronted with any demands to the effect that the workmen on this railway were guaranteed an eight-hour day. The first time that he realized that a demand was being made by any employee of the railway to the effect that the charter guaranteed him an eight-hour day was in the spring of 1949 at a meeting in Mr. Turner's office, attended also by three or four union representatives. Edward G. Cahill was manager of utilities from April 1, 1932, until October, 1945. In that capacity he certified payrolls upon the municipal railway. In performing that function he was mindful of the requirement of section 150 of the new charter that 'No officer or employee shall be paid for a greater time than that covered by his actual service', and abided by it. He testified that the 1932 bulletin which we have quoted did not come to his attention until sometime after its issuance. In late 1934 he was approached by union representatives concerning it. He investigated the situation, took it up with the public utilities commission and recommended that it be changed. This resulted in the above quoted bulletin of 1935. During those discussions with the union representatives, Cahill said, no claim was made by them that the men were entitled to an eight-hour day by virtue of the charter provision. Henry S. Foley, an employee of the municipal railway for approximately 33 years preceding 1951, was one of those representatives. He testified that in 1946 the city and county controller notified the railway management they would have to discontinue paying for 'dead time'; at that time operators whose runs finished at 7:45, and so on, up to eight hours were paid a full eight hours' pay. Subsequently, Foley requested reinstatement of the practice of allowing eight hours' pay for such runs.

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[7] "The evidence shows a marked unevenness in rider demand each day. It is extremely high in the morning between 7:20 and 8:40 and in the evening between 4:55 and 5:30. In consequence, by 7 p.m. two-thirds of the equipment is withdrawn from service and by midnight demand is extremely low.

"William H. McRobbie, engaged in various employments on the municipal railway over the years, a member of the same union as Mr. Foley, testified that he was active in the union in 1932, and following, to restore the range time, overtime pay for work done after the ten-hour span. Finally, his committee met with Mr. Cahill, the mayor, and the city attorney. There was a discussion as to whether it was legal to pay this penalty time for any work performed in excess of ten hours' spread. The city attorney orally stated that in his opinion it was legal. That meeting was about two weeks before the issuance of the 1935 bulletin restoring range time. Asked if at that meeting there was any assertion that the men, by virtue of the charter, were afforded a guarantee of eight hours a day, he said 'No, there was no assertion that the men, all the men would be guaranteed eight hours a day; however, we did contend that the regular runs should be eight hours and any work performed in excess of the ten hours spread should be paid for at the rate of time and a half; that was all that was discussed.' Concerning the regular runs, he explained that the city and county had been giving eight hours' pay for those runs which were in fact but seven hours and 45 minutes; that after the range time was taken away, the contention was being made by those who took it away that the pay for such runs should be only for actual time, seven hours and 45 minutes. He said that he and his committee did refer to the charter 'in this respect: That the implication was contained in that Charter amendment that would pay time and a half for all work in excess of the ten-hour spread; that was the main contention at that time'; that there was also talk 'for the restoration of that pay between seven hours and forty-five minutes and eight hours.'

"Respondents attach some significance to two items which they suggest show an administrative interpretation in favor of an eight-hour guaranteed workday. The first of these appears in a letter dated March 19, 1925, from Mr. Boeken, then superintendent of the municipal railway, to Honorable Ralph McLaren, then Acting Mayor of San Francisco, concerning the problem of complying with the provisions of Charter Amendment No. 21, the 1925 amendment. Concerning estimated costs for an average month, there was included this item: 'Cost for time allowed for runs under eight hours, $2,898.23. This item does not enter into Amendment 21.' Appellants explain this statement by reference to management's established practice prior to 1946 of paying a full eight hours' pay for a regular run of seven hours and 45 minutes. This seems the only reasonable inference that can be drawn considering the relatively low monthly cost noted, and in view of the interpretations made of the 1925 amendment by the city attorney in April and by Mr. Halling, president of Local 518, in March, 1925. The second item consists of an unsigned memorandum dated September 4, 1925, entitled 'Municipal Railway, San Francisco, data re working conditions of platform men.' This memorandum was prepared in response to a written request from another transit company and consists of a short summary of working conditions before and after the effective date of Charter Amendment No. 21. In it this statement appears: 'Previous to Charter amendment, schedules were made out on an eight hour day with no limits as to range, except that they were kept as near ten hours as possible. All *regular* runs under eight hours were paid full eight hours and time and one-half was paid for all time beyond eight hours and twenty minutes. Number of hours after Charter amendment 21? Conditions same as above, except that overtime is paid after eight hours instead of after eight hours and twenty minutes, and one [and one-] half time is also allowed after the tenth hour range. * * *' (Emphasis added.) The statement concerning eight hours' pay for all regular runs should be read in the light of the practice then in force of treating a regular run of seven hours and 45 minutes as the equivalent of a full eight hour regular run. We conclude that these two items, viewed in their setting, are in harmony, not in conflict, with our analysis of the administrative interpretation.

"This is all of the significant evidence of administrative interpretation which has been brought to our attention by the parties or discovered by us in the record. It does not support the finding that the 'administrative construction adhered to throughout the years of Section 125 of the Charter is not in contravention of petitioner's [respondents', upon this appeal] construction.'

"(2) *In respect to the fixing of 'the wages of platform employees and bus operators of the municipal railway', section 151.3*[8] *of the charter* directs the civil service commission, each year, to certify to the board of supervisors 'the two highest wage schedules in effect on July 1st of that year for' such employees 'of other street railway systems in the State * * *.'

"The board thereupon fixes wage schedules for such employees 'which shall be the average of the two highest wage schedules so certified' by the commission. If such average is less than the rate fixed therefor in San Francisco's salary standardization ordinance adopted March 18, 1946, the board shall fix the wage schedules at the same rates as those fixed in that ordinance.

"Respondents claim that section 151.3 requires the commission to include guaranteed hourly, weekly, or monthly wage rates, if any, in effect in such other railway systems. The appellants claim that 151.3 does not require the inclusion of any such guaranty factors.

"The court found that in 1949 the commission certified that the wage schedules of Torrance Municipal Bus Lines, Torrance, and the California Street Cable Line, San Francisco, were the two highest. The court further found that the Torrance schedules provide monthly guaranteed wages ranging from $231 to $265 according to the number of years of service of the employee; also, that the California Street Cable schedule provided for a guaranteed work week of six days or 48 hours per week;[9] but that the commission refused to certify those elements of the two highest wage schedules, certifying only the hourly rate for each. In this connection we observe that the court also found that the commission when certifying the Torrance hourly rate, included the several monthly wage rates ('1st year of service $221 per month equal to $1.275 per hour * * * 5th year of service $265 per month equal to $1.52884 per hour' and recited 'Factor used to convert to per hour rate is—4⅓ weeks of 40 hours each per month or 1.73.33 hours per month.'

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[8] "Stats.1947, ch. 2 of Res., p. 3264, at p. 3266.

[9] "Appellants do not question the accuracy of this finding as to these features of the Torrance and California Street schedules, except that they claim that the California Street 'extra platform men were in direct terms excluded from the eight hour provision.'

"The court found that because of the omission of the 'minimum guaranteed work week features' of these two systems from the certification, the commission had deprived the respondents and others similarly situated of a 'daily and weekly wage equivalent to the average of the wages receivable by platform employees and bus operators' of the two systems mentioned.

"The conclusions of law followed these findings. The judgment gave declaratory relief and ordered the issuance of a writ of mandate requiring the commission to certify to the board of supervisors 'in addition to the hourly rate of wages of the two highest wage schedules in California, any guarantee or minimum daily, weekly, or monthly wage contained in said schedules, affecting the wage rate or wages.'

"Although this conclusion may have been based in part upon the premise that section 125 guarantees wages for at least eight hours each scheduled work day upon which an employee performs every assignment given him, the conclusion does not necessarily fall with that premise. If section 151.3 should, in a given year, guarantee a minimum wage because the two highest wage schedules of other systems embrace such a provision that year, it would operate and apply to the respondents and other similarly situated quite independently of section 125. Especially so, in view of the positive declaration in section 151.3 that the wages of platform employees and bus operators shall be determined and fixed as provided in section 151.3 'Notwithstanding the provisions of section 151 or any other provisions of this charter.'

"Let us analyze the significant portions of section 151.3.

"It was added to the charter as a new section by an amendment which took effect January 15, 1946. Ch. 8 of Res., 1st Ex. Sess.1946; printed in Stats.1947, p. 219, at 233. At that time it provided for the establishment of rates of pay for 'groups and crafts' predicated upon rates fixed in collective bargaining agreements, under the conditions described in section 151.3.

"The section was later enlarged by an amendment which took effect January 7, 1947, Stats.1947, ch. 2 of Res., p. 3264, at 3266. The amendment slightly modified the original text and added the provisions which now govern the fixing of wage schedules for platform men and bus operators. In this form section 151.3 consists of two distinct parts, although not separately designated as such by paragraph or subdivision numbers. For convenience of reference we designate them as Part I (the original text as modified in 1947) and Part II (the substantive addition made in 1947).

"It is important to consider both parts, for Part I has been judicially interpreted. That interpretation may be helpful in ascertaining the meaning of Part II. The significant portions of the section read as follows:

" 'Section 151.3 [Part I]. Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco, and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as compensations for such groups and crafts engaged in the city and county service. The rate of pay so fixed by the board of supervisors shall be determined on the basis of rates of pay certified by the civil service commission on or prior to April 1st of each year and shall be effective July 1st following: provided, that the civil service commission shall review all such agreements as of July 1st of each year and certify to the board of supervisors on or before the second Monday of July any modifications in rates of pay established thereunder for such crafts or groups as herein provided. The board of supervisors shall thereupon revise the rates of pay for such crafts or groups accordingly and the said revised rates of pay so fixed shall be effective from July 1st of the fiscal year in which the said revisions are determined. * * *

"'[Part II] Notwithstanding the provisions of section 151 or any other provisions of this charter the wages of platform employees and bus operators of the municipal railway shall be determined and fixed, annually, as follows:

"'(A) On or before the second Monday of July of each year the civil service commission shall certify to the board of supervisors the two highest wage schedules in effect on July 1st of that year for platform employees and bus operators of other street railway systems in the State of California;

"'(B) The board of supervisors shall thereupon fix wage schedules for platform employees and bus operators of the municipal railway which shall be the average of the two highest wage schedules so certified by the civil service commission; provided, if the average of the two highest wage schedules shall be less than the rates of pay fixed for such service in the salary standardization ordinance adopted by the board of supervisors on March 18, 1946, the board of supervisors shall fix wage schedules for such service which shall be the same as the rates fixed for such service in the said ordinance;

"'(C) When, in addition to their usual duties, such employees are assigned duties of instructors of platform employees or bus operators they shall receive twenty (20¢) cents per hour above the rates of pay fixed for platform employees and bus operators as herein provided;

"'(D) The rates of pay so fixed for platform employees and bus operators as herein provided shall be effective from July 1st of the fiscal year in which such rates of pay are certified by the civil service commission;

"'(E) Platform employees and bus operators shall be paid one and one-half times the rate of pay fixed as herein provided for all work performed on six days specified as holidays by ordinance of the board of supervisors for such employees. * * *'

"Part I was interpreted by this court in Adams v. Wolff, 84 Cal.App.2d 435 [190 P.2d 665]. (A petition for a hearing by the Supreme Court was denied by that court.) The case involved the rates of pay of municipally employed machinists and mechanics.

"The pertinent collective bargaining agreements prescribed pay at a fixed sum for day work on the basis of a work week consisting of five days, except that when certain holidays fell on work days the same rate of pay per week was fixed, pay for a four-day week with such holidays off without loss of pay. Also, those agreements increased the rate of pay 10 per cent and 15 per cent respectively, for work on night and midnight shifts. They also provided that a foreman would receive 10 per cent in excess of the journeyman rate. (The city conceded the foreman pay differential if Part I were found constitutional.)

"The judgment of the trial court allowed the holiday pay, the increased rates for night and midnight shifts, and the increased rate for foremen. We affirmed the judgment.

"We did so after analyzing the section [Part I] and finding that by it 'the people have set up a standard for determining rates of pay that will insure these public employees a wage scale commensurate with wages received by workers in the same field in private industry.' (84 Cal. App.2d at page 443, 190 P.2d at page 671.)

"Concerning holiday pay and premium pay on the night and midnight shift, we said: 'Section 151.3 requires the "rate of pay" to be fixed in the manner there set forth. It is contended that this relates only to the "basic" rate of pay, and that holiday and premium pay on night shifts does not relate to the "basic" rate of pay but relates to "working conditions," and it is urged that the fixing of working conditions is beyond the scope of § 151.3. It is probably true that § 151.3 relates only to the "basic" rate of pay and does not relate to "working conditions." But that in no way assists defendants. It is quite apparent that it was the intent of § 151.3 to give to the public employees of the type here involved the same take home pay received by private employees in the same industry. That means that when the public employees work on a night shift, or where a work week is interrupted by a holiday they are to receive the same pay that private employees would receive for work similarly performed. It is quite obvious that night shift pay and pay for holidays is a part of the "basic" rate of pay, and is as much a part of the wage structure as the hourly wage itself. If evidence were necessary on such an obvious matter it was supplied by Norman Beals, San Francisco representative for the State Personnel Board, who so testified. The "basic" "rate of pay" is the take home pay of the employee. The charter provision guarantees that the take home pay of public employees shall be the same as private employees. That obviously includes holiday and premium pay for night work.' (84 Cal.App.2d at pages 444–445, 190 P.2d at page 671.)

"Later, we had for consideration the question whether or not Part I of section 151.3 envisioned and embraced provisions for vacation with pay (five days each year, after one year of service; ten days, after three years of service) if contained in the pertinent collective bargaining agreements. We concluded that it did, by the same process of reasoning as that used in Adams v. Wolff, supra. Adams v. City and County of San Francisco, 94 Cal.App.2d 586 [211 P.2d 368, 212 P.2d 272]. A petition for hearing by the Supreme Court was denied by that court. We said: 'the "rate of pay" is the "take home pay" of those on the list of employees in good standing eligible for active duty. * * * Pay for an unworked holiday is part of the basic rate of pay. Adams v. Wolff, supra. The number of holidays is designated in the private collective bargaining agreement. With equal right and authority may the same agreement control the number of vacation days. The *period of vacation,* if any, set forth in a private bargaining agreement is the period that the public employees must accept, for the reason that it is part of the basis upon which "rate of pay" is computed.' (94 Cal.App.2d at page 592, 211 P.2d at page 372.)

"We further observed: 'The holding in Adams v. Wolff, supra, that section 151.3 [Part I] was intended to equalize take home pay and that holiday pay is a part of the basic rate of pay must be considered controlling, and forces a determination that vacation pay directly and with certainty affects the hourly, the weekly, the monthly or the yearly wage.' (94 Cal.App.2d at page 594, 211 P.2d at page 373.)

"The five and ten day vacation periods which Part I of section 151.3 thus prescribed, prevailed over the two weeks' period prescribed by section 151 of the charter because of the declaration at the very beginning of Part I that its provisions operate and apply 'notwithstanding the provisions of section 151'. Later, the addition of sections 151.4[10] and 151.5[11] modified the scope of section 151.3 (both Part I and Part II) in relation to vacation privileges. That modification leaves intact the scope and application of Parts I and II of section 151.3 in relation to other 'take home pay' features appearing in collective bargaining agreements or in the 'two highest wage schedules'.

"Section 151.5 in declaring that vacation rights 'contained * * * in any street railway or bus wage schedules,' as well as those 'contained in any collective bargaining agreements,' shall 'in no way increase, reduce or otherwise affect or be deemed to affect' the 'wage of pay rate or schedule determinations made pursuant to the provisions of said section 151.3', recognizes the possibility that Part II as well as Part I comprehends and embraces guaranteed or minimum wages. We do not view these provisions as a legislative interpretation or determination that section 151.5 does comprehend and embrace such features. It is probable that these references to Part II of section 151.3 were of a precautionary nature, to preclude the possibility of such an interpretation in relation to 'vacation rights,' especially in view of the use of the words 'or be deemed to affect.' Significantly, however, section 151.5 removes from the purview of section 151.3 [Part II as well as Part I] only the vacation with pay element of the take home pay feature, no other element thereof, such as premium pay for night shifts or guaranteed daily, weekly, or monthly wages.

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[10] "§ 151.4 added: 1949 first Ex.Sess., ch. 4, Stats.1950, p. 36, at 46.

[11] "§ 151.5 added: 1950 third Ex.Sess., ch. 10; Stats.1951, p. 100, at 102.

"What of the similarity, if any, of the provisions of Part II of section 151.3 to Part I of that section, and the applicability to Part II of our interpretation of Part I?

"They are similar in this: Each reaches out for a yardstick; Part I to collective bargaining agreements in private industry, Part II to other street railway systems, public or private. Part I uses the term 'rates of pay'; Part II, 'wage schedules.' Part I uses the rate ('such rate'), established by collective bargaining agreements, which is 'generally prevailing' in San Francisco. Part II uses 'the average of the two highest wage schedules' of other street railway systems than the San Francisco municipal railway system.

"The only seeming differences [12] are: (a) 'The average' in Part II, instead of 'such rate' in Part I; and (b) 'wage schedules' in Part II, in contrast to 'rates of pay' in Part I. Neither of these is a differentiating factor. 'The average rate' denotes a fixed and certain quantity or quality, equally as does 'such rate.' 'Wages schedules' is equally as comprehensive in its scope and sweep as is the expression 'rates of pay'; perhaps more comprehensive, certainly not less comprehensive.

"The conclusion seems irresistible that Part II sets up a standard for determining wage schedules (rates of pay) that will assure the municipal platform men and bus operators of San Francisco a wage scale commensurate with the highest wages received by workers in the same field in this state (the same take home pay), using the average of the two highest as a yardstick.

"We conclude that Part II comprehends 'guaranteed or minimum daily, weekly, or monthly wages' (as found by the trial court), within the scope of the yardstick prescribed by Part II of section 151.3 as factors to be ascertained and certified by the civil service commission to the board of supervisors for the information and use of the board in fixing the indicated wage schedules.

"Appellants ask how minimum wages can be averaged when one is a monthly wage and the other is weekly, or when one street railway system has a minimum wage and the other not. The answer is that this question is not here involved. It is the function of the board of supervisors (not the civil service commission) to do the averaging, when it fixes the wage schedules, and the board is not a party to this action.

"Appellants make the further claim that, prior to suit, the petitioners made no demand upon the civil service commission to include the minimum wage factor when certifying the two highest wage schedules to the court. This, of course, has reference to the writ of mandate not the declaratory relief count on that subject.

"The answer is that the record demonstrates that such a demand would have been futile. Moreing v. Shields, 28 Cal.App. 513 [152 P. 964]; Moore v. Superior Court, 20 Cal.App. 299 [128 P. 946].

"Appellants further contend the judgment is erroneous in directing a peremptory writ of mandate on this subject because the alternative writ of mandate did not include such a provision. The answer to this point is that the respondents in their amended petition asked for a writ of mandate for certification of the minimum wage features of the Torrance and California Street Lines, and for general relief; the appellants joined issue; the case was thoroughly tried; and the appellants have not indicated that they presented this point to the trial court.[13] The trial court, of course, did not in its judgment command the commission to certify the minimum wage features of the Torrance and California Street Cable Lines. Certification occurs each year. No one could predict what two street railway systems might in future years have the highest wage schedules. The court did appropriately direct the commission to include minimum wage features appearing in any wage schedule certified by it to the board of supervisors in any year in the future. In this situation, the principles enunciated in Buxbom v. Smith, 23 Cal.2d 535, at pages 542–543 [145 P.2d 305], apply.

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[12] "We are mindful of the fact that paragraph (E) of Part II fixes pay at time and one-half for work done on certain holidays and paragraph (C) prescribes 20 cents per hour extra for instruction service, features not in Part I. These features, however, are limited in scope and obviously do not change the overall resemblance of Part II to Part I.

"(3) *We do not find the judgment uncertain or contradictory in its provisions.* Should ambiguities develop, we believe they could be resolved by reference to the findings of fact and conclusions of law.

"(4) *The practice and procedural points presented by the appellants* include the following claims asserted by them: (a) the respondents are not in a position, have not the legal right to raise the questions presented by them, (b) there is no true basis for a class suit, and (c) the judgment is incapable of complete enforcement for lack of proper parties and for failure to include the controller and the civil service commission in the writ of mandate to Turner.

"(a) *The claim that the respondents are without legal right to raise the questions presented by them* seems predicated upon the asserted fact that the seniority of each of the respondent(s) is such that he, in fact, has an eight-hour day. This we think is not a significant factor. It appears to be true that a high seniority may presently assure a platform man or bus operator of a run of such a length that he will be able to put in eight hours each day, perhaps eight hours within a span of ten; and thus also be assured of his minimum wage. However, it is possible, under appellants' interpretation of the charter that management in response to rider demand might find it necessary to readjust the service in such a manner as to reduce a good many regular runs to considerably less than eight hours, and divide others into parts, spreading them over a span considerably in excess of ten hours. In other words, it appears that each senior employee has this sword of Damocles suspended over him by a potentially slender thread. He believes that the charter makes certain guaranties. He should be able to have such questions determined before the sword falls. (The second amended petition in this action was filed March 14, 1951, and the judgment is not yet final.) The law accords him that right. He, therefore, is properly in court, asserting his claim.

"(b) *Appellants contend there is no true basis for a class suit.* They question the propriety of extending the benefits of this judgment to include other 'employees similarly situated.'

"They present two bases for this claim. The first is that there are two unions to which the employees in the operating department of the municipal system respectively belong, no employee having membership in both unions. It is asserted that the respondents belong to but one of these unions and therefore cannot very well represent those employees who give adherence to the other union. This, we think, is a false quantity. The respondents appear in this action as employees of the city and county, not as members of a union. Neither of the unions, as such, is a party to the action.

"The other premise is that each of the respondents 'is afforded the identical work schedule sought for in this second amended petition, if they had not of their own volition, absented themselves from work.' Appellants' Opening Brief, pp. 61, 62. From this premise (assuming solely for the purpose of discussion the accuracy of this quoted statement), appellants conclude that the respondents do not belong to the same class or group as those operators, whether regular or extra men, who do not presently enjoy such a schedule. That conclusion does not follow. For, as we have seen (in sub-paragraph (a), above), respondents' enjoyment of the sought for schedule (under appellants' interpretation of the charter) is not a matter of right; i. e., a mere privilege, enjoyed today and gone tomorrow. This certainly puts these respondents in the same class as all other operators, whether regular or extra men.

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[13] "The alternative writ was issued in July, 1949. The second amended petition was filed in March, 1951. The return to the second amended petition was filed May 8, 1951. The case was tried on the issues thus joined, the trial commencing June 7, 1951.

"(c) *Appellants claim that the judgment is incapable of complete enforcement* because of the absence as parties of the public utilities commission and the city and county itself, and the mandate to Turner does not run also to the controller and the civil service commission.

"In this connection they direct attention to the fact that Manager Turner, who by this judgment is directed to certify time rolls or payrolls in a certain manner, works under the direction of the public utilities commission and the commission, not a party to the action, would not be bound by the judgment. They direct attention also to the fact that although the members and secretary of the civil service commission are parties, the judgment does not operate directly upon them by way of ordering them, when scrutinizing payrolls, to recognize the certification of eight hours per day per man by Turner. They make the same observation in respect to Controller Ross who, though a party to the action, is not by the judgment expressly directed to do anything.

"We may assume for the purpose of this discussion that the controller and the civil service commission and its secretary, although parties to the action, might not be bound by Manager Turner's certification of payrolls. That would not necessarily render the judgment incomplete or abortive. Should the judgment in the form rendered become final, it would be binding upon Manager Turner and would govern him in the certification of payrolls. The mere fact that it might not be binding upon and govern these other officials, including the members of the public utilities commission, would furnish no sufficient reason in itself for reversal of the judgment. There is no basis for assuming that these other officials would disregard the law as thus adjudicated. Should they disregard it as thus finally adjudicated, the remedy would be the institution of another legal proceeding of an appropriate nature.

"The judgment is reversed insofar as it declares that respondents (the petitioners below, and employees similarly situated) are entitled to wages for at least eight hours each scheduled work day (as stated in subparagraph (a) of paragraph 3 of the judgment) and insofar as it orders and decrees that a writ of mandate issue ordering appellant James Turner to approve and transmit to the civil service commission time rolls or payrolls showing that each respondent and employee similarly situated is credited for at least eight hours, of work within a span of ten, each scheduled work day (as stated in paragraph 1 of the judgment). In all other respects the judgment is affirmed. Each party will bear his own costs upon this appeal."

TRAYNOR, Justice (dissenting).

I agree with the discussion in the majority opinion concerning section 125 of the charter. It is my opinion, however, that for the reasons set forth in the opinion written by Mr. Justice Fred B. Wood for the District Court of Appeal, 1st Dist. Div. 1, when this case was before that court, 256 P.2d 662, section 151.3 of the charter requires consideration of any minimum wage guarantees included in the wage schedules of the other street railway systems.

GIBSON, C. J., concurs.

42 Cal.2d 358

OSBORN v. OSBORN et al.

L. A. 22540.

Supreme Court of California.
In Bank.
March 1, 1954.
Rehearing Denied March 25, 1954.

Suit to quiet title. The Superior Court, Los Angeles County, Ben V. Curler, J., entered judgment from which the plaintiff appealed. The Supreme Court, Traynor, J., held that where compromise settlement of dispute between father and son as to title to certain property provided for holding of title by father until his death, and vesting in son upon father's demise, and father was required to deliver deed of such tenor to escrow holder, father received his consideration for the deed when the compromise settlement was executed, and there were no conditions precedent to vesting of legal title in remainder in son, but such title passed, if there was a valid delivery, at time of deposit of deed, even though deed was to be retained by holder until father's death.

Judgment reversed.

Carter, J., dissented in part and Schauer, J., dissented.

Prior opinion, 256 P.2d 653.

1. Deeds 🔑132, 141

The deposit of a deed granting an estate in fee simple, with instructions that it be transmitted to the grantee upon the death of the grantor, conveys a remainder interest in fee simple with a life estate reserved in the grantor, if the grantor intended the deposit to be irrevocable.

2. Escrows 🔑12

Where grantor, as party to binding contract for sale of realty with reservation of life estate, deposits the deed in escrow, the legal title passes to the grantee at the time of his completion of the conditions precedent, if any, regardless of whether the escrow holder gives grantee physical position of the deed, since grantor's delivery in escrow is absolute and cannot thereafter be disaffirmed.

3. Escrows 🔑13

Where compromise settlement of dispute between father and son as to title to certain property provided for holding of title by father until his death, and vesting in son upon father's demise, and father was required to deliver deed of such tenor to escrow holder, father received his consideration for the deed when the compromise settlement was executed, and there were no conditions precedent to vesting of legal title in remainder in son, but such title passed, if there was a valid delivery, at time of deposit of deed, even though deed was to be retained by holder until father's death.

4. Deeds 🔑56(2), 200
Evidence 🔑230(2, 3)

The question of whether a deed was delivered is one of intent, and resort may be had to the acts and declarations of the grantor, both before and after his transmission of the deed to the grantee or a third party, for purpose of determining such intent.

5. Deeds 🔑66

Where grantor's only instructions with respect to delivery of a deed are in writing, the effect of the transaction depends upon the true construction of the writing, and it is a pure question of law whether there was an absolute delivery of the deed.

6. Deeds 🔑61

Agreement between father and son in settlement of dispute as to title to certain property, which required father to deposit in escrow a deed granting remainder interest in fee simple to son, and reserving life estate in father, and which expressly instructed escrow holders to resist any attempt by either father or son to obtain possession of deed prior to demise of father, followed by a delivery of deed in accordance therewith, resulted in an absolute delivery, notwithstanding reservation in father of right to revoke deed in event son harmed him or refused to carry out terms of the agreement, since right to revoke merely limited the future interest created to a vested remainder subject to being divested upon happening of a condition subsequent.

7. Appeal and Error 🔑878(1)

The failure to take an appeal demonstrates only satisfaction with the judgment as it is, and not as it is changed by a partial reversal.

8. Appeal and Error ⟾878(1), 1172(1)

Where both that part of judgment refusing to quiet title in plaintiff and that portion refusing to quiet title in plaintiff's stepmother, who purchased at execution sale, involved question of whether plaintiff had acquired a remainder interest under deed deposited in escrow by his father pursuant to agreement settling dispute as to ownership of certain property, Supreme Court had jurisdiction to review the entire judgment, even though the execution purchaser did not appeal, and it would reverse the entire judgment upon determination that trial court erred in determining that no remainder interest passed.

◆

Guerin & Guerin and John J. Guerin, Los Angeles, for appellant.

Louis Warren, Los Angeles, for respondents.

TRAYNOR, Justice.

Plaintiff Merinoeth Osborn appeals from an adverse judgment on his complaint to quiet title to certain real property in Los Angeles County, known as Lot 97 of the Casa Verduga Villa Tract. Defendant Louise Osborn, plaintiff's stepmother, answered and cross-complained to have title to Lot 97 quieted in her. Judgment was entered for plaintiff on the cross-complaint, and defendant Louise Osborn has not appealed therefrom. The other defendants named in the complaint disclaim any interest in the property.

Lot 97 was originally acquired by Merinoeth's mother Chloie Osborn, in 1922. Chloie died intestate leaving her husband, Thomas D. Osborn, and their son, Merinoeth, surviving. On June 27, 1939, during the administration of Chloie's estate, Merinoeth and Thomas executed a "Stipulation", subsequently approved by the court, to resolve their conflicting claims to Chloie's estate. The material part of this stipulation follows: "It is further stipulated and agreed by and between the parties hereto that upon execution of the within Stipulation that Thomas D. Osborn will execute either by deed contract or declaration of trust sufficient documents, conveyances or declarations so that the property known as Lot 97, Casa Verduga Villa Tract, etc., will be retained in the name of Thomas D. Osborn, during his lifetime and that the same should vest in his son Merinoeth R. Osborn at the time of the demise of the said Thomas D. Osborn." After the execution of the stipulation, the probate court distributed Lot 97 to Thomas.

On July 7, 1939, pursuant to the stipulation, Thomas and Merinoeth executed a trust agreement, and Thomas executed a deed "in accordance with the terms and conditions of that certain trust agreement of July 7th, 1939, * * * and * * * *subject to all conditions, exceptions and reservations as in said trust agreement provided.*" (Italics added.) The deed granted Lot 97 to Merinoeth subject to a life estate in Thomas. The trust agreement provided that the deed to Lot 97 "shall be turned over and delivered to the Trustees to hold and keep possession of said deed, not to record the same during the lifetime of" Thomas. The trustees were instructed to "turn over and deliver" the deed to Merinoeth on the death of Thomas. It was recited in the trust agreement that Thomas reserved a life estate in the property, and that he also reserved "*the right to revoke the deed in the event* [*Merinoeth*] *wilfully harms* [*Thomas*], and [Merinoeth] reserves the right to cancel this agreement if [Thomas] wilfully harms" him. (Italics added.) Other material parts of the trust agreement are: "The parties hereto further agree that *in the event any attempt is made by either party* hereto to break the terms of the within trust agreement, or *to force the trustees to surrender the within described deed prior to the demise of* [*Thomas*] by court action, or other proceedings, then, in that event, the party attempting to break the terms of the within trust agreement, shall pay in addition to expenses and court costs, a reasonable attorney's fee to the said trustees. The parties hereto further *authorize and instruct the trustees herein mentioned to* *defend any attempts made by either parties hereto to break the terms of the within trust agreement, or to force the trustees to surrender the within described deed.* * * * The wilfull failure or refusal on the party [sic] of either party hereto to carry out the terms and conditions of the within trust agreement, or the wilfull refusal or failure of either party to comply with the obligations herein provided, on his part to be performed, shall permit either party to rescind this agreement and shall confer upon the grantor the right to cancel the within mentioned deed and this agreement by a declaration duly executed and recorded with the formality of a deed and a thirty day written notice thereof served on the grantee, or his attorney." (Italics added.) The deed was deposited with defendants Franklin and Warner, who were named as trustees in the trust agreement.

Merinoeth had become indebted to Warner for legal services in the probate of Chloie's estate and the preparation of the trust agreement. In 1941, Warner resigned as trustee and assigned his claim against Merinoeth to his secretary, Champion, who recovered judgment thereon. Execution was levied on Merinoeth's interest in Lot 97, and the property was sold in 1942 to Champion for $336.37. Thereafter, at the request of Thomas, Champion transferred the certificate of sale to Louise Osborn for $415. Although Louise contends that Merinoeth had notice of these proceedings, he made no appearance and disclaims any knowledge of them.

In anticipation of a sale of Merinoeth's interest in Lot 97 to Thomas, an agreement purporting to cancel the trust agreement was executed on January 14, 1946 and then cancelled in March 1946. Thomas died intestate on December 31, 1946, leaving his second wife, Louise, and Merinoeth surviving. Merinoeth's subsequent demand upon the trustees for the deed executed by Thomas was refused.

In refusing to quiet title in either Merinoeth or Louise, the trial court concluded that Merinoeth had not acquired any interest in Lot 97 under the deed executed by Thomas and deposited with Warner and Franklin. Since Merinoeth had acquired no interest, the court concluded that Louise acquired none by reason of the execution sale.

Plaintiff's basic contention on this appeal is that the trial court erred in holding that he acquired no interest in Lot 97 under the deed executed by Thomas and deposited with Warner and Franklin to be transmitted to him on the death of Thomas. Plaintiff contends that the deposit with Warner and Franklin constituted a valid delivery immediately vesting in him a remainder interest in the property. The first issue to be resolved, therefore, is the validity and effect of the deed executed by Thomas.

[1, 2] It has long been established in this state that the deposit of a deed granting an estate in fee simple, with instructions that it be transmitted to the grantee upon the death of the grantor, conveys a remainder interest in fee simple with a life estate reserved in the grantor, if the grantor intended the deposit to be irrevocable. Bury v. Young, 98 Cal. 446, 451–452, 33 P. 338; Hunt v. Wicht, 174 Cal. 205, 206–208, 162 P. 639, L.R.A.1917C, 961; Wilkerson v. Seib, 20 Cal.2d 556, 560, 127 P.2d 904. The result is the same as if the grantor delivered to the grantee a deed reserving a life estate and granting a remainder in fee. The same result is also accomplished by the deposit of a deed in escrow pursuant to a binding contract of sale of a remainder and the grantee's performance of the conditions of the escrow. At the time of the execution of the contract of sale, the grantee acquires an equitable title to the estate being sold; the grantor retains the legal title as security for the purchase price. The legal title passes to the grantee at the time of his completion of the conditions precedent, whether or not the escrow holder gives him physical possession of the deed; the grantor's delivery to the escrow holder is absolute and cannot thereafter be disaffirmed. Cannon v. Handley, 72 Cal. 133, 140, 13 P. 315; McDonald v. Huff, 77 Cal. 279, 282, 19 P. 499; Bradbury v. Davenport, 120 Cal. 152, 154, 52 P. 301; see, also, Hagge v. Drew, 27 Cal.2d 368, 375, 165 P.2d 461.

[3] In the present case, the deed from Thomas to Merinoeth was executed pursuant to a binding contract supported by adequate consideration. On the face of the deed, Thomas reserved a life estate and granted a remainder to Merinoeth. When Thomas delivered the deed to the trustees, there were no conditions precedent for Merinoeth to perform. Thomas had received the consideration for the grant, when the compromise settlement of Chloie's estate was executed. The provision that the trustees should hold the deed until Thomas' death was not a condition precedent to the passage of legal title, for even in cases of gift, e. g., Bury v. Young, supra, an instruction that the depositary is to retain possession of the deed until the death of the grantor does not prevent the deed from being operative as a present conveyance. In this case, Merinoeth was not a donee; he was a purchaser for value, already vested with an equitable title to the remainder. The situation is thus analogous to that of a true escrow after the purchaser has performed all of the conditions precedent. Performance of those conditions automatically vests the legal title in him, even though the escrow holder retains possession of the deed.

[4-6] Defendant contends, however, that Thomas did not make a legal delivery of the deed. Delivery is a question of intent. In some cases to ascertain the grantor's intent it is necessary to have recourse to his acts and declarations both before and after his transmission of the deed to the grantee or a third party. Williams v. Kidd, 170 Cal. 631, 649-652, 151 P. 1; Rice v. Carey, 170 Cal. 748, 753-754, 151 P. 135; Donahue v. Sweeney, 171 Cal. 388, 391-392, 153 P. 708; Northern Cal. Conference Ass'n, etc., v. Smith, 209 Cal. 26, 33, 285 P. 314. When, as here, however, the grantor's "only instructions are in writing, the effect of the transaction depends upon the true construction of the writing. It is, in other words, a pure question of law whether there was an absolute delivery or not." Moore v. Trott, 156 Cal. 353, 357, 104 P. 578, 580. Thomas executed the deed and delivered it to the trustees pursuant to the provisions of the trust agreement. It was a completed act and nothing remained to be done to vest the legal title to the remainder in Merinoeth. Thomas was bound by the terms of the trust agreement, executed contemporaneously with the deed, not to attempt to recall the deed from the possession of the trustees. The trustees were specifically instructed to resist any attempt by either Thomas or Merinoeth to obtain possession of the deed prior to the demise of Thomas, and were further instructed to hold the deed for the benefit of Merinoeth. Even if it had been contended that Merinoeth had harmed Thomas or failed to carry out the terms of the trust agreement and Thomas had wished to assert his right to revoke, he could not recall the deed; he had to execute and record a declaration of revocation with the formality of a deed, after giving thirty days' notice thereof to Merinoeth, who might then defeat the proposed revocation by showing that there was no violation of the trust agreement.

It is clear, therefore, that Thomas did not retain control over the deed after he delivered it to the trustees. There is nothing in the trust agreement, or external to it, to indicate that Thomas did not intend the transmission of the deed to the trustees to be a valid legal delivery. Indeed, the whole tenor of the stipulation and the trust agreement is that Thomas intended to grant Merinoeth a presently vested remainder interest. In the stipulation of June 27th, Thomas promised that "upon execution of the within Stipulation" he would execute the documents necessary to transfer a remainder interest to Merinoeth. The trust agreement contained a number of restrictions on Thomas' right to use the property during his lifetime. If Merinoeth was not to have a presently vested remainder interest, these provisions were superfluous. Furthermore, Thomas' conduct after the execution and delivery of the deed, in requesting Champion to sell the certificate from the execution sale and in negotiating with Merinoeth in 1946 (after the execution sale) for the purchase of his interest in the property for $3,500, is corroborative of

Thomas' intent as revealed in the documents.

Defendant contends, however, that Thomas' reservation of the right to revoke the deed, in the event that Merinoeth harmed him or refused to carry out the terms of the trust agreement, made the delivery to the trustees conditional so that no estate vested in Merinoeth by virtue of the deposit of the deed with the trustees. This contention cannot be sustained. Thomas' right to revoke did not affect the delivery to the trustees, but merely limited the future interest created to a vested remainder subject to being divested upon the happening of a condition subsequent. The situation is similar to that in Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 P. 242, where the grantor reserved an unqualified right to revoke on the face of the deed, which granted a remainder in fee to vest in possession at the termination of the grantor's life estate. It was there held that the grantee acquired a remainder subject to a condition subsequent, and that "the power to revoke did not operate to destroy, or in anywise restrict the effect of the deed as a present conveyance of a future vested interest." 167 Cal. 570, 578, 140 P. 242, 246; see, also, Gray v. Union Trust Co., 171 Cal. 637, 642–643, 154 P. 306; Scott, The Law of Trusts, 1939, Vol. 1, § 57.1. These cases are distinguishable from those on which defendant relies to sustain her contention that the grantor's reservation of a right to revoke renders the delivery conditional. See Kenney v. Parks, 125 Cal. 146, 150–151, 57 P. 772; Moore v. Trott, 156 Cal. 353, 357, 104 P. 578; Long v. Ryan, 166 Cal. 442, 445, 137 P. 29. The latter cases were cases of gift, and the court was concerned with the problem of attempted testamentary disposition without compliance with the statute of wills. In those cases, the grantors reserved the right to recall their deeds from the depositary. It was found that the respective grantors did not intend any interest to pass to the grantees when the deeds were given to the depositary, but only intended an interest to pass at the time of their death. The right to revoke was, therefore, a right to recall the deed, and attached to the delivery and not to the interest granted. In the present case, the deed was executed and delivered to the trustees, not to accomplish any testamentary purpose, but to discharge Thomas' obligations under the contract he entered into with Merinoeth to compromise their conflicting claims to Chloie's estate. This contract vested Merinoeth with an equitable title to the remainder, since he had a specifically enforceable right to have Thomas convey the legal title. The legal title was conveyed when the deed was delivered to the trustees under a binding contract that made the delivery irrevocable. Cannon v. Handley, supra; McDonald v. Huff, supra; Pothast v. Kind, 218 Cal. 192, 195, 24 P.2d 771; see also, Brunoni v. Brunoni, 93 Cal. App.2d 215, 219, 208 P.2d 1028. Although Thomas could have accomplished the same result by delivering a deed to Merinoeth with the same reservations as those set forth in the trust agreement, see Tennant v. John Tennant Memorial Home, supra—just as in the cases like Bury v. Young, supra, the same result could be accomplished by delivery to the grantee of a deed granting a remainder interest—the effect of the transaction is the same: Merinoeth acquired a vested remainder subject to divestment should he breach the terms of the trust agreement.

The only question remaining is the order that should now be made by this court. Merinoeth contends that the part of the judgment refusing to quiet title in him should be reversed with directions to enter a judgment quieting his title to the property and that the part of the judgment refusing to quiet title in Louise should be affirmed because she did not appeal. This contention cannot be sustained.

[7] The trial court determined that Merinoeth did not obtain an interest under the deed and therefore refused to quiet title either in him or in Louise. If Merinoeth did not acquire a remainder interest, Louise could acquire nothing by the execution sale. Apparently in the belief that as a result of the judgment each party

would get half the property as an heir of Thomas, Louise did not appeal. Merinoeth appealed, contending that he acquired a remainder interest under the deed, that the execution sale did not pass any interest to Louise, and that he was therefore entitled to the property. Had Louise appealed, her position could only be that Merinoeth acquired a remainder interest and that the execution sale was effective. That contention, however, would concede the first half of Merinoeth's proof—that he acquired a remainder interest—a concession fatal to a claim that she was entitled to half the property as an heir of Thomas. She was apparently willing to let the judgment stand and take half an interest as heir rather than risk an adverse ruling with respect to the execution sale, which would leave her with nothing. "[T]he failure to take an appeal demonstrates only satisfaction with the judgment *as is*, not as changed by a partial reversal. One may elect to stand upon a judgment which, he believes, although largely in his favor, does not give him all of the benefits to which he is entitled. To avoid the time and expense of further litigation, he may be persuaded to permit the unfavorable portions to stand in reliance upon the benefits received in the other parts." American Enterprise, Inc. v. Van Winkle, 39 Cal.2d 210, 221, 246 P.2d 935, 940.

[8] Both parts of the judgment turned on the trial court's construction of the deed and agreement. It refused to quiet title in Merinoeth on the ground that he did not acquire an interest by the deed and agreement; it refused to quiet title in Louise for the same reason. Since both parts of the judgment embrace the identical issue—did Merinoeth acquire a remainder interest under the deed—we have jurisdiction to review the entire judgment. American Enterprise, Inc. v. Van Winkle, supra, 39 Cal.2d 210, 217, 246 P.2d 935; Blache v. Blache, 37 Cal.2d 531, 538, 233 P.2d 547; Milo v. Prior, 210 Cal. 569, 571, 292 P. 647; Whalen v. Smith, 163 Cal. 360, 362, 125 P. 904. Our decision that a remainder interest passed under the deed removes the basis of the trial court's decision adverse to Louise and unless the entire judgment is reversed she will be denied an opportunity to establish her claim that the execution sale was valid. A complete reversal is therefore appropriate. Blache v. Blache, supra; Rediker v. Rediker, 35 Cal.2d 796, 798, 221 P.2d 1, 20 A.L.R.2d 1152; Estate of Murphey, 7 Cal.2d 712, 717, 62 P.2d 374; cf. Hamasaki v. Flotho, 39 Cal.2d 602, 609, 248 P.2d 910.

The judgment is reversed. The parties are to bear their own costs on appeal.

GIBSON, C. J., and SHENK, EDMONDS, and SPENCE, JJ., concur.

CARTER, Justice (concurring and dissenting in part).

I concur in the reversal of that portion of the judgment from which plaintiff appealed, which reads as follows: "That plaintiff take nothing by reason of his amended complaint herein and that defendant Louise L. Osborn have judgment for costs of court expended in the sum of $———," but I dissent from the holding of the majority that the judgment against defendant and cross-complainant from which no appeal was taken must also be reversed. That portion of the judgment reads as follows: "That cross-complainant take nothing by reason of her cross-complaint herein, and that cross-defendant Merinoeth R. Osborn have judgment for costs of court expended in the sum of $———."

It is obvious from a reading of the majority opinion that the two portions of the judgment above quoted are separate and distinct and that they are in no wise interdependent, or that the portion from which plaintiff and cross-defendant has appealed is so connected with the remainder, from which no appeal was taken, that the appeal from the first part affects the second part and involves a consideration of the whole judgment. This conclusion is manifest from the face of the majority opinion itself where it discusses in detail both the facts and the law relating to plaintiff's side of the case but only gives a passing reference to the basis upon which defendant and cross-complainant claims title to the property. The majority opinion does not purport to hold that there would have been merit in an appeal prosecuted by defendant and cross-complainant if such an appeal had been taken. Notwithstanding this situation, the majority directs the reversal of the entire judgment so that the claims of the defendant and cross-complainant set up in her cross-complaint may again be litigated in the trial court.

In so holding the majority goes outside of the record in suggesting possible reasons why defendant and cross-complainant did not appeal, as if her reasons for not appealing had any bearing whatever upon the scope of review of this court on an appeal by plaintiff from the portion of the judgment against him. Until the decision of this court in Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910, it was the settled rule that "when an appeal is taken from a part of a judgment or order not so intimately connected with the remainder that a reversal of the part appealed from would require a reconsideration of the whole case in the court below, an appellate court can review only the portion appealed from. The unaffected parts must be deemed final, and can be enforced pending the appeal." See 4 Cal.Jur.2d, § 535, p. 389. This rule has been followed in every case decided by this court prior to the Hamasaki case, supra, and it has never been departed from except in the Hamasaki case. In Glassco v. El Sereno Country Club, Inc., 217 Cal. 90, at page 91, 17 P.2d 703, the late Chief Justice Waste, speaking for a unanimous court, said: "Preliminarily, it might be said that that portion of the judgment denying the appellants a lien, and which is attacked by the plaintiffs in their brief herein, is not properly a subject of review upon this appeal because of the insufficiency of the notice of appeal. The notice states that the appeal is 'from so much of the judgment herein as denies relief to the plaintiffs against the said defendant, Clotilde G. Castruccio * * *.' The notice of appeal makes no mention of that separate and distinct portion of the judgment denying plaintiffs a lien. It is elementary that an appeal from a portion of a judgment brings up for review only that portion designated in the notice of appeal. 2 Cal.Jur. 155, § 25. While it is true that notices of appeal are to be liberally construed with a view to hearing causes on their merits (Harrelson v. Miller & Lux, [Inc.], 182 Cal. 408, 414, 188 P. 800), we are of the opinion that the notice filed in the present case does not present 'a mere misdescription' of the judgment, calling for the application of said rule, but rather presents a situation somewhat analogous to that presented in Dimity v. Dixon, 74 Cal.App. 714, 718, 241 P. 905, viz. one where the description of that portion of the judgment appealed from is so clear and unmistakable as to preclude a description of that portion of the judgment denying appellants a lien." The following cases fully support the rule that an appellate court has jurisdiction to review the portion of the judgment appealed from only unless the part appealed from is so interwoven and connected with the remainder, or so dependent thereon, that the appeal from a part affects the other parts or involves a consideration of the whole, and is really an appeal from the whole judgment: Lake v. Superior Court, 187 Cal. 116, 200 P. 1041; G. Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 143 P. 1025; Whalen v. Smith, 163 Cal. 360, 125 P. 904; In re Burdick's Estate, 112 Cal. 387, 44 P. 734; Luck v. Luck, 83 Cal. 574, 23 P. 1035; Early v. Mannix, 15 Cal. 149; Pacific Mut. Life Ins. Co. v. Fisher, 106 Cal. 224, 39 P. 758.

It must be remembered that the judgment denying plaintiff relief was based upon his complaint and the evidence offered by him in support of the allegations of the complaint that he was the owner of the property as a result of the deed executed by his father and placed in escrow to be delivered to plaintiff upon his father's death. The judgment denying defendant relief was based upon the allegations of her cross-complaint that she was the owner of the property as the result of an execution sale under a judgment against plaintiff. It seems to me that if this court has the power to review the portion of the judgment against the defendant, it should determine on this appeal the validity of the execution sale and the conveyances under which defendant claims and then reverse the entire judgment with directions to render judgment either in favor of plaintiff or defendant, thus bringing an end to the litigation. However, the majority does not purport to do this but nevertheless reverses the judgment against the defendant who did not appeal therefrom and makes no contention that the judgment against her was erroneous.

Section 938 of the Code of Civil Procedure provides: "Any person *aggrieved* may appeal in the cases prescribed in this title. The party appealing is known as the appellant, and the adverse party as the respondent." (Emphasis added.) It goes without saying that plaintiff could not have appealed from the portion of the judgment against the defendant, since he was not aggrieved thereby, and defendant could not have appealed from the portion of the judgment against plaintiff for the same reason. Therefore, plaintiff appealed from the only portion of the judgment from which he could lawfully appeal.

Section 956 of the Code of Civil Procedure which covers the matters which may be reviewed on appeal from a judgment concludes with the following sentence: "The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken." The clear implication of this provision is that the court may not review any decisions or order from which an appeal might have been but was not taken. Applying this provision to the case at bar it seems clear that this court is not authorized to review the judgment against defendant from which no appeal was taken.

To summarize, it appears that the plaintiff appealed from the portion of the judgment denying the relief demanded by him in his complaint. The majority opinion holds that his appeal is meritorious. The relief demanded by defendant was by way of cross-complaint and the judgment denied her such relief. She did not appeal. It is conceded that her claim of title is based upon instruments entirely separate and apart from the instruments on which plaintiff's claim of title is based. Defendant has not sought to have this court review the portion of the judgment denying her relief on her cross-complaint. It is obvious that the portion of the judgment denying her relief on her cross-complaint is in no wise related to the portion of the judgment denying plaintiff the relief demanded in his complaint. There is no interdependence between the two portions of the judgment. Such being the case, it is clear under both the code provisions relating to review on appeal and the authorities which I have cited above that the review here should be limited to the portion of the judgment from which plaintiff appealed, and that the judgment against defendant from which no appeal was taken should not be reviewed.

As stated earlier in this opinion the only case holding to the contrary is Hamasaki v. Flotho, supra. The decision in that case was based upon the theory advanced by the majority that even though there was no appeal from the judgment and only an appeal from an order granting a limited new trial, this court had the power to review the judgment because it felt required to do so "in the interests of justice." There was no question of any interdependence in the Hamasaki case as there was only one judgment and one order, both of which were in favor of the respondent. The majority now rely upon the Hamasaki case as authority for reversing the judgment against defendant in the case at bar from which no appeal has been taken. Certainly the Hamasaki case is not authority for the holding in this case. The other cases relied upon by the majority clearly fall within the exception to the rule that where the part of the judgment appealed from is so interwoven and connected with the remainder, or so dependent thereon, that the appeal from a part affects the other parts or involves a consideration of the whole, that it is really an appeal from the whole judgment. The case at bar does not fall within this rule as clearly appears from what I have heretofore stated.

It should be noted that the foregoing rule relates only to judgments which are not divisible into *separate* parts. And in order for the rule to be applicable, the judgment, *on its face,* must disclose that the part appealed from is interwoven with or dependent upon other parts not appealed from. In other words, unless the interdependence of the separate parts of the judgment appears upon the face of the judgment itself there can be no basis for holding that the part appealed from is so interwoven and connected with the remainder, or so dependent thereon, that the appeal from a part affects the other parts or involves a consideration of the whole judgment. Since the judgment in the case at bar is in two separate and distinct parts or paragraphs and neither makes any reference to the other, there is no basis whatever for a holding that they are in any way interwoven with or dependent upon each other.

The effect of the majority holding in this case is not only to create confusion in the law, as it undoubtedly will, but it places an additional burden on both appellate and trial courts to review portions of judgments from which no appeal is taken in clear violation of the statutory provisions which I have heretofore cited. The right of appeal is clearly statutory as well as the scope of review. The Legislature has sought to limit the power of appellate courts to review only such portions of judgments as may be appealed from. This legislation has a dual purpose. First, to reduce the amount of work required by an appellate court in disposing of an appeal, and second, to limit the issues which may be retried in the trial court in the event of a reversal which should have the effect of saving the time of both the trial court and litigants. It now appears that the majority of this court not only ignores this salutary legislation but overrules the long line of authorities upholding and applying such legislation without even mentioning either the legislation or the authorities. The majority claims the right to do this "in the interests of justice." However, it has been aptly stated that "Justice is what is well established" and that "Justice is compliance with the written laws." I find no basis for the holding of the majority in this case in any concept of justice with which I am familiar.

SCHAUER, Justice.

I dissent. It is my view that the dissenting opinion of Mr. Justice McComb of the District Court of Appeal, Second District, Division Two (Osborn v. Osborn (1953; Cal.App.), 256 P.2d 653, 657), correctly disposes of the legal issues presented by the undisputed facts alleged, proved, and found in this case. I shall state the facts in somewhat greater detail than they are stated by Justice McComb in order that I may hereinafter point out those facts which, in my opinion, have caused the majority of this court to announce an erroneous view of the applicable law.

In order to compromise a dispute as to who was entitled to the property of Chloie I. Osborn, deceased mother of plaintiff Merinoeth and wife of Thomas D. Osborn, plaintiff and Thomas on June 27, 1939, executed a contract entitled "Stipulation." The validity of this contract is not questioned. On July 21, 1939, such contract was filed in the proceeding for probate of the estate of Chloie I. Osborn. It provides in material part that the probate court may set aside disputed real property (Lot 97) to Thomas as having been the homestead of Thomas and Chloie; that Thomas "will execute either by deed, contract or declaration of trust, sufficient documents, conveyances or declarations so that * * Lot 97 * * * will be retained in the name of Thomas D. Osborn, during his lifetime and that the same should vest in his son Merinoeth R. Osborn at the time of the demise of the said Thomas * * * [A]ll income on the property will go to and belong to Thomas D. Osborn during his lifetime and out of the said sum of monies received, he will pay all ordinary and usual expenses, such as, maintenance, taxes, repair and ordinary improvements due to wear and tear. Any surplus from said amounts shall belong to Thomas * *.

This Stipulation shall be binding upon the heirs, executors, administrators and assigns of the parties hereto."

Pursuant to this agreement the probate court on July 21, 1939, determined that Lot 97 had been the homestead of Thomas and Chloie and set it aside to Thomas as his separate property.

On July 7, 1939, Thomas signed a grant deed of Lot 97 to plaintiff Merinoeth, "reserving to the grantor the exclusive possession and the use and enjoyment in his own right of the rents, issues and profits of said property * * * during the term of his natural life. This deed is executed in accordance with the terms and conditions of that certain trust agreement of July 7th, 1939, * * * and is subject to all conditions, exceptions and reservations as in said trust agreement provided."

The "trust agreement" of July 7 provides that "the said deed is to be turned over and delivered to the trustees herein [Finkenstein and Warner] to be used, delivered and held under the terms and conditions in this agreement set forth"; the deed shall reserve to Thomas, the grantor, a life estate and "the right to revoke the deed in the event second party [Merinoeth] wilfully harms grantor, and second party reserves the right to cancel this agreement if grantor wilfully harms second party"; the only powers and duties of the trustees are to keep the deed and not record it during the life of Thomas and to deliver it to Merinoeth only on the death of Thomas, and to defend against any attempt by either party "to break the terms of the within trust agreement"; Thomas "agrees to will any and all right, title, or interest he may have in said real property to" Merinoeth; the agreement is binding on the heirs, executors, and assigns of the parties; and "the wilful failure or refusal of either party to comply with the obligations herein provided, on his part to be performed, shall permit either party to rescind this agreement and shall confer upon the grantor the right to cancel the within mentioned deed and this agreement."

On January 14, 1946, Merinoeth, Thomas, and the trustees executed an "agreement cancelling trust agreement." In March, 1946, by an exchange of letters, the parties agreed to rescind the cancellation agreement. These two agreements were executed in the course of unsuccessful negotiations between Thomas and plaintiff for the purchase by Thomas of plaintiff's interest in Lot 97. Evidence of the negotiations and the cancellation agreements and accompanying letters has probative value as it tends to show that Thomas recognized that Merinoeth had a valuable remainder interest.

The opinion of Justice McComb disposes of the issues raised by the above stated facts in the following manner:

"*Questions:* First: *Did the trial court properly decline to quiet title in the parcel of land in question in plaintiff?*

"*Yes.* The following rules are here pertinent:

"(1) An escrow is a written instrument or personal property which is delivered to a third party by the grantor, maker, promisor or obligor to be held by the depositary until the happening of a designated event or the performance of a designated condition and then to be delivered to the grantee, promisee or obligee. (Civ.Code, § 1057. See also cited cases in 10 Cal.Jur. [1923] Escrows, § 1, n. 2, p. 576.)

"(2) When a deed is deposited by a grantor with a third person to be handed to the grantee on the death of the grantor * * * without any intention of a present transfer of title, but on the contrary, with the intention of the grantor to reserve the right of dominion over the deed and the right to revoke or recall it there is no effective delivery. * * * (Williams v. Kidd [1915], 170 Cal. 631, 637 et seq. [151 P. 1, Ann.Cas.1916E, 703].)

"(3) Plaintiff in a quiet title action must depend on the strength of his own title and not on the weakness of that of defendant. Thus, if he fails to prove title in himself, he is not entitled to recover. (Alspach v. Landrum [1947], 82 Cal.App.2d 901, 903 [1] [187 P.2d 130]; Tanner v. Title Ins. & Trust Co. [1942], 20 Cal.2d 814, 825 [13] [129 P.2d 383].)

"Applying the foregoing rules to the facts in the present case we find that under rule (1) the handing of the deed to defendants Finkenstein and Warner created an escrow, and since Mr. Osborn reserved the right to revoke or cancel the deed upon the happening of certain conditions, there was no intent to make an unconditional delivery of the deed. Therefore, it not having been delivered to plaintiff prior to his father's death, under rule (2) the deed was never delivered and no title passed to plaintiff. Hence, under rule (3), plaintiff having failed to prove title in himself the trial court properly held that he was not entitled to have title quieted in him.

"Second: *Was there substantial evidence to sustain the trial court's finding that the transaction between the parties did not create a trust agreement but merely created an escrow?*

"*Yes.* The transaction falls squarely within the definition of an escrow as set forth under rule (1) supra. There is a total absence of any of the elements of a trust agreement. Therefore the court's finding is supported by substantial evidence."

The majority herein proceed upon the fallacious premise that "Thomas was bound by the terms of the trust agreement, executed contemporaneously with the deed, not to attempt to recall the deed from the possession of the trustees * * *. Thomas did not retain control over the deed after he delivered it to the trustees. There is nothing in the trust agreement, or external to it, to indicate that Thomas did not intend the transmission of the deed to the trustees to be a valid legal delivery." Obviously such "finding" by the majority invades the province of the trier of fact and draws inferences from both the documents and the surrounding circumstances contrary to those drawn by the trial judge. Why was an escrow created and conditions for cancellation specified if the delivery was unconditional? Furthermore, I cannot agree that "Thomas was bound by the terms of the trust agreement." The signing by Thomas of the July 7 trust agreement and deed was, at best, an ineffective attempt to perform the June 27 agreement. It appears that the June 27 agreement, rather than the trust agreement, was binding and enforceable. And the June 27 agreement has never been discharged by performance or otherwise.

The majority opinion here appears to be an attempt to give, or to lay the foundation for giving, plaintiff Merinoeth and the nonappealing cross-complainant Louise, a remedy akin to quasi-specific enforcement of the June 27 agreement. But that is a remedy which Merinoeth should have sought against the representatives of the estate of his deceased father, and Merinoeth has not seen fit to institute such proceedings and proceed on such a theory.

For the reasons above stated I should affirm the judgment.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

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123 Cal.App.2d 585

DANIELS v. BRIDGES.

Civ. 19825.

District Court of Appeal, Second District,
Division 3, California.
March 1, 1954.

Suit for declaratory relief, to establish a constructive trust and for an injunction involving right to revoke a joint will. From a judgment of the Superior Court, Los Angeles County, James M. Allen, J., in favor of the defendant, the plaintiff appealed. The Court of Appeal, Vallée, J., held that survivor of husband and wife who made a joint will devising property to third person after death of both was entitled to revoke will, in absence of any contract depriving survivor of right of revocation.

Judgment affirmed.

1. Wills 🔑**100**

A "joint will" is a single testamentary instrument constituting or containing the wills of two or more persons, and jointly executed by them as their respective wills.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Will".

2. Wills 🔑100

A joint will is not necessarily either mutual or reciprocal, but is in legal effect the separate will of each of persons executing it, and fact that it is executed by all of such persons does not affect its validity or effect as the will of anyone of them.

3. Wills 🔑100

"Mutual wills" are the separate wills of two or more persons which are reciprocal in their provisions.

See publication Words and Phrases, for other judicial constructions and definitions of "Mutual Will".

4. Wills 🔑100

A "joint and mutual will" is one instrument executed jointly by two or more persons the provisions of which are reciprocal.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint and Mutual Will".

5. Wills 🔑78

Each will in one instrument is a unilateral act and its execution creates no rights in the legatees or devisees, as will is ambulatory until the death of testator.

6. Wills 🔑188

A joint or a mutual will may be revoked by any of the testators in like manner as any other will.

7. Frauds, Statute of 🔑75
Wills 🔑58(1)

A person may contract to make a particular disposition of his property by will, but statute of frauds applies and contract must be in writing. Civ.Code, § 1624, subd. 6.

8. Wills 🔑58(2), 62

A contract to make will may be in a mutual will, but mere fact that a joint will contains reciprocal, similar or identical provisions is not of itself sufficient evidence of a contract nor enough to establish legal obligation to forebear revocation.

9. Wills 🔑66

Revocation of will by one of parties is a breach of contract to make a particular disposition of property by will.

10. Wills 🔑66, 67

When two persons execute a joint and mutual will or mutual wills pursuant to an oral contract, and one of parties dies before one of them revokes his will, and survivor accepts benefits of the decedent's will and then revokes, a constructive fraud sufficient to raise an estoppel has been practiced on the first decedent and on beneficiaries of the oral contract, and in such case equity will enforce a constructive trust on the property.

11. Specific Performance 🔑17

When two persons execute joint and mutual will or mutual wills pursuant to an oral contract, and survivor revokes will after death of one of parties, right to enforce contract is not restricted to the promisee, but intended legatees and devisees may enforce their rights.

12. Wills 🔑188

Where husband and wife made a joint will devising all property after their death to a third person, and after wife's death surviving husband took possession of their property and made a will revoking all former wills and devising property to a different person, the original devisee had no right to property in absence of evidence of any contract between husband and wife depriving survivor of right of revocation.

Gordon, Schaffer & Lang, and Walter L. Gordon, Jr., Los Angeles, for appellant.

Earl C. Broady and Rufus W. Johnson, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an adverse judgment in a suit for declaratory relief, to establish a constructive trust, and for an injunction.

On May 16, 1946, Eddie and Sarah Robinson, husband and wife, made a joint will by which each of them bequeathed and devised all of his and her property "after the death of the two of us" to plaintiff, Howard C. Daniels. There was no evidence of the making of a written contract by Eddie and Sarah to execute the joint will. Sarah died on August 21, 1946. The joint will had not then been revoked; but it has not been probated. On Sarah's death, Eddie took possession of all of their property, which included two parcels of realty held by them in joint tenancy. On May 5, 1948, Eddie made a will by which he revoked all former wills and bequeathed and devised all of his property to Mary Louise Webb. On May 13, 1948, he married Mary Louise. On August 13, 1950, Eddie died leaving Mary Louise surviving him. Eddie's will of May 5, 1948, was admitted to probate. His estate has not been distributed. On December 14, 1950, Mary Louise died intestate. Defendant is her sole heir and administratrix of her estate.

On the foregoing facts, plaintiff sought a decree, 1) declaring his rights under the joint will of May 16, 1946; 2) adjudging that he is the owner of the property bequeathed and devised by that will, subject to administration of Eddie's estate; 3) adjudging that defendant holds the property in trust for his use and benefit, and that she be required to account for the same; 4) enjoining her from disposing of any of the property; 5) declaring that Eddie's will of May 5, 1948, is null and void.

The court found that Eddie and Sarah did not make an oral agreement and in performance thereof execute the joint will of May 16, 1946, to the effect that on "their death" all of their property should go to plaintiff, and concluded that Eddie revoked that will by the due execution of the will of May 5, 1948, and that the property became the sole and separate property of Eddie on the death of Sarah. Judgment was entered accordingly. Plaintiff appeals.

Plaintiff's specifications of error are: 1. The judgment is contrary to law and the evidence, and the findings of fact are not supported by the evidence. 2. The court failed to make findings on material issues. He argues that the will of May 16, 1946, was irrevocable and that the will of May 5, 1948, was of no force or effect. His contentions cannot be sustained.

[1-6] A joint will is a single testamentary instrument constituting or containing the wills of two or more persons, and jointly executed by them as their respective wills. It is not necessarily either mutual or reciprocal. It is, in legal effect, the separate will of each of the persons executing it. The fact that it is executed by both or all of such persons does not affect its validity or effect as the will of anyone of them.[1] Mutual wills are the separate wills of two or more persons which are reciprocal in their provisions. A joint and mutual will is one instrument executed jointly by two or more persons, the provisions of which are reciprocal.[2] Each will, in one instrument, is a unilateral act, and its execution creates no rights in the legatees or devisees, as the will is ambulatory until the death of the testator. A joint or a mutual will may be revoked by any of the testators in like manner as any other will.[3]

[7-11] A person may contract to make a particular disposition of his property by will.[4] The statute of frauds applies to such a contract; it must be in writing.[5] The contract may be in the mutual will.[6]

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[1] 69 C.J. 1295, § 2709; Annotations: 169 A.L.R. 9, 11.

[2] Frazier v. Patterson, 243 Ill. 80, 90 N.E. 216, 27 L.R.A.,N.S., 508, 17 Ann. Cas. 1003; Annotations: 169 A.L.R. 9, 12.

[3] Probate Code, § 23; Notten v. Mensing, 3 Cal.2d 469, 473, 45 P.2d 198; Shive v. Barrow, 88 Cal.App.2d 838, 839, 843, 199 P.2d 693; 26 Cal.Jur. 832, § 162; Annotations: 169 A.L.R. 9, 22; 13 Cal. L.Rev. 179; 17 Mich.L.Rev. 677; 77 Univ.Pa.L.Rev. 357; 15 Corn.L.Quar. 358.

[4] Brown v. Superior Court in and for Los Angeles County, 34 Cal.2d 559, 563-565, 212 P.2d 878; Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 52, 55, 113 P.2d 495.

[5] Civ.Code, § 1624(6); Notten v. Mensing, 3 Cal.2d 469, 473-474, 45 P.2d 198; Shive v. Barrow, 88 Cal.App.2d 838, 843, 199 P.2d 693.

[6] For a mutual will which constitutes a

The mere fact that a joint will contains reciprocal, or similar or identical, provisions is not of itself sufficient evidence of a contract, nor is it enough to establish a legal obligation to forebear revocation in the absence of a valid contract.[7] Revocation of the will by one of the parties is a breach of the contract. When two persons execute a joint and mutual will, or mutual wills, pursuant to an oral contract, and one of the parties dies before one of them revokes his will, and the survivor accepts the benefits of the decedent's will and then revokes, a constructive fraud, sufficient to raise an estoppel, has been practiced on the first decedent and on the beneficiaries of the oral contract. In such a case equity will enforce a constructive trust on the property.[8] The right to enforce such a contract is not restricted to the promisee. Intended legatees and devisees are entitled to enforce their rights under the contract.[9]

[12] Eddie Robinson had the legal right to revoke the will of May 16, 1946, as a will. He took possession of the property bequeathed and devised by that will on the death of Sarah; and although it was not probated on her death, we assume he accepted the benefits of Sarah's will. Anyone taking from or through him is estopped from asserting title to the property bequeathed and devised by that will only if Eddie and Sarah entered into a contract to the effect that each, in consideration of the promise of the other, would make the will of May 16, 1946, and that it would not be revoked. The language of the joint will of Eddie and Sarah Robinson is purely testamentary in character; there is nothing to indicate a contractual intent, or to indicate that the disposition to plaintiff was the result of a contract as would deprive the survivor of the right of revocation. There is no evidence that each promised to keep his will in force. There is nothing in the facts and circumstances in evidence, surrounding the execution of the joint will, which would support or compel the conclusion that the parties intended or undertook to bind themselves irrevocably on the prior death of either.

Fuller v. Nelle, 12 Cal.App.2d 576, 55 P.2d 1248, does not help appellant. In that case there was testimony that a contract had been made between the makers of a joint and mutual will that neither would revoke the will.

Plaintiff asserts the court failed to find on the question of whether Eddie came into possession of certain personal property on the death of Sarah and retained possession until his death. The court found that he did and the parties so assume on the appeal. Plaintiff also asserts the court failed to find there is a controversy between the parties. Such a finding would have been surplusage. It seems quite apparent there is a controversy.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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contract not to revoke, see Chase v. Leiter, 96 Cal.App.2d 439, 450, 215 P.2d 756; In re Brown's Estate, 101 Kan. 335, 166 P. 499; Warwick v. Zimmerman, 126 Kan. 619, 270 P. 612; Sage v. Sage, 230 Mich. 477, 203 N.W. 90; Schumacker v. Schmidt, 44 Ala. 454, 4 Am.Rep. 135. See, also, Mechem and Atkinson, "Cases and Materials on Wills and Administration," 3d ed., 388.

[7] Rolls v. Allen, 204 Cal. 604, 608, 269 P. 450; Notten v. Mensing, 3 Cal.2d 469, 477, 45 P.2d 198. See 20 Cal.L.Rev. 217, 218.

[8] Rolls v. Allen, 204 Cal. 604, 607, 269 P. 450; Notten v. Mensing, 3 Cal.2d 469, 473–476, 45 P.2d 198; Bank of California, Nat. Ass'n v. Superior Court in and for City and County of San Francisco, 16 Cal.2d 516, 524, 106 P.2d 879; Brown v. Superior Court, 34 Cal.2d 559, 564, 212 P.2d 878; Fuller v. Nelle, 12 Cal.App.2d 576, 55 P.2d 1248; Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 52–53, 113 P.2d 495; Ryan v. Welte, 87 Cal.App.2d 897, 198 P.2d 357; Shive v. Barrow, 88 Cal.App.2d 838, 843, 199 P.2d 693; West v. Stainback, 108 Cal.App.2d 806, 814–815, 240 P.2d 366; Annotations: 169 A.L.R. 9, 58.

[9] Brown v. Superior Court, 34 Cal.2d 559, 563–565, 212 P.2d 878.

EDWARDS et ux.

v.

TWAIN LUMBER CO. et al.

Civ. 8219.

District Court of Appeal, Third District, California.

March 4, 1954.

Rehearing Denied March 24, 1954.

Hearing Denied April 28, 1954.

Action for injuries received in collision between plaintiffs' overtaking automobile and truck which allegedly turned left towards a private road as automobile was about to pass. The Superior Court, Plumas County, MacMillan, J., entered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, Peek, J., held that the giving of an instruction relating to passing at an intersection, and of further instructions in which court repeatedly referred to place of accident as an intersection was error, in view of fact that situs of accident was not an intersection area as the term is defined in Vehicle Code, and prejudicial effect thereof was not cured by instruction defining private roadway and presenting to jury question whether the road involved was such a private roadway.

Judgment reversed.

1. Automobiles ⟹171(1)

Where road, into which truck was allegedly turning at time it was struck by overtaking automobile, was not noticeable from highway except within a relatively short distance from point at which it entered highway, and no markings of any sort appeared along highway either designating intersection or giving warning thereof, and a sign stating that such road was a private road, and forbidding trespassing, was posted a short distance from its point of entry, situs of accident was not an "intersection area" within meaning of term as defined in Vehicle Code. Vehicle Code, §§ 81, 82, 86.

See publication Words and Phrases, for other judicial constructions and definitions of "Intersection Area".

2. Automobiles ⟹246(11)

Trial ⟹296(4)

In action arising out of collision between plaintiffs' overtaking automobile and truck which allegedly turned left towards a private road as automobile was about to pass, giving of instruction relating to passing at intersection, and of other instructions in which court repeatedly referred to place of accident as an intersection, was error, in view of fact that situs of accident was not an intersection area within meaning of term as defined in Vehicle Code, and prejudicial effect thereof was not cured by instruction defining private roadway and presenting to jury question whether road was such a private roadway. Vehicle Code, §§ 81, 82, 86, 528, 530(2).

◆

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for appellants.

Peters & Peters by Jerome D. Peters, Chico, for respondents.

PEEK, Justice.

This is an appeal by plaintiffs from an adverse judgment in an action instituted by plaintiffs for injuries received as the result of a collision between plaintiffs' car and a truck owned and operated by defendant company. Following the entry of the judgment, plaintiffs' motion for a new trial was denied and this appeal followed.

The collision occurred at a point on the Feather River Highway where a private road known as Soda Creek Road enters the highway. Both vehicles were traveling in a northerly direction. The actual collision was allegedly occasioned when the driver of the truck turned left on the private road as plaintiff was about to pass.

Plaintiffs' opening brief of more than 100 pages contains over 20 separate contentions. In the main, these refer to matters arising during the voir dire examination of prospective jurors; the admission and refusal of certain testimony; the sufficiency of the evidence to sustain the verdict; and the instructions, some of which were given and some of which were refused. However, since the case must be reversed because of certain instructions given by the court pertaining to the passing of vehicles and in particular at intersections, it is unnecessary to discuss the other contentions.

In its first instruction relative to the rules of the road, the court read in its entirety section 528 of the Vehicle Code, which section sets forth the rules governing the overtaking and passing of vehicles proceeding in the same direction. The next instruction given was in the language of section 530:

> "Limitations on Overtaking on the Left.
>
> "(a) Except when a roadway has been divided into three traffic lanes, no vehicle shall be driven to the left side of the center line of a roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction.
>
> "(b) No vehicle shall at any time be driven to the left side of the roadway under the following conditions:
>
> "1. When approaching the crest of a grade or upon a curve in the highway where the driver's view is obstructed within such distance as to create a hazard in the event another vehicle might approach from the opposite direction.
>
> "2. When the view is obstructed upon approaching within one hundred feet of any bridge, viaduct, tunnel, or when approaching within one hundred feet of or when traversing any intersection or railroad grade crossing.
>
> "(c) The foregoing limitations shall not apply upon a one-way roadway."

Appellants' argument is not that the instructions were incorrect statements of the law, but that it was prejudicial error for the court to refer to the situs of the accident as an intersection; and that the court erroneously included in the charge, subsection (2) of Vehicle Code section 530.

The evidence discloses that the Soda Creek Road where it entered the Feather River Highway was not noticeable from that highway until one had approached to within a relatively short distance. No markings of any sort appeared along the highway either designating an intersection or giving warning thereof. Furthermore on the Soda Creek Road, a short distance from its point of entry on the Feather River Highway, there was a sign stating "Private Road—No Trespassing."

Sections 81, 82 and 86 of the Vehicle Code embrace the definitions of public highway, private road and intersection. Section 81 in part defines a public highway to be "* * * a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." Section 82 defines a private road to be "'Private road or drive way' is a way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other members of the public." Section 86 of the Code in part defines an intersection to be "* * * the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angles or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict."

[1, 2] The evidence in the record reviewed in the light of these three sections can lead to but one conclusion, that the situs of the accident was not an intersection area within the meaning of the term as defined in the Vehicle Code, and that to include the instruction embodying subsection (2) of section 530 of the Vehicle Code was error.

Following the instruction on passing, the court charged the jury as follows:

> "A violation of a section of the Vehicle Code of the State of California,

> enacted for the public safety, is negligence, per se, though it is not actionable negligence unless it proximately causes injury or damage."

By such instruction the court compounded the error of inclusion referred to. This instruction, as a matter of law, charged the jury that plaintiff, by attempting to pass at the point where the collision occurred, was guilty of contributory negligence.

Following the above-quoted instruction, the court gave the following charge to the jury:

> "Whether the driver of one vehicle is passing another vehicle at an *intersection* or at any other place, and whether such *intersection* be an *intersection* of two public highways or whether it be an *intersection* of a public highway and a private road, the one driving the vehicle that is to pass the other one must use ordinary care, and if he fails to do so is negligent.
>
> "The evidence discloses that the roadway into which the defendants' truck was making a turn at the time of the collision was privately owned, but if you determine from the evidence that said roadway was generally used by the public as a thoroughfare, then you may determine whether or not the plaintiff, Burel J. Edwards, exercised that degree of care and caution that would have been exercised by an ordinarily careful and prudent man in the same or similar circumstances in attempting to pass where said private road *intersected* the highway upon which he was traveling." (Emphasis added.)

It cannot be said that the court specifically instructed the jury that the accident occurred at an *intersection,* but the implication that such was the case is readily apparent from a reading of the instructions as a whole, and from the repeated use of the term, *intersection,* throughout.

However, as noted, the court did instruct on the definition of a private roadway, and that whether or not Soda Creek Road was such a private roadway was a question for the jury's determination. But that instruction cannot be said to have cured prejudicial error contained in the instruction relating to passing at an intersection, and the implication contained in the repeated reference by the court to the place of accident as an intersection.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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123 Cal.App.2d 668

SAN FRANCISCO UNIFIED SCHOOL DIST.

v.

HONG MOW.

Civ. 16055.

District Court of Appeal, First District,
Division 1, California.
March 4, 1954.

Eminent domain proceeding. The Superior Court, San Francisco County, Herbert C. Kaufman, J., rendered judgment in favor of plaintiff assessing defendant's compensation and damages and defendant appealed. Pending the appeal the trial court filed order which authorized plaintiff to take possession of and use property condemned, defendant appealed, and plaintiff moved to dismiss the appeal. The District Court of Appeal, Fred B. Wood, J., held that entry of order giving plaintiff possession and use of property and staying all proceeding against plaintiff until final conclusion of litigation did not preclude defendant from appealing.

Motion to dismiss appeal from the order for possession denied.

1. Appeal and Error 🔑77(1)

In eminent domain proceeding, judgment which fixed compensation and damages for taking of property was appealable "final judgment". Code Civ.Proc. §§ 963, subds. 1, 2, 1253, 1237–1266.2.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

2. Appeal and Error 🔑82(1)

In eminent domain proceeding, order which authorized plaintiff to take possession of and use property until final conclusion of proceeding was appealable as "special order made after final judgment". Code Civ.Proc. §§ 963, subds. 1, 2, 1253, 1237–1266.2.

See publication Words and Phrases, for other judicial constructions and definitions of "Special Order Made After Final Judgment".

3. Eminent Domain 🔑254

Entry of order by trial court in eminent domain proceeding giving plaintiff possession and use of property and staying all proceedings against plaintiff until final conclusion of litigation did not preclude defendant from appealing from final judgment which fixed amount of compensation and damages to be awarded defendant, and from order which awarded possession of property to plaintiff. Code Civ. Proc. §§ 963, subds. 1, 2, 1253, 1237–1266.2, 1254, 1256, 1257.

Phil F. Garvey, San Francisco, for appellant.

Dion R. Holm, City Atty., Norman Sanford Wolff, Deputy City Atty., for respondents.

FRED B. WOOD, Justice.

In a proceeding in eminent domain to acquire certain real property of the defendant, judgment was rendered in favor of the plaintiff, assessing defendant's compensation and damages at $17,500 and awarding him costs in the sum of $47.09. Defendant appealed from the judgment and that appeal is pending.

After entry of the judgment and payment of the full amount of the judgment into court by plaintiff for the benefit of the defendant the trial court upon motion of plaintiff made and filed an order authorizing plaintiff "to take possession of and use the property so condemned for the purposes for which the same has been condemned as aforesaid, during the pendency and until the final conclusion of this action or proceeding, and that all actions and proceedings against said plaintiff on account thereof be stayed." Such an order finds sanction, under appropriate circumstances, in section 1254 of the Code of Civil Procedure.

Defendant has appealed from the order authorizing possession and plaintiff has moved to dismiss that appeal upon the sole ground that such an order is not appealable. Our analysis of the applicable statutes and pertinent judicial decisions convinces us that the order is appealable.

The inquiry starts with section 963 of the Code of Civil Procedure. It states that "An appeal may be taken from a superior court in the following cases: 1. From a final judgment entered in an action, or special proceeding, commenced in a superior court, * * * 2. * * * from any special order made after final judgment * * *."

[1] There is no doubt that the judgment herein which fixed the compensation and damages for the taking is a "final judgment" within the meaning of that term as used in subdivisions 1 and 2 of § 963. See California S. R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 63, 7 P. 123; McDaniels v. Dickey, 219 Cal. 89, 92, 25 P.2d 404; City of Los Angeles v. Deacon, 3 Cal.2d 641, 645, 46 P.2d 165.

[2] Nor is there any doubt that the subsequent order authorizing possession is a "special order made after final judgment." It meets the test for such a special order in that it affects the judgment or bears a relation to it, in this case by implementing or enforcing the judgment. For example, an order for the sale of perishables, made after judgment and during the pendency of an appeal, is a special order made after final judgment and as such is appealable. Rogers v. Superior Court, 158 Cal. 467, 111 P. 357. Of more immediate precedential value is the fact that a "final order of condemnation", § 1253, Code Civ.Proc., is appealable as a

special order made after final judgment. California S. R. Co. v. Southern Pac. R. Co., supra, 67 Cal. 59, 63, 7 P. 123; McDaniels v. Dickey, supra, 219 Cal. 89, 92, 25 P.2d 404.

These provisions of § 963 are in part two of the code and thus included in the rules of practice and the provisions for new trials and appeals which §§ 1256 and 1257 make applicable to proceedings in eminent domain, to the extent that they are not inconsistent with the provisions of the title, §§ 1237–1266.2, on eminent domain. Does that title contain provisions which are so inconsistent with § 963 as to render an order for possession nonappealable?

Plaintiff claims it has found "inconsistent" provisions in §§ 1254 and 1257 of that title.

[3] Section 1254 states that the trial court when it makes an order authorizing a plaintiff to take possession "may, if necessary, stay all actions and proceedings against the plaintiff on account thereof." This clause, presumably, gives the trial court authority, in its sound discretion, to stay all actions and proceedings which would interfere with plaintiff's "possession of and use the property during the pendency of and until the final conclusion of the litigation," which the very same section, 1254, says the plaintiff is to have upon the terms and under the conditions stated in that section.

When the trial court exercises this authority to "stay" actions and proceedings which would "interfere" with plaintiff's possession, there is no necessary inference that an appeal from the judgment or from the order for possession is stayed, much less prohibited. Indeed, the order for possession is made "after * * * judgment entered or pending an appeal from the judgment" and is designed to give plaintiff continuous possession "until the final conclusion of the litigation."

Moreover, the words "actions and proceedings" do not necessarily include "appeals," and an appeal from the judgment or from an order for possession does not "interfere" with the plaintiff's possession unless it stays or suspends the present operative effect of the judgment or the order. So, the clause of § 1254 which plaintiff invokes could, at most, mean that such an appeal shall not of itself suspend or interfere with plaintiff's possession and use of the property. It does not mean that there shall be no appeal to test the validity of the order or of the judgment upon jurisdictional or procedural grounds or upon any other ground.

Section 1257 speaks of the right of a plaintiff in eminent domain, under certain circumstances, to enter into, improve, and hold possession of the property, and then declares that "no motion for new trial or appeal shall, after such payment and filing of such bond[1] as aforesaid, in any manner retard the contemplated improvement." Here again we have the concept of preventing interference with plaintiff's possession, use and improvement of the property, this time expressly directed to "motion for new trial or appeal". Indeed, it is predicated upon the existence of a right to move for a new trial or to appeal, a right accorded by other provisions of law, particularly "the provisions of part two of this code, relative to new trials and appeals," which the forepart of the very same section, 1257, incorporates by reference and makes applicable to proceedings in eminent domain.

Neither of the clauses of §§ 1254 and 1257 which plaintiff invokes indicates or suggests, expressly or by implication, a legislative intent to deny or preclude the right of appeal from an order for possession which § 963 clearly accords. It would require unmistakably clear language, indeed, to derive from a statute and ascribe to the Legislature an intent to depart from the fundamental policy of providing for the review of judicial orders and decrees, a policy declared in our Constitution by necessary implication if not in those very words and implemented by the Legislature, consistently and unwaveringly, by its enactments throughout the years.

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[1] In certain types of cases provision is made for the filing of a bond to assure the building of crossings, fences and cattle-guards. See § 1251, Code Civ.Proc.

Although no decision which discusses the specific points presented by plaintiff upon this appeal has come to our attention, there are at least two decisions in each of which the reviewing court entertained and decided an appeal from an order for possession made after judgment in an eminent domain proceeding. County of San Mateo v. Coburn, 130 Cal. 631, 637, 63 P. 78, 621; City of Los Angeles v. Oliver, 110 Cal.App. 248, 250, 253, 294 P. 760. The only case we have found in which an order for possession was deemed nonappealable is Central Contra Costa, etc., Dist. v. Superior Ct., 34 Cal.2d 845, 215 P.2d 462. But that was an order made before, not after, final judgment.

Thus, it is clear that the motion to dismiss the appeal from the order for possession must be denied. The sole issue, of course, is the appealability of the order and nothing said herein is determinative of any other aspect of that order; e. g., whether or not the appeal does, or might under some set of circumstances, stay or suspend the operative effect of the order.

The motion to dismiss the appeal from the order for possession is denied.

PETERS, P. J., and BRAY, J., concur.

123 Cal.App.2d 685

ANDREWS

v.

STATE BOARD OF REGISTRATION FOR CIVIL AND PROFESSIONAL ENGINEERS et al.

Civ. 8318.

District Court of Appeal, Third District, California.

March 5, 1954.

Petition for writ of mandate to compel the respondent to issue to the petitioner a certificate of registration as an electrical engineer without examination. From a judgment of the Superior Court for Sacramento County, Henry, J., discharging an alternative writ and denying the petition for the peremptory writ, the petitioner appeals. The District Court of Appeal, Schottky, J., held that the Board abused its discretion in denying the application without affording the petitioner a hearing thereon.

Judgment reversed with direction.

1. Administrative Law and Procedure 🔑470
Licenses 🔑22

A hearing on the merits is necessary where an administrative agency is charged by law with the duty of issuing licenses upon specified conditions and while its procedure may be somewhat informal, such informality does not justify the denial of a hearing.

2. Licenses 🔑22

On application for registration as an electrical engineer without examination, the Board of Registration abused its discretion in denying the application without affording the applicant a hearing thereon, where the application was sufficient to entitle the applicant to a hearing and an opportunity to furnish evidence of six years or more experience in engineering work satisfactory to the board evidencing that applicant was competent to practice character of engineering in the branch for which he applied for registration. Business and Professions Code, §§ 6800–6814.

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F. M. Brack & A. M. Frad, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., by August F. Cetti, Dep. Atty. Gen., for respondents.

SCHOTTKY, Justice.

On June 14, 1948, petitioner filed with respondent Board a written application for registration as an electrical engineer without examination. On March 29, 1949, he was notified by a letter from respondent Board that his application was denied. Thereafter he filed a petition for a writ of mandate to compel the issuance to him of said certificate of registration. This appeal is from a judgment discharging an alternative writ of mandate and denying the petition for a peremptory writ.

The Business and Professions Code sets forth a statutory scheme for the registration of professional engineers. The provisions involved in this appeal were added to the code in 1947, as sections 6800 through 6814. The entire chapter, which contained these provisions was recodified in 1951 and is now set out in the code, starting with section 6700.

Section 6800 states that the registration law "pertains to registering of professional engineers in the branches of * * * electrical * * * engineering." Section 6801 defines a professional engineer as a "person engaged in professional practice of rendering service or creative work requiring education, training and experience in engineering sciences, and the application of special knowledge of the mathematical, physical and engineering sciences in such professional or creative work as consultation, investigation, evaluation, planning or design of public or private utilities, structures, machines, processes, circuits, buildings, equipment or projects, and supervision of construction for the purpose of securing compliance with specifications and design for any such works." Section 6802 provides that only persons who are registered by respondent Board shall be entitled to take and use the title of "professional engineer" and, if registered in the field of electrical engineering, the title of "electrical engineer." In this connection, section 6813 makes it unlawful for any person not so registered to use these titles. The practical effect of these sections is to prevent a person from practicing electrical engineering unless he is registered, for without registration he cannot hold himself out to be a professional engineer or an electrical engineer.

Section 6803 provides that in order to entitle a person to registration *without examination,* the applicant must, on or before June 30, 1948, submit to respondent Board, under oath, "evidence satisfactory to the board that the person is possessed of the qualifications specified in Section 6804." The qualifications, as set out in section 6804, are that the applicant must:

> "(a) Furnish satisfactory evidence of good moral character;
>
> "(b) Pay the application fee;
>
> "(c) Furnish evidence of six years or more of experience in engineering work satisfactory to the board evidencing that the applicant is competent to practice the character of engineering in the branch for which he is applying for registration, * * *."

Respondent Board is authorized by section 6717 of the Code to adopt rules, not inconsistent with law, needed to govern its action. Apparently pursuant to this authority respondent Board adopted Administrative Rule No. 403, which provides:

> "'Electrical Engineering' is that branch of professional engineering which embraces studies or activities relating to the generation, transmission, and utilization of electrical energy, including the design of electrical and magnetic circuits and the technical control of their operation and of the design and manufacture of electrical gear. It is concerned with research, organizational, and the economic aspects of the above."

Appellant applied to respondent Board for registration, without examination, as a professional engineer in the field of electrical engineering. In making this application appellant used a printed application form furnished by respondent Board and swore to same. It is admitted that appellant filed the application with respondent Board prior to June 30, 1948, and that he paid the required fee. By letter dated March 29, 1949, respondent Board denied the application, stating as its reason:

> "It is the opinion of the Board that your application does not indicate that you have had six years experience in electrical engineering as required by statute. Accordingly you have been declared ineligible for registration and your application has been denied. For your information electrical engineering as defined in Administrative Rule #403 reads: [quoting the rule]."

Section 6803 of the Code authorizes respondent Board to prescribe all application forms. The application form in question instructs the applicant that every question must be answered fully. In order to fully understand and evaluate the application and petitioner's answers thereto, we think it is necessary to see the application itself. A facsimile of it was introduced in evidence and the portions dealing with questions 10 and 11 and the answers thereto are as follows:

10. The nature and extent of my education are:

a. PREPARATORY (Grammar, High or Private Schools)

Name and Location of Institution	Attendance		Did You Graduate (Yes or No)	Date of Graduation
	From (Year)	To (Year)		
High School	Too long a	go to remember		

b. COLLEGE OR UNIVERSITY (Indicate here ONLY full time enrollment; not night or extension classes)

Name and Location of Institution	Attendance		Course Enrolled (As C.E., ME., EE., Etc.)	Did You Graduate (Yes or No)	Date of Graduation	Degree Received
	From (Month and Year)	To (Month and Year)				
I-C-School	Home	study				
College of hard knocks	1902	to date				

c. POSTGRADUATE WORK

I have done the following postgraduate work.

(Note name and location of institution, period in which work was done, courses completed and degrees received.)

d. EXTENSION AND CORRESPONDENCE WORK

I have taken the following correspondence and extension courses.

(Name only those in which you were regularly enrolled.)

11. My practical experience in Professional Engineering is summarized below (Outline your experience record since you commenced the practice of professional engineering. Number each engagement in chronological order beginning with your earliest engagement. List all engagements of whatever nature, but under the "Time Engaged" column enter only those portions spent in professional engineering practice as defined in Section 6801. Before recording the items of time, read carefully Sections 6703, 6731 and 6801 of the Civil Engineers' Act.)

Engagement Number	Date		(In this column state (*a*) nature, location and character of work; (*b*) magnitude of work; (*c*) name and title of supervisor; (*d*) your duties.)	Time Engaged		Name and Address of My Employer
	From	To		Total Time	Respon-sible Charge	
1	1902	1904	Owner Pikes Peak Repair Works Installing Steam-Gas-Engines-for Irrigation and Oil wells Electrical Engineer United Oil Co. Florence Colo.			
2	1905	1906	Electrical Engineer Colorado Midland R. R. Light and Power-Telephone-Telegraph and Some of the first RR crossing signals Colorado City Colorado.			
3	1906	1907	Electrical Engineer Reno & Mona Electric RR. Reno Nev.			
4	1908	–1910	Engineer and Owner Fallon Light & Power Co. Fallon Nevada			
5	1910	–1911	Electrical Engineer Studebaker Co. San Francisco—Electric Trucks and Cars.			
6	1912	1924	Owner Andrews Magneto & Motor Works Farmer lines and Telephone Work Electrical La Grange Dredge and Power Co. Generating power at 11,000 Volts and Transmission at same voltage			
7	2 V 1934	1927	Went broke in 1924 depression Engineer and Manager Kewin Mills Steam and Electric Power Plant—Near Sonora Cal. Taught—Winter Electrical Class Modesto High School.			
8	2 V 1938	1945	Owner Andrews Electrical Motor Works Frank Andrews—Mechanical & Electrical Engineering Hundreds of engineering jobs on Irrigation–Gravel–Pitts–Canning Plants–Milk Plants–Mining Saw mill and other problems—			

Engagement Number	Date		(In this column state (*a*) nature location and character of work; (*b*) magnitude of work; (*c*) name and title of supervisor; (*d*) your duties.)	Time Engaged		Name and Address of My Employer
	From	To		Total Time	Respon-sible Charge	
9	1945	to date	Frank Andrews–Mechanical & Electrical Engineering Industrial Plant Surveys–Radio–Sound on Film and general Electrical Engineering.			
10			Holder California State Contractors License–C–10– Electrical—for Years #23004–July 14, 1931.			
11			Hold Retailers Permit #K-3816 since 1933.			
12						
13						
14						
15						
16						
17						
18						
			Applicant's Summary of Total Time			
			Board's Summary of Total Time			

Typographical errors in the dates under Engagement numbers 7 and 8, above, were corrected by amendment at the trial to read: "1924–1927" and "1928–1945."

It will be noted that Question 10 requests the applicant to set out the nature and extent of his education, consisting of preparatory schooling, college work, postgraduate work and extension and correspondence work. Question 11 asks the applicant to summarize his practical experience in professional engineering, outline his experience record since he commenced the practice of professional engineering and list all engagements of whatever nature, but to enter under the "Time Engaged" column only those portions spent in professional engineering practice as defined in section 6801.

In answer to Question 10, appellant wrote "High School" for the name and location of his preparatory school, and wrote "Too long ago to remember" in the attendance date column. He did not, as requested, state whether he had graduated. It may be pointed out in this regard that appellant was 67 years of age when he made the application. Asked to show the colleges or universities attended, the attendance dates, engineering courses taken, and degrees received, he wrote "I-C-School"—"Home study," and "College of hard knocks"—"1902 to date." If the "I-C-School" mentioned was intended to refer to a correspondence school, he did not so show under the section requesting him to state what extension and correspondence work he had taken.

Question 11 dealt with the applicant's professional engineering experience and it will be noted that in one column the applicant is required to state "(a) nature, location and character of work; (b) magnitude of work; (c) name and title of supervisor; (d) your duties." In the "Time Engaged" column the applicant is required to show the "Total Time" and the "Responsible Charge."

It is apparent from an examination of the application form and appellant's answers thereto that he made no effort to show in the "Time Engaged" column what part of the work he mentions was spent in professional engineering practice, nor does he give any sufficient detail about the work he performed that would justify the respondent Board in concluding that he had had six years or more of the type of engineering work to indicate that he was competent to practice professional engineering or electrical engineering as the same are hereinbefore defined in section 6801 of the Business and Professions Code and Rule No. 403 of the Respondent Board.

In Question 8 of the application form, appellant was asked to list the professional and honorary organizations of which he was a member in good standing. He did not list any such organization.

After receiving notice of the rejection of his application, appellant petitioned the Superior Court for a writ of mandate to compel respondent Board to issue a registration certificate to him. Respondents (the Board and the individual members) demurred to the original petition. The demurrer was sustained, leave to amend was given, and appellant filed an amended petition. Respondents answered the amended petition, putting in issue appellant's allegations that he was a person of good moral character, that he had furnished evidence of six years or more of experience in engineering work satisfactory to show that he was competent to practice electrical engineering, and that respondent Board had acted arbitrarily in rejecting appellant's application for registration. Respondents' answer also affirmatively alleges that appellant does not possess six *months* (sic) or more of experience in electrical engineering, as differentiated from the work of an electrician, mechanic or electrical contractor; that appellant has had no education or training in mathematical, physical or engineering sciences and has no knowledge of engineering science; and that appellant has never furnished evidence of six years or more of experience in any engineering work satisfactory to respondent Board and evidencing that appellant is competent to practice electrical engineering.

At the trial appellant introduced in evidence a copy of the application and the original of the letter of rejection, obtained a stipulation that the required fee had been paid, and then rested. The due filing of the application had been admitted by the answer. Respondents offered no evidence, their counsel stating that they were willing to rest on the fact that respondent Board had acted within its discretion in denying the registration on the basis of the application. The trial court made findings, and judgment was entered discharging the alternative writ and denying a peremptory writ. Appellant's motion for new trial was denied, whereupon appellant brought this appeal.

Appellant's position upon this appeal, and as it was in the trial court, is "If the application was sufficient the writ should have been granted; if the application is insufficient the writ was properly denied." Appellant points out that according to the record the only evidence before respondent Board, pertaining to appellant's qualifications in the field of electrical engineering, was the application filed by appellant, and this application, appellant contends, shows that he had not only six, but forty-six, years of continuous experience in electrical engineering. He points out further that no objection was made to the form of his answers, that no more complete statement or exact information was requested of him, and that he never had a formal hearing before respondent Board. The Board's discretion in this matter, he says, is not arbitrary and may not be exercised capriciously, fraudulently or without factual basis sufficient to justify a reversal. His case really rests on the contention that his application shows sufficient professional work experience to qualify him for registration. His statements were made under oath and must be taken as true, he contends, for there is no evidence to the contrary in the record. He is willing to accept the Board's definition of electrical engineering as set out in Rule No. 403.

Respondents in reply contend that appellant's application on its face supports the court's findings that respondent Board regularly performed its official duty in denying the application, that appellant did not furnish evidence of six years or more of engineering work experience satisfactory to respondent Board and showing his competency to practice electrical engineering, and that respondent Board did not abuse its discretion in denying the application. Respondents argue that the application itself fails to show that appellant had sufficient work experience in the field of electrical engineering to qualify him for registration, and that it is evident from a reading of the application that appellant failed to furnish the information requested of him with respect to his professional experience. They assert he did not show experience in electrical engineering within the meaning of the definition laid down by the Board, and which he says he is willing to accept, and that his answers do not show that he ever worked as a professional engineer within the meaning of the definition set out in section 6801 of the Code.

While there is much force in respondents' criticism of the sufficiency of appellant's application to show that he was entitled to registration as a professional engineer without examination, we are still confronted with the question as to whether or not respondent Board acted arbitrarily in rejecting his application and declaring him ineligible for registration without requesting a more complete statement of his work and affording him a hearing.

[1] The cases of Martin v. Board of Supervisors, 135 Cal.App. 96, 26 P.2d 843, decided by this court, and Fascination, Inc. v. Hoover, 39 Cal.2d 260, 246 P.2d 656, hold that a hearing on the merits is necessary where an administrative agency is charged by law with the duty of issuing licenses upon specified terms and conditions, and that such an agency becomes a quasi-judicial body for determining the facts and exercising sound and legal discretion in the performance of its duty, i. e., determining the merits of the application. While its procedure may be somewhat informal, such informality does not justify the denial of a hearing.

In Martin v. Board of Supervisors, supra, the county ordinance regulating the sale of beverages containing above a certain percentage of alcohol, designated the board of supervisors as the licensing board for the issuance of licenses to sell beverages. A person desiring a license should apply in writing to the board giving such information as the board prescribed. Upon receipt of the application the board shall "investigate" and deny such application if the applicant and the premises to be used for his business did not conform to specified conditions. Plaintiff filed an application for a license which was denied by the board without notice or hearing. On mandamus the court directed the board to afford plaintiff a hearing, stating, 135 Cal.App. at pages 100–103, 26 P.2d at page 845:

> "When a board of supervisors is charged by law with the duty of issuing licenses upon specified terms and conditions, that tribunal becomes a quasi judicial body for determining the facts and exercising sound and reasonable discretion in the performance of its duty. Since a board of supervisors is only a quasi judicial body in its investigation and determination of the merits of petitions for licenses in conformity with the provisions of an ordinance, its hearings may be somewhat informal and need not conform in all respects to the solemnity of a court proceeding. Nevertheless, the law does contemplate a fair and impartial hearing of an application for license with an opportunity for the petitioner to present competent evidence for the consideration of the board. Reed v. Collins, 5 Cal.App. 494, 90 P. 973; 33 C.J. 548, §§ 138–141. By the great weight of authority, as appears from the text in 33 C.J. at page 548: 'One who has made an application for license is entitled to a hearing by the licensing authority.' On page 549 of the same volume it is further said: 'Where the hearing on an application for a license is held before a court, or before a board which acts in a judicial capacity, the proceedings are in the nature of a civil action and are governed by the ordinary rules of judicial procedure applicable thereto.'
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> "* * * It is true that an individual has no vested right to engage in the business of selling intoxicating liquor. Ritz v. Lightston, 10 Cal.App. 685, 689, 103 P. 363. The regulation of that business is governed by legal principles different from those which apply to what may be termed inherently lawful avocations. While it is contended the ordinance which is involved in this proceeding purports to license only nonintoxicating beverages, we are satisfied the interpretation of this act should be governed by the same rules which apply to the regulation of intoxicating drinks. A court may not take judicial notice of just what percentage of alcohol mingled with beer, ale, or wine will necessarily intoxicate a particular individual, or just what quantity of the beverage will have that effect. 33 C.J. 498 § 17. * * * In spite of the fact that a vested right to engage in the dispensing of these beverages may not exist, still the law contemplates a fair and impartial hearing of any application for a license which has been filed in strict conformity with the law. * * *
>
> * * * * * *
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> "It would be preposterous to concede that any judicial tribunal could be clothed with the arbitrary power of issuing licenses and regulating business subject only to its own caprice; that, with or without, a hearing on the merits of the application, with or without reason, or upon ex parte statements or rumors, with no opportunity of refuting them, the board could grant or deny a petition for license. This is not the purpose or spirit with which regulatory statutes are enacted. Law contemplates justice whether it is granted as a privilege or recognized as a vested right. We therefore conclude that the right to engage in the sale of beverages under the ordinance of Lake county may not be arbitrarily denied by the board of supervisors without a hearing or an opportunity on the part of the petitioner to present the merits of her application to the licensing tribunal."

In Fascination v. Board of Supervisors, supra, which was a mandamus proceeding to compel a city tax collector, chief of police and city prosecutor to issue a license to operate an amusement game, the Martin case was cited with approval and the foregoing quotation from the Martin case was quoted. The Supreme Court held that a notice and hearing upon the application were required, and held further that where an application has been denied without a hearing it is proper procedure to remand the matter to the agency or board for further and proper proceedings.

While the two decisions just cited dealt with local administrative agencies the rule announced therein is equally applicable to a state-wide agency such as the respondent Board. No reason is apparent why the same rule should not apply to state-wide administrative agencies, such as respondent Board. Both perform similar quasi-judicial functions. Weiss v. State Board of Equalization, 40 Cal.2d 772, 256 P.2d 1.

In Southern California Jockey Club, Inc. v. California Horse Racing Board, 36 Cal.2d 167, 223 P.2d 1, it was sought by mandamus to compel the Horse Racing Board to issue a license to conduct a horse racing meeting. Section 19480 of the Business and Professions Code provided that the board may issue a license to any person "who makes application therefor in writing, who has complied with the provisions of this chapter", etc. In that case the Board after a hearing denied the application. The Supreme Court affirmed the judgment of the trial court denying the writ of mandamus, and held that on petition to the superior court for a writ of mandate to compel the Horse Racing Board to issue a horse racing license, the court should not reweigh the evidence before the Board and that its sole function is to determine from the record whether there is sufficient evidence to sustain the ruling of the Board. The court said, 36 Cal.2d at pages 174, 175, 223 P.2d at page 6:

> "* * * This rule was announced in McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 1039 [123 A.L.R. 1205], where this court said: 'The legislature has the power to vest in a public officer the discretion to deny an application for a permit to engage in a business subject to regulation when prerequisite facts do not exist. But such a discretion must be exercised within legal bounds. Those bounds are generally that the discretion of the administrative officer or board may not be exercised arbitrarily, capriciously, fraudulently, or without a factual basis sufficient to justify the refusal. * * A survey of the foregoing authorities discloses that it is the settled general rule of law in this state that where the legislature has by statute clothed an administrative officer with power to ascertain the facts with reference to the fitness of an applicant for a permit to engage in a business subject to regulation under the police power and has vested in such officer the discretion, based on the facts ascertained, to grant or deny a permit to engage in such business the courts will not interfere with the exercise of such discretion except in the case of an abuse thereof. * *'
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> * * * * * *
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> "* * * We therefore hold, that in a case such as this, the trial court should not reweigh the evidence, and its sole function is, to determine from a review of the record, whether there is sufficient evidence to sustain the ruling of the board. If the trial court should hold the evidence insufficient, and this holding is attacked on appeal, the court to which the appeal is taken must review the record and determine the sufficiency of the evidence. If the evidence is found to be sufficient, the ruling of the board must be sustained."

[2] We conclude that the respondent Board abused its discretion in denying appellant's application without affording him a hearing thereon. While the application as filled out and filed by appellant may not have been sufficient to have entitled appellant to have it granted without further evidence or explanation, we believe it was sufficient to entitle him to a hearing and an opportunity to furnish evidence of

six years or more of experience in engineering work satisfactory to the board evidencing that the applicant is competent to practice the character of engineering in the branch for which he is applying for registration. We believe that the respondent Board, in denying his application and declaring him ineligible for registration without affording him a hearing upon his application, acted arbitrarily and contrary to the spirit and intent of the statute.

In view of the foregoing we deem it unnecessary to discuss the other points raised in the briefs.

The judgment is reversed with directions to the trial court to remand the matter to the respondent Board for further proceeding in accordance with the views herein expressed.

VAN DYKE, P. J., and PEEK, J., concur.

* * *

123 Cal.App.2d 631

LEBKICHER v. CROSBY et al.

No. 15629.

District Court of Appeal, First District,
Division 2, California.
March 3, 1954.

Action for personal injuries sustained by pedestrian when struck by an automobile. From a judgment of the Superior Court, San Mateo County, A. R. Cotton, J., in favor of the plaintiff, the defendants appealed. The Court of Appeal, Kaufman, J., held that questions of speed, of the pedestrian's contributory negligence and last clear chance were for the jury and that there was no error in instructions, except one conceded to be erroneous.

Judgment modified and, as so modified, affirmed.

1. Automobiles 🔑245(40)

In action for injuries sustained by pedestrian struck by automobile, whether driver's speed was reasonable in view of the circumstances was a question for jury. Vehicle Code, § 510.

2. Automobiles 🔑160(1)

A driver is bound to be reasonably vigilant for pedestrians on the highway.

3. Automobiles 🔑146, 160(1)

A driver's vigilance should increase with evidence of increasing numbers of pedestrians and motor vehicles in the area.

4. Automobiles 🔑217(3, 7)

There is a continuing duty of care upon a pedestrian crossing a street between crosswalks or diagonally. Vehicle Code, § 562.

5. Automobiles 🔑245(72)

In action for injuries sustained by pedestrian when struck by automobile while crossing road which had no marked crosswalks, whether pedestrian was negligent in attempting to cross road under the circumstances was a question of fact. Vehicle Code, § 562.

6. Abatement and Revival 🔑50

Statute providing for survival of actions for personal injury which became effective prior to death of tort feasor and prior to commencement of action was applicable thereto, even though it became effective subsequent to date of injury. Civ. Code, § 956.

7. Automobiles 🔑227(3)

To render last clear chance doctrine applicable in automobile accident case driver must have not only the last chance, but the last clear chance to avoid accident by exercise of ordinary care.

8. Negligence 🔑83.4

To render last clear chance doctrine applicable plaintiff's negligence must have placed him in position of danger from which he cannot escape by exercise of ordinary care, defendant must have knowledge of plaintiff's predicament, must know or, in exercise of ordinary care, should know that plaintiff cannot escape, defendant must have chance to avoid accident by use of ordinary care, and must fail to use that care.

9. Negligence ⟹83.3

California supports the doctrine of discovered peril.

10. Automobiles ⟹245(6, 91)

In action for injuries sustained by pedestrian struck by automobile while crossing road, whether motorist in exercise of ordinary care should have swerved to avoid hitting pedestrian and whether there was a last clear chance to avoid accident were questions for jury.

11. Automobiles ⟹246(58)

In action for injuries sustained by pedestrian struck by automobile while crossing road, evidence as to circumstances of accident justified giving of instruction on last clear chance. Vehicle Code, § 670.

12. Negligence ⟹141(11)

Instruction that owner of automobile would be liable in damages to same extent as driver for injuries sustained by pedestrian struck by automobile was erroneous in view of statutory provision limiting liability of owner for imputed negligence, in ordinary situation to $5000. Vehicle Code, § 402(a).

13. Trial ⟹229, 244(4)

Instructions in automobile accident case were not subject to objection that they were repetitious and over-emphasized duty placed on driver, since repetition alone is not reversible error.

14. Automobiles ⟹246(4)

In action for injuries sustained by pedestrian when struck by automobile, instruction that failure to sound horn if reasonably necessary to insure safe operation of automobile was negligence, was not subject to objection that it instructed jury that failure to blow horn was negligence. Vehicle Code, § 671.

15. Automobiles ⟹246(20)

In action for injuries sustained by pedestrian struck by automobile, refusal of instruction consisting of part of statutory provision specifying prima facie speed limits, but which failed to state all qualifications of the statute, was not error, particularly where jury was instructed that speed considered as an isolated fact is not proof either of negligence or of exercise of ordinary care. Vehicle Code, § 511.

16. Appeal and Error ⟹762

Reviewing court was not required to consider question presented in reply brief in absence of any good reason for not raising point in the opening brief.

17. Appeal and Error ⟹237(2)

Cross-examination of defendants' witness as to settlement negotiations was not prejudicial where counsel did not assign it as misconduct or ask for a mistrial.

* * *

Hoffman & Nagle, San Mateo, for appellant Thomas Aitken, Jr.

L. B. DeMatteis, Dist. Atty. of San Mateo County, Louise Eleanor Falvey, Deputy Dist. Atty., of San Mateo County, Redwood City, for William Crosby, Public Administrator.

Cosgriff, Carr, McClellan & Ingersoll, Robert R. Thompson, Burlingame, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court of San Mateo County in a personal injury action in the sum of $5,500 and costs of $242.20 in favor of plaintiff Robert C. Lebkicher and against the administrator of the estate of Theola Louise Aitken, the deceased driver of the car involved in the accident, and Thomas Aitken, Jr., her husband.

The accident in which plaintiff was injured occurred on January 12, 1949, and the original complaint was filed on January 4, 1950. Theola Louise Aitken had died on November 4, 1949, hence a supplemental complaint was filed August 17, 1950, reciting that William Crosby had upon plaintiff's motion been substituted as defendant and that on July 27, 1950, plaintiff had presented his claim for damages against the administrator of said estate. On March 13, 1952, an amended complaint alleging additional injury and medical expense was filed.

Robert C. Lebkicher, plaintiff and respondent, an employee of Pan American

Airways, South San Francisco, left work at 4:15 p. m. on January 12, 1949, and began walking from the easterly terminus of Coast Guard Road toward Old Bayshore Highway. Coast Guard Road, also referred to in the record as Pan American Road, runs from the Pan American Airways buildings at its eastern terminus to Old Bayshore Highway. The westerly portion of the road has an overall width of about 30 feet, but as the road approaches the easterly terminus it widens to about 65 feet excluding shoulders where it is divided by concrete divider strips. The southerly lane becomes in this area much wider than the northerly, having a width of about 40 feet. There are no pedestrian sidewalks along this road nor any marked crosswalks. It was a straight flat road with no obstruction. A person could stand at the eastern terminus and view the entire road to Old Bayshore Highway.

Approximately 700 to 800 other employees of Pan American were leaving work at the same time as was respondent, and between 300 and 400 automobiles were leaving the grounds by way of Coast Guard Road, the only available exit. The traffic headed westward was bumper to bumper, but the incoming traffic was very light. Several people were proceeding on foot along the Coast Guard Road westward toward Old Bayshore Highway.

Respondent testified that he was approximately 300 feet west of the point where he entered the road when he was called to by someone in an outgoing car. He started diagonally across the road. Prior to starting across the road he had been looking west, facing oncoming traffic. Respondent thought that the nearest incoming car was not near enough nor traveling at a speed great enough to constitute a danger to him. As he began to cross respondent looked back over his right shoulder at the traffic coming out of Pan American. He then noticed the Aitken car approaching in the south lane at a distance of about 65 feet or almost 4 car lengths from him. It was just passing the slight jog in the south lane, which on the map appears to be the point where the Coast Guard Road begins to widen. Respondent had taken from 3 to 5 steps and had just reached the edge of the heavily traveled portion of the widest section of the south lane. He testified that his first reaction was to get out of the way, and thought of the traffic hump (evidently the concrete dividers between the north and south lanes) as a possible escape but saw that they were too far away. So he stayed where he was and put his hands on his hips to indicate that he was going to stay where he was. Respondent was struck by the Aitken automobile about a foot in from the right edge of the bumper, and was thrown to the pavement, sustaining a broken leg and other injuries. If the accident occurred at the point on Coast Guard Road where respondent contends that it did, the driver had approximately an area 25 feet in width between respondent and the concrete dividers in which she could have safely passed by swerving to the left. The driver's speed was estimated by respondent's witnesses at from 25 to 40 miles per hour. The driver did not blow her horn, swerve her car, nor decrease her speed.

There is considerable conflict in the testimony. Officer Stagnero, the police officer who arrived at the scene shortly after the accident, placed the scene of the accident at a point much farther west, on the narrow portion of Coast Guard Road where it consists of 2 ten foot lanes. There were no concrete dividers in this section of the road. The officer's report contained the information that the driver stated that the pedestrian darted in front of her without looking, and that respondent said that he started to cross and saw other cars coming, and as he did this he walked into the right front fender of the Aitken car. He told the officer it was not the driver's fault. The officer testified that there were no speed restriction signs posted between Old Bayshore and the point where the accident occurred.

[1–3] Appellant contends that the finding of negligence on the part of Mrs. Aitken is not supported by the evidence. This argument is based on appellant's version of the facts, that respondent stepped directly in front of the Aitken car, creating a situation of imminent peril in which the driver could not be expected to act with the degree of care required had there been time to deliberate. However, respondent's version is that the Aitken car was between 25 and 65 feet away when he stopped, placing his hands on his hips. While the officer places the accident on the narrow portion of the road where the driver most probably could not have swerved any appreciable distance, respondent and his witnesses Lynehan and Brain place it on the widest portion of the road. There was testimony that several other persons were walking along the edge of Coast Guard Road, some ahead of respondent, hence the driver should have been alert to the presence of pedestrians. She should have also been able to note that there were no crosswalks. Her view was unobstructed. The evidence was that the driver did not decrease her speed. Section 510, Vehicle Code, the basic speed law, provides that no person shall drive upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on the surface and width of the highway, and in any event at a speed which endangers the safety of persons or property. Whether or not the driver's speed was reasonable in view of the circumstances herein was a fact question to be determined by the jury, Geisler v. Rugh, 19 Cal.App.2d 738, 741, 66 P.2d 671; a driver is bound to be reasonably vigilant for pedestrians on the highway, Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125. The driver's vigilance should increase with evidence of increasing numbers of pedestrians and motor vehicles in the area. Washam v. Peerless Automatic, etc. Co., 45 Cal.App.2d 174, 179, 113 P.2d 724.

[4, 5] Appellant contends that respondent was negligent as a matter of law, since respondent did not cross the road at a crosswalk and did not yield the right of way to the driver of the car. Section 562, Vehicle Code, provides that every pedestrian crossing a roadway at any point other than in a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. The section further provides that "The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway." Appellant cites Rios v. Bennett, 88 Cal.App.2d 919, 200 P.2d 73, 76, to the effect that there is a continuing duty of care upon a pedestrian crossing a street between crosswalks or diagonally. That is true and that case states that a pedestrian crossing in such manner may have to exercise even a higher degree of care than at a regular crosswalk, "but", the opinion continues, "the question as to whether or not such care was exercised in a given case is one for the jury, unless he is so careless that it can be said he is negligent as a matter of law", citing Watkins v. Nutting, 17 Cal.2d 490, 495, 110 P.2d 384; Brannock v. Bromley, 30 Cal. App.2d 516, 524, 86 P.2d 1062; Foti v. Morrissey, 57 Cal.App.2d 328, 134 P.2d 51, cases also cited by appellant herein. In the Watkins case a verdict for damages for the death of a pedestrian was affirmed. It was contended that the pedestrian was guilty of negligence as a matter of law. The pedestrian walked from behind an automobile into the center lane of the highway where he was struck by defendant's truck. It was held that whether or not the pedestrian was guilty of contributory negligence was a question of fact where there was evidence that the pedestrian looked, but either did not see the truck or saw it and misjudged either its speed or distance. Brannock v. Bromley, supra, affirmed a verdict for defendant. In that case the jury brought in a verdict finding both plaintiffs and defendants guilty of negligence, so plaintiff clearly was not held guilty of negligence as a matter of law. In Foti v. Morrissey, supra [57 Cal.App.2d 328, 134 P.2d 53], the question as to whether the pedestrian was guilty of contributory negligence was submitted to the jury, and the court in the opinion states that "the implied finding that deceased was guilty of contributory neligence which proximately contributed to his injury is not without support in inferences reasonably to be drawn from the evidence and is therefore conclusive upon this court." The rule is stated in Sanker v. Humborg, 48 Cal.App.2d 203, 204, 119 P.2d 433, that when a pedestrian looks before placing himself in a position where he may

be in peril and fails to see an approaching vehicle, or seeing it, misjudges its distance or speed and proceeds on his way again without looking, the question of his negligence is generally one of fact, but where he does not look at all or where he looks from a position where he cannot see and takes no precaution for his own safety, the question of negligence is generally one of law for the court. In the case at bar there is testimony that respondent looked at incoming traffic from a position where he could see. He may have misjudged its distance from him or its speed, but whether or not he was negligent in attempting to cross the road under the circumstances herein would appear to be a fact question.

[6] Appellants contend that the accident occurred prior to the effective date of Section 956 of the Civil Code providing for the survival of actions for personal injury. The statute became effective October 1, 1949. Mrs. Aitken died on November 4, 1949. The action was commenced in January 1950. Appellants say that the purpose of the statute was to create a new cause of action and that the accident is the controlling date, citing Cort v. Steen, 36 Cal. 2d 437, 224 P.2d 723. However, in Smith v. Finley, 112 Cal.App.2d 599, 600, 246 P.2d 989, it is pointed out that in Cort v. Steen the action against the administrator of the deceased tortfeasor was commenced prior to the effective date of the section. The court in Smith v. Finley held that the language of Cort v. Steen was subject to the interpretation that if Section 956 was in effect at the date of the tortfeasor's death, then the cause of action survived, even though the section was not in effect at the date of the accident.

[7–9] It is also argued that it was error to instruct on the doctrine of last clear chance. The driver must have not only the last chance, but the last *clear* chance to avoid the accident by the exercise of *ordinary* care. Poncino v. Reid Murdock & Co., 136 Cal.App. 223, 28 P.2d 932. Five elements must be present to make the doctrine applicable (1) plaintiff's negligence placing him in a position of danger from which he cannot escape by the exercise of ordinary care; (2) defendant's knowledge that plaintiff is in such a situation; (3) defendant knows or in the exercise of ordinary care should know that plaintiff cannot escape; (4) defendant has a chance to avoid the accident by use of ordinary care; (5) defendant fails to use ordinary care to avoid the accident. Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915. Appellant argues that there is no testimony nor evidence of any kind to justify an inference that Mrs. Aitken was aware of respondent's peril, and that respondent negatived such an inference by testifying that he did not see the car swerve, slow down nor was the horn sounded. California supports the doctrine of discovered peril. Starck v. Pacific Electric Railway Co., 172 Cal. 277, 156 P. 51, L.R.A.1916E, 58; Lasch v. Edgar, 46 Cal.App.2d 726, 116 P.2d 949. Construing the evidence in the light most favorable to respondent appellants say that assuming a speed of 40 miles per hour at a distance of 65 feet,—the distance respondent states he was from the Aitken car when he stopped on the road—the driver did not have a clear chance to avoid the accident, since the vehicle would be traveling at about 60 feet per second, and reaction time must also be added. Section 670 of the Vehicle Code prescribes a stopping distance of 148 feet at 40 miles per hour. See Buck v. Hill, 121 Cal.App.2d 352, 263 P.2d 643. Although respondent's testimony as to where he first saw the Aitken automobile appears to be somewhat confused and contradictory, it is subject to the interpretation that it was the jog where the pavement begins to widen, a distance of about 200 feet from him when calculated on the map in relation to the spot from which he began to cross the road, that he started crossing when the Aitken car was 200 feet away, and stopped after a few diagonal steps when it was 65 feet away, in order to let it pass by him. If respondent started across when the driver was 200 feet away, then at 40 miles per hour there was more than the minimum distance of 148 feet in which to stop if the driver observed respondent's peril. But, as pointed out by respondent, ordinary care is not limited to stopping. Here the accident could have been avoided by swerving slightly to avoid the pedestrian. See Center v. Yellow Cab, 216 Cal. 205, 208, 13 P.2d 918.

Respondent cites Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645, to the effect that it is for the jury to determine whether in the space of time involved the driver could have avoided the collision. In Bailey v. Wilson, 16 Cal.App.2d 645, 649, 61 P.2d 68, 70, it was said that, where the victim was in the path of the vehicle and plainly visible to the driver, the jury may conclude that the driver "must have seen" him, and may therefore be instructed on the doctrine of last clear chance even though there is no direct evidence that defendant actually knew of the victim's presence in the roadway, and even though he may have testified that he did not see the victim in time to avoid hitting him.

Appellants acknowledge that they are familiar with the rule of Bailey v. Wilson, supra, that in cases where the victim is in the path of the approaching automobile it is proper to instruct on last clear chance. They say that although the jury may infer that appellant was aware of respondent's position, it is not proper to instruct them that they may make such inference. This reasoning is difficult to follow. They cite Haerdter v. Johnson, 92 Cal.App.2d 547, 551, 207 P.2d 855 to the effect that the line of cases represented by the Bailey case, supra, does not hold that defendant is liable because he *ought* to have known of plaintiff's danger, or because circumstances put him on notice of the danger, or that he was remiss in failing to discover the danger, but rather that "under all the facts and circumstances shown by the evidence it was proper to find that the defendant, despite his denial of knowledge, or despite the absence of direct testimony on the subject, was actually aware of the plaintiff's danger in time to avert it." The portion of the instruction on last clear chance that appellants take particular exception to here is "Third, That Theola Louise Aitken, deceased, had *or from all the facts you find she must have had,* actual knowledge of plaintiff's perilous situation" does not tell the jury that they may apply the doctrine upon a finding that the driver "ought to have known" of respondent's position of danger.

[10, 11] When the jury should be instructed on the doctrine of last clear chance and when it should not must be determined in view of the recent Supreme Court decisions, Peterson v. Burkhalter, 1951, 38 Cal.2d 107, 237 P.2d 977, and Rodabaugh v. Tekus, 1952, 39 Cal.2d 290, 246 P.2d 663. The Peterson case has not been overruled by the Rodabaugh case, as has been pointed out in the latter case's concurring opinion. In the Rodabaugh case a judgment notwithstanding verdict for plaintiffs was affirmed where defendant testified that he observed deceased's car for 500 feet approaching the intersection, that when decedent was 75 to 100 feet from the intersection and decedent saw that he was not slowing down, he applied his brakes gently, thinking decedent would probably stop for the boulevard stop sign, that he observed decedent looking straight ahead and that he did not slacken his speed, that defendant then applied his brakes harder at about 75 feet from the intersection and at 35 feet therefrom slammed them down harder. It was held that there was no substantial evidence that defendant had a *last clear* chance to avoid the accident, that there must be more shown than just a *bare possible* chance. In the present case, it is contended that respondent was not in a position where the driver could be aware of his peril until he stepped out on the pavement, 65 feet from her car and since 148 feet, Sec. 670, Vehicle Code, is the necessary stopping distance at 40 miles per hour, 83.3 feet at 30 miles per hour, there would not appear to have been the *clear* chance which is considered necessary under the Rodabaugh case. As far as the driver here stopping the car is concerned the Rodabaugh case quotes with approval the language from Bagwill v. Pacific Electric Ry. Co., 90 Cal. App. 114, 121, 265 P. 517 that " 'Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise.' " [39 Cal.2d 290, 246 P.2d 666.] In the present case, of course, stopping was not the only solution for the driver as she could have swerved. See Center v. Yellow Cab, 216 Cal. 205–208, 13 P.2d 918. It was therefore a question for the jury to determine as to whether the driver

should have in the exercise of ordinary care swerved to avoid hitting respondent, and whether or not appellant had the last clear chance to avoid the accident. In our opinion the evidence justified the giving of the instruction on last clear chance.

[12] Appellants attack an instruction given at respondent's request which stated that the owner of the car, Thomas Aitken, Jr., would be liable in damages to the extent to which Mrs. Aitken would be liable if she were then alive. Respondent concedes the error in this instruction. He states that prior to trial appellants and respondent had orally agreed to eliminate instructing the jury on the limitations of Vehicle Code, Section 402(a) with the understanding that any judgment against Thomas Aitken could be reduced by stipulation to $5,000, but due to inadvertence such modification was not sought till after notice of appeal had been filed. Respondent concedes that the judgment should be modified so that nothing in excess of $5000 may be recovered against Thomas Aitken, Jr.

[13] Appellants contend that there was error in giving respondent's instructions 19, 20, 21 because they were repetitious and therefore over-emphasized the duty placed on the operator of a motor vehicle. Respondent notes that appellants requested and received 2 instructions on contributory negligence and 4 on the duty of care imposed on a pedestrian. The instructions do not appear to be objectionable in any way nor unduly repetitious. Repetition alone is not reversible error. Rose v. Tandowsky, 80 Cal.App.2d 927, 932, 183 P.2d 347.

[14] Appellant contends that the instruction in connection with Sec. 671, Vehicle Code, instructed the jury that the driver was negligent if she failed to blow her horn. This is an incorrect interpretation. The jury were instructed that if they found from the evidence that it was "reasonably necessary in order to insure the safe operation * * * of her automobile" for her to have sounded the horn, and that if she failed to do so, they should find that she was negligent in her operation of the automobile.

[15] Appellants maintain that it was error to refuse their instruction No. 19, which consisted of part of Sec. 511 on prima facie speed limits. Some exhibits admitted over appellants' objection included a photograph showing a sign posted to the east of the point of impact indicating a 15 miles per hour zone. In Rednall v. Thompson, 108 Cal.App.2d 662, 239 P.2d 693, 696, it was held that the type of instruction offered in the present case was properly refused since it failed to state all of the qualifications of Sec. 511, "namely, that compliance with the basic speed law set forth in Section 510 of that code is a prerequisite of the lawfulness of speeds within the prima facie limits set forth in Section 511." It has also been held that failure to instruct on Sec. 511 is not reversible error when an instruction is given as was given here, that the speed of a vehicle considered as an isolated fact and simply in terms of so many miles per hour is not proof either of negligence or of the exercise of ordinary care. Reich v. Long, 97 Cal.App.2d 657, 661, 218 P.2d 589. There was no error in refusing appellants' incomplete instruction.

[16, 17] For the first time, appellants in the Reply Brief contend that it was error to allow counsel to inquire into the question of settlement negotiations. There appears to be no good reason why this point was not raised in the opening brief. The court therefore does not need to consider it. 2 Cal.Jur. 734, sec. 424, and cases there cited. Appellant cites Squires v. Riffe, 211 Cal. 370, 295 P. 517, and Freeman v. Nickerson, 77 Cal.App.2d 40, 174 P.2d 688. In these cases there were references made to insurance which was not the case here. The adjuster Brown was brought in as a witness by defendants in order to identify and get into evidence a statement (Exhibit A) of the accident secured from respondent during the course of an investigation by Brown's adjusting firm. The statements appellants object to occurred on cross-examination. While objections were made, counsel did not assign it as misconduct or ask for a mistrial. Any error in this connection was not prejudicial.

In view of the foregoing, we conclude that the judgment must be modified as against Thomas Aitken, Jr., to limit recovery against him in the sum of $5,000 and as so modified the judgment must be affirmed.

Judgment as modified affirmed. Costs to appellants.

NOURSE, P. J., and DOOLING, JJ., concur.

123 Cal.App.2d 654

COUGHLAN
v.
JUSTICE COURT OF KERN RIVER JUDICIAL DIST., KERN COUNTY et al.

Civ. 4659.

District Court of Appeal, Fourth District, California.

March 3, 1954.

Defendant was charged with violation of the Labor Code. The Superior Court, Kern County, Robert B. Lambert, J., entered judgment granting peremptory writ of prohibition commanding complainants to desist and refrain from further criminal proceedings and complainants appealed. The District Court of Appeal, Barnard, P. J., held that where more than ten months elapsed from arrest until demurrer was ruled on, and almost 11 months elapsed until arraignment at which time action was ordered dismissed but appeal was taken and order was reversed and trial date set, but no further action was taken up until filing of petition for the writ some 84 days later, and no excuse appeared for delays, issuance of writ of prohibition was proper.

Judgment appealed from affirmed.

Criminal Law ⇨573
Prohibition ⇨11

Where more than 10 months elapsed after arrest before defendant's demurrer was ruled on, almost 11 months elapsed before defendant was arraigned, order directing dismissal was reversed with directions to proceed with trial but nothing further was done until petition for writ of prohibition was filed, 84 days later, and no excuse appeared for delays, defendant had been denied speedy trial and writ of prohibition against further proceedings was correctly entered. Labor Code, § 270; Pen.Code, §§ 681a, 686, subd. 1, 1382, subd. 3; Const. art. 1, § 13.

◆

Joseph E. Wooldridge, Dist. Atty., Lothair Schoenheit, Dep. Dist. Atty., Bakersfield, Pauline Nightingale; Edward M. Belasco; Leon H. Berger, Los Angeles, for appellants.

Maurice J. Hindin, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment granting a peremptory writ of prohibition commanding the defendants to desist and refrain from taking further proceedings in a criminal action, save and except to dismiss said action.

The petition for the writ alleged, among other things, that a criminal complaint was filed in the justice court charging the petitioner with a violation of section 270 of the Labor Code; that he was arrested on October 31, 1951, and admitted to bail; that he filed a demurrer on November 9, 1951; that this demurrer was overruled on September 13, 1952; and that in the intervening period he did not appear before the respondent court, was not arraigned, was not ordered to appear, requested no continuance, and did not waive his right to a speedy trial.

It was further alleged that no hearings were had or rulings made in connection with said demurrer until September 13, 1952; that on that date the respondent court ordered the petitioner to appear for arraignment on September 29, 1952; that on September 16, 1952, petitioner filed a written notice of motion to dismiss for failure to bring him to trial within thirty days after his arrest, and for denial of his right to a speedy trial; that on September 29, 1952, respondent court granted this motion and entered a judgment of dismissal; that the People appealed from that order; that on November 21, 1952, the superior court reversed that order and directed the respondent court to proceed with the trial of the action; that the respondents proposed to try the petitioner on said complaint during the week beginning March 9, 1953; and that the respondent court is without jurisdiction to try the petitioner on said complaint for the reason that he has been denied the right to a speedy trial as guaranteed by Article I, Section 13 of the Constitution, and for four other reasons which are set forth in the petition. After a hearing, at which both sides were represented, the court found that no question of fact had been raised and that all of the allegations of the petition are true, and ordered a peremptory writ issued as prayed for. Such a writ was issued and the respondents have appealed.

The right to a speedy trail is provided for in Article I, Section 13 of the State Constitution, and in Sections 681a, 686, subd. 1, and 1382, subd. 3, of the Penal Code. The latter section provides, with respect to a misdemeanor, that the court must order the action to be dismissed where it has not been brought to trial within thirty days after the person is arrested, unless the delay is caused by some action or neglect on the part of the defendant. The right of a defendant to dismiss under such circumstances has been frequently upheld. Harris v. Municipal Court, 209 Cal. 55, 285 P. 699; People v. Molinari, 23 Cal.App.Supp.2d 761, 67 P.2d 767; People v. Godlewski, 22 Cal. 2d 677, 140 P.2d 381; People v. Angelopopulos, 30 Cal.App.2d 538, 86 P.2d 873; De La Mar v. Superior Court, 22 Cal.App. 2d 373, 71 P.2d 96, 97. In the last named case, the court said:

> "A party charged with crime has the constitutional right to a speedy trial and the court has no discretionary power to deny him a right so important. It would be unreasonable to hold that a delay of over a year was not in violation of the constitutional right to a speedy trial where the delay was not traceable to petitioner. The policy of the law upon this subject has been declared by the Legislature and by constitutional enactment, and courts have not hesitated by writ of mandamus or on appeal to compel the dismissal of felony cases not speedily brought to trial in accordance with the legislative and constitutional requirements."

In this case more than ten months elapsed after the arrest and before the demurrer was ruled on, and almost eleven months before the defendant was arraigned. At that time the action was ordered dismissed, but an appeal was taken from that order. Although that order was reversed with directions to proceed with the trial on November 21, 1952, nothing further was done until the petition for a writ of prohibition was filed on February 13, 1953, eighty-four days later. No excuse appears for either of the long delays and under the facts, as admitted and found by the court, the order for the issuance of the writ of prohibition was correctly entered.

Under the circumstances, it is unnecessary to consider the other grounds upon which the sufficiency of the complaint were attacked in the petition for a writ filed in the superior court.

The judgment appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

HAGGERTY v. FRESNO COUNTY et al.*

Civ. 4645.

District Court of Appeal, Fourth District,
California.

March 2, 1954.

Rehearing Denied March 26, 1954.
Hearing Granted April 28, 1954.

Action to enjoin enforcement of a county ordinance prohibiting emission or transmission of loud and raucous noises on public highways. From a judgment of the Superior Court of Fresno County, Edward L. Kellas, J., permanently enjoining defendants from enforcing the ordinance, and an order denying defendants' motion to set aside and vacate the judgment, defendant county and certain other defendants appealed. The District Court of Appeal, Mussell, J., held that a provision of the ordinance, denouncing use on any public highway in the county of the human voice or any record thereof when amplified by any device to such extent as to carry on to private property or be heard by others using public highways, irrespective of whether sounds are of such volume and intensity or carrying power as to interfere with the peace and quiet of users of county highways or owners of private property, is invalid as an unconstitutional abridgment and denial of the right of free speech.

Judgment and order affirmed.

1. Counties 🔑21½

The definition of phrase, "loud and raucous noise," by county ordinance prohibiting emission or transmission of any loud and raucous noise on any public highway, is binding on District Court of Appeal.

2. Constitutional Law 🔑90

A provision of county ordinance, denouncing use on public highway of human voice or record thereof, when amplified by any device to such extent as to carry on to private property or be heard by others using public highways, as constituting a "loud and raucous noise" prohibited by ordinance, irrespective of whether sound is of such volume, intensity or carrying power as to interfere with peace and quiet of users of county highways or owners of private property, is invalid as unconstitutional abridgment and denial of right of free speech. U.S.C.A.Const. Amends. 1, 14.

3. Injunction 🔑85(2)

The provision of Code of Civil Procedure that injunction cannot be granted to prevent execution of public statute by officers of law for public benefit does not apply to unconstitutional statute or ordinance. Code Civ.Proc. § 526.

4. Injunction 🔑85(2)

The Civil Code provision that injunction cannot be granted to prevent execution of public statute by officers of law for public benefit is a limitation on court's power to restrain public officers from enforcing valid law, but one specially interested may sue to enjoin attempted execution of unconstitutional statute. Civ.Code, § 3423.

5. Injunction 🔑130

Absence of finding that persons represented by plaintiff in suit to enjoin enforcement of county ordinance were in danger of irreparable injury or deprivation of reasonable opportunity to question constitutionality of ordinance in criminal proceedings did not preclude granting of injunction.

6. Injunction 🔑105(2)

Equity will not ordinarily enjoin a criminal prosecution, but will entertain injunction suit to test validity of municipal ordinance enforcement of which seriously interferes with property rights, where persons have been arrested and further arrests and prosecutions are threatened thereunder.

7. Equity 🔑16

Equity will protect personal as well as property rights.

8. Injunction 🔑130

In action to enjoin enforcement of county ordinance prohibiting emission of loud and raucous noises on public highways, trial court's findings that persons including class of labor union members represented by plaintiff would be subject to arrest and prosecution under ordinance, if they employed loud speakers on public highways for any purpose, that many lawsuits would be commenced if defendants were not restrained from enforcing ordinance, that several of such members had been arrested for violating ordinance, and that its enforcement interfered with plaintiff's constitutional rights, were sufficient to show that plaintiff and members of union were specially interested in attempted execution of unconstitutional statute and hence entitled to injunctive relief. U.S.C.A.Const. Amends. 1, 14.

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* Subsequent opinion 279 P.2d 734.

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Robert M. Wash, County Counsel of Fresno County, John E. Loomis, Asst. County Counsel, and Dearing, Jertberg & Avery, Fresno, for appellants.

Todd & Todd, Clarence E. Todd and Henry C. Todd, San Francisco, for respondent.

MUSSELL, Justice.

In this action for injunctive relief and damages appellants appeal from a judgment permanently enjoining them from enforcing ordinance No. 415 of the county of Fresno and from a minute order denying their motion for an order setting aside and vacating said judgment.

The ordinance involved was passed by the board of supervisors of Fresno county on October 10, 1950, and is entitled "An ordinance prohibiting the making, emitting, or transmitting of any loud and raucous noise upon or from any public highway or public thoroughfare or from any aircraft." The ordinance provides in Section 3 thereof that "It shall be unlawful for any person to wilfully make, emit, or transmit or cause to be made, emitted, or transmitted any loud and raucous noise upon or from any public highway or public thoroughfare or from any aircraft of any kind whatsoever."

"Loud and raucous noise" as used in the ordinance, and as defined therein, means:

> "(1) Any noise made by the motor of any automobile, truck, tractor, motorcycle, or aircraft of any kind not reasonably required in the operation thereof under the circumstances and shall include but not be limited to backfiring, motor racing, and the buzzing by airplanes.
>
> "(2) The sound of the discharge of any gun or other explosive except by or with the permission of the governing body having control of the highway or thoroughfare.
>
> "(3) The human voice or any record or recording thereof when amplified by any device whether electrical or mechanical or otherwise to such an extent as to cause it to carry on to private property or to be heard by others using the public highways or public thoroughfares.
>
> "(4) Any sound not included in the foregoing which is of such volume, intensity, or carrying power as to interfere with or tend to interfere with the peace and quiet of persons upon private property or other users of the public highways and thoroughfares."

Violation of the ordinance is made a misdemeanor, punishable by fine or imprisonment, or both.

The trial court found that plaintiff C. J. Haggerty is the secretary of the California State Federation of Labor and a member of one of the labor unions affiliated with said federation; that he was authorized to represent the members of said federation with respect to the matters alleged in the complaint and brought the instant action in a representative capacity for and on behalf of himself and all other organizations and persons similarly situated; that the following persons, to wit, William Swearingen, Doc Reynolds, Jose Torres, Cleo Wheeler, Thos. D. Webb, Arthur Cramp, Andres Hernandez, Juan Mendoza, Clarence O. Goodwin, Vernon Pruett, Floyd Chadwich and J. Gunn (some of these men were representatives of the union involved and others were union members and pickets), were arrested under the provisions of said ordinance No. 415 for operating a loud speaker upon and from the public highway, thereby, by such device, amplifying the human voice to such an extent as to cause it to carry onto private property; that said ordinance No.

415 will be enforced against those using loud speakers upon the public highways, including the prosecution and hearing of the cases now pending before the defendant justices of the peace; that the present law enforcement officials of the county of Fresno, unless enjoined, will enforce the provisions of said ordinance No. 415 as written; that the enforcement of said ordinance is an interference with plaintiff's constitutional rights; that if the provisions of said ordinance relating to the operation of a loud speaker upon the public highways are enforced, the unions involved and their members will be prevented from effectively operating loud speakers upon the public highways; that persons, including the class thereof represented by plaintiff, will be subject to arrest and prosecution under said ordinance if they employ and use loud speakers on the public highways for any purpose or purposes whatever; and "that as set forth above, large numbers of law suits will be commenced if said county, its officers and employees, attorneys and those persons acting in concert with same, are not enjoined and restrained from enforcing said ordinance No. 415; that there will also be necessary many suits to enjoin the prosecution of said members and employees of said union, if this court does not grant the injunction as prayed."

The trial court concluded:

> "That Ordinance No. 415 of the County of Fresno insofar as it purports to prohibit the use of loud speakers upon the public highways and thoroughfares of the county of Fresno is unconstitutional upon its face as an abridgment of the constitutional guarantee of the rights of free speech; that the provisions of said ordinance defining a loud and raucous noise as among other things the human voice or any record or recording thereof when amplified by any device whether electrical or mechanical or otherwise to such an extent as to cause it to carry on to private property or to be heard by others using the public highways or public thoroughfares is so inseparable from other provisions of said ordinance that the entire ordinance must be found to be unconstitutional."

Judgment was rendered enjoining and restraining appellants "from any manner enforcing or causing ordinance No. 415 of the County of Fresno or any part or provision thereto to be enforced."

Defendants appeal from the judgment and contend (1) That ordinance No. 415 is constitutional on its face; and (2) That plaintiff is not entitled to an injunction to prevent the enforcement of a constitutional public statute by officers of the law; that even if the ordinance is unconstitutional on its face, an injunction cannot be granted to prevent its enforcement by officers of the law where there is no finding that by reason of its enforcement the persons represented by plaintiff are in danger of irreparable injury to private rights or of being deprived of a reasonable opportunity to question the constitutionality of the ordinance in the threatened criminal proceedings.

In Saia v. People of State of New York, 334 U.S. 558, 68 S.Ct. 1148, 1149, 92 L.Ed. 1574, the question of the validity under the fourteenth amendment of a penal ordinance of the city of Lockport, New York, which forbade the use of sound amplification devices except with permission of the chief of police was presented and passed upon. Saia was convicted of a violation of the ordinance and the Supreme Court set aside the conviction declaring that the ordinance was unconstitutional on its face as it established a previous restraint on the right of free speech in violation of the first amendment which is protected by the fourteenth amendment against state action. The court said:

> "To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance therefore has all the vices of the ones

> which we struck down in Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352; Lovell v. [City of] Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; and Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423."

The later case of Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 453, 93 L.Ed. 513, 10 A.L.R.2d 608, involved the validity of an ordinance which prohibited the use of a loud speaker or sound amplifier which emitted therefrom loud and raucous noises and was attached to and upon any vehicle operated or standing upon the streets or public places in the city of Trenton, New Jersey. Kovacs was convicted by a police judge of the city and on appeal to the Supreme Court, his conviction was affirmed. The court said:

> "We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities. On the business streets of cities like Trenton, with its more than 125,000 people, such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions. We cannot believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets. * * *"

In Haggerty v. County of Kings, 117 Cal.App.2d 470, 256 P.2d 393, 396, this court held that the use of vehicles equipped with loud speakers emitting loud and raucous noises and objectionably amplified sound on public highways is subject to legislative control. The ordinance there under consideration provided that:

> "'Section 2. It shall be unlawful for any person, other than law enforcement and governmental agencies to employ a speaker mounted upon a vehicle for the purpose of giving instructions, directions, making talks, addresses or lectures to any persons or assemblage upon or over any highway, without first obtaining a permit therefor as hereinafter provided.'"

The ordinance further provided that a permit should be granted by the board of supervisors unless there was presented to the board substantial and convincing evidence of a "'clear and present danger that the granting of said permit will result in the obstruction of the orderly movement of traffic or the peaceable passage or presence of persons, to, over or upon the public highways and other public places, or disorder or unlawful conduct, or unlawful injury of persons, or destruction of life or property, or tending to incite crime, or an invasion of the rights of privacy, or threatening the overthrow of the lawfully established government by force, in which case said permit may be denied.'" It was there held that the ordinance was constitutional and did not abridge or deny the right of free speech or assembly.

[1, 2] In the instant case the board of supervisors of Fresno county in enacting the ordinance in question specifically defined the meaning of "loud and raucous noise" as used in the ordinance and the definition there used is binding on this court. Rideaux v. Torgrimson, 12 Cal.2d 633, 636, 86 P.2d 826. By its provisions the ordinance denounces "the use upon any public highway in the county" of "the human voice or any record or recording thereof when amplified by any device whether electrical or mechanical or otherwise to such an extent as to cause it to carry on to private property or to be heard by others using the public highways or public thoroughfares." It should be here noted that the emission or transmission of such sounds are made unlawful irrespective of whether such sounds are of such volume, intensity or carrying power as to interfere with or tend to interfere with the peace and quiet of the users of the county highways or owners of private property. Such a limitation upon the use of the human voice or any recording or

amplification thereof is in our opinion an unconstitutional abridgment and denial of the right of free speech. Under the provisions of this ordinance the use of radios in private automobiles on county highways will be prohibited if the sounds therefrom carry to private property or could be heard by others using the highways and even the use of the human voice when amplified otherwise than by any mechanical device would constitute a violation of the ordinance when carried onto private property or heard by others using the highways.

[3, 4] Appellants contend that an injunction cannot be granted to prevent the enforcement of a constitutional public statute by officers of the law. Section 526 of the Code of Civil Procedure and the case of Fairchild v. Brock, 88 Cal.App.2d 425, 199 P.2d 9, are cited as authority for this contention. However, it was held in the Fairchild case, supra, that this section of the code does not apply to an unconstitutional statute or ordinance. As was said in Brock v. Superior Court, 12 Cal.2d 605, 609, 86 P.2d 805, 807:

> "The petitioners place their principal reliance upon section 3423 of the Civil Code which provides that 'an injunction cannot be granted * * * tc prevent the execution of a public statute, by officers of the law, for the public benefit'. This section has been construed as a limitation upon the power of a court to restrain public officers from enforcing a valid law (Reclamation District [No. 1500] v. Superior Court, 171 Cal. 672, 154 P. 845), but it has uniformly been held that one specially interested may enjoin the attempted execution of an unconstitutional statute. Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 407, 65 P.2d 884, 109 A.L.R. 895; Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; Wheeler v. Herbert, 152 Cal. 224, 92 P. 353; Schofield v. City of Los Angeles, 120 Cal.App. 240, 7 P.2d 1076."

[5, 6] The contention that an injunction cannot be granted because no finding was made that by reason of the enforcement of the ordinance the persons represented by the plaintiff were in danger of irreparable injury or of being deprived of a reasonable opportunity to question the constitutionality of the ordinance in criminal proceedings is without merit. As was said in Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 408, 65 P.2d 884, 886, 109 A.L.R. 895:

> "* * * while ordinarily equity will not enjoin a criminal prosecution, yet where persons have been arrested and further arrests and prosecutions are threatened under a void municipal ordinance, the enforcement of which seriously interferes with property rights, it will entertain a suit brought to test the validity of the enactment. Carey v. [City of] Atlanta, 143 Ga. 192, 84 S.E. 456, L.R.A.1915D, 684, Ann.Cas.1916E, 1151. The complaint clearly shows that the business of plaintiffs, which is a perfectly lawful one, is being interfered with by the steps which have already been taken to enforce the ordinance. Plaintiffs under the circumstances shown must either comply with the terms of the ordinance or defend each person who is arrested for a violation of it. In such a situation, a court of equity will entertain the suit."

[7] In Orloff v. Los Angeles Turf Club, 30 Cal.2d 110, 116, 180 P.2d 321, 171 A.L.R. 913, it was held that equity will protect personal as well as property rights. See also 175 A.L.R. 438, 442.

[8] The trial court found that if the provisions of the ordinance No. 415 relating to the operation of a loud speaker upon the public highways are enforced, persons, including the class represented by plaintiff, would be subject to arrest and prosecution under said ordinance if they employ and use loud speakers on the public highways for any purpose or purposes whatever and that large numbers of lawsuits would be commenced if the defendants are not restrained from enforcing said ordinance; that several persons (representatives and members of plaintiff association) had been arrested under the provisions of said or-

dinance and that the enforcement thereof is an interference with plaintiff's constitutional rights. These and other findings are sufficient to show that plaintiff and members of the association which he represents are specially interested in the attempted execution of an unconstitutional statute and are, therefore, entitled to injunctive relief. French Art Cleaners v. State Board, etc., Cleaners, 91 Cal.App.2d 890, 900, 206 P.2d 25.

Judgment and order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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123 Cal.App.2d 765

CONSTANTELOS v. RICE et al.

No. 16178.

District Court of Appeal, First District, Division 2, California.

March 10, 1954.

Hearing Denied May 6, 1954.

Action to recover damages for personal injuries. The Superior Court rendered judgment for defendants, and plaintiff appealed. On defendants' motion to dismiss appeal, the District Court of Appeal, Kaufman, J., held that since appellant had failed to comply with Rules on Appeal relative to preparation of record on appeal, appeal must be dismissed.

Appeal dismissed.

1. Appeal and Error ⚷371, 596

Appellant must give the notice to prepare reporter's transcript on appeal and arrange for payment of reporter's charges. Rules on Appeal, rule 4(a, c).

2. Appeal and Error ⚷371, 611

Where no notice to prepare transcript on appeal had been filed with clerk of superior court or served on respondent in accordance with Rules of Appeal, no deposit to cover estimated cost of preparing reporter's transcript or waiver of such deposit had been filed with clerk, no proceeding for preparation of record on appeal was pending in superior court and time to institute such proceeding had expired, and no excuse for appellant's failure to comply with Rules on Appeal was shown, appeal must be dismissed. Rules on Appeal, rules 4(a, c), 10(a).

Demetrios Constantelos, in pro. per.

Daniel J. O'Brien, Jr., and Daniel J. O'Brien, III, San Francisco, for respondent.

KAUFMAN, Justice.

Motion to dismiss appeal.

This was an action brought by appellant to recover damages for personal injuries. The record discloses that on the 29th day of September 1953 judgment was rendered for respondent and against appellant and said judgment was entered on October 1, 1953. No motion for new trial was made. Notice of appeal was filed on November 4, 1953, said appeal being taken to the District Court of Appeal. That no notice to prepare transcript has been filed with the Clerk of the Superior Court or served upon the respondent in accordance with Rule 4 (a) of the Rules on Appeal. That no deposit of cash to cover the estimated costs of preparing the reporter's transcript has been filed with the clerk. That no waiver of said deposit signed by the reporter has been filed with the clerk. That no proceeding for the preparation of the record on appeal is pending in the Superior Court and the time to institute any such proceeding has expired.

Rules on Appeal, Rule 10(a), provides as follows:

"If the appellant shall fail to perform any act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion."

[1] The appellant must give the notice to prepare reporter's transcript on appeal,

Rules on Appeal, Rule 4(a); and arrange for payment of reporter's charges, Rules on Appeal, Rule 4(c).

[2] It is evident from the record that the appellant has done nothing and has completely failed to comply with the rules and has shown no excuse for his failure to so comply.

In view of the foregoing, we have no option but to dismiss the appeal.

The motion to dismiss is granted and the appeal is dismissed.

NOURSE, P. J., and DOOLING, J., concur.

123 Cal.App.2d 767

PEOPLE v. HUGHES.

Cr. 2922.

District Court of Appeal, First District, Division 2, California.

March 10, 1954.

Rehearing Denied March 25, 1954.

Hearing Denied April 7, 1954.

Husband was convicted in the Superior Court, City and County of San Francisco, Twain Michelsen, J., of assault with a deadly weapon upon his wife. Husband's motion for a new trial was denied and he appealed. The District Court of Appeal, Nourse, P. J., held that evidence of prior assault by husband upon wife was admissible to overcome testimony of husband concerning his nice treatment of his wife.

Affirmed.

1. Criminal Law 🔑369(2)

The general tests of admissibility of evidence in a criminal case are: does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense, and, if it does, it is admissible regardless of whether it embraces the commission of another crime, whether the crime is similar in kind and whether it is part of a single design.

2. Criminal Law 🔑369(2)

In prosecution for assault with a deadly weapon by husband upon wife, evidence of prior assault by husband upon wife was admissible to overcome testimony of husband concerning his nice treatment of his wife. Pen.Code, § 245.

3. Criminal Law 🔑377, 380

Evidence of good character to show the improbability of having done the act charged is material, and when the issue is opened up by the accused, the prosecution may rebut it by a showing of other crimes.

4. Criminal Law 🔑1186(4)

In prosecution for assault with a deadly weapon by husband upon wife, even if admission of evidence of a prior assault by husband upon wife was erroneous the strength of the evidence against husband was such that possible error could not have caused a miscarriage of justice and did not constitute ground for reversal. Const. art. 6, § 4½.

5. Criminal Law 🔑1035(3)

In prosecution for assault with a deadly weapon by husband upon wife, fact that District Attorney was permitted to interrupt interrogation of husband by his counsel in order to question husband as to a prior assault by him upon his wife did not deprive defendant of fair trial inasmuch as no objection was made at trial to untimeliness of question and no statement was made on appeal as to what accused could have offered if he had not been interrupted. Pen.Code, § 245.

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Lawrence W. Jordan, Jr., San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Clayton R. Janssen, Jr., Dep. Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Appellant was charged with assault with a deadly weapon, sec. 245, Penal Code, allegedly committed on December 7, 1952, and with two prior felony convictions. He pleaded not guilty to the assault but admitted the two prior convictions. He was found guilty by the court, jury trial having been waived.

On December 7, 1952, an assault with a knife was perpetrated on appellant's wife, with whom he was not living. In the assault she received numerous cuts, of which some nearly severed two of her fingers. She and a daughter of hers by a former marriage, who lived with her and who was present at the assault, testified that it was committed by defendant. A neighbor testified that she saw defendant enter, by a fire escape, the house in which his wife lived, saw the assault itself through a window and saw defendant leave along the fire escape, having blood on him. Appellant testified in his own defense. His testimony and that of two other defense witnesses related mainly to the fact that on December 5, 1952, an assault had been committed on the wife by another man.

There is no contention that the conviction was not supported by the evidence. Counsel, appointed by this court to represent appellant, makes two points and diligently argues them, but neither calls for a reversal.

[1-4] (1) The first is that the District Attorney was erroneously permitted, over objection, to question defendant as to an assault made by him on his wife two years previous, contrary to the general rule as to inadmissibility of such evidence. " 'The general tests of the admissibility of evidence in a criminal case are: * * * does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not.' ". People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924, 929. Here defendant testified in his own defense and the Public Defender, who assisted him at the trial, offered evidence of his conversation with the police to show that he was a man of peaceful character, who wanted no trouble and therefore called the police on December 5th after his wife had been assaulted and informed them about it; that he was not the type of man that would do the cutting. When the evidence of what he had said to the police had been excluded as hearsay, he testified that he said to his wife that there was nothing he could do because he could not go into her hotel anymore because he was on probation for disturbing the peace. "I have been as nice as I possibly could to you. I gave you $100 a month when I didn't have to give it to you." It was then that the District Attorney brought up the prior assault. It can well be said that defendant's evidence as to his nice treatment of his wife also related to the proof of his character as excluding the assault charged and that therefore the prior assault on the wife was admissible to overcome such evidence. Evidence of good character to show the improbability of having done the act charged is material, 8 Cal.Jur. 53–54, and when the issue is opened up by the defendant, the prosecution may rebut it also by a showing of other crimes. 22 C.J.S., Criminal Law, § 678, page 1077, note 75; see People v. David, 12 Cal.2d 639, 647, 86 P.2d 811. The evidence as to the prior assault might also be relevant to the identity of the assailant, defendant having introduced the fact that another man had assaulted his wife. But even if the admission of the evidence as to the prior assault was erroneous the strength of the evidence against defendant is such that the possible error cannot have caused a miscarriage of justice and does not constitute a ground for reversal. Art. VI, sec. 4½ of the California Constitution; People v. Guthrie, 103 Cal.App.2d 468, 472, 229 P.2d 841.

[5] (2) Appellant's second contention is that the above interruption by the District Attorney of the interrogation of defendant by his counsel prevented defendant from developing his defense and from having a fair trial. No objection was made below to the untimeliness of the question; to the contrary, the Public Defender expressly declared that there was nothing more he could offer. Neither is there any statement on appeal of what defendant

could have offered if he had not been interrupted. The second point is clearly without merit.

The judgment and the order denying a new trial are affirmed.

DOOLING and KAUFMAN, JJ., concur.

Hearing denied; CARTER, J., dissenting.

123 Cal.App.2d 451

WAGNER v. SHAPONA et al.

Civ. 15628.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1954.

Action by sublessee against sublessors for declaratory judgment interpreting provisions of the sublease. The Superior Court of the City and County of San Francisco, Albert C. Wollenberg, J., rendered a declaratory judgment, and after notice of appeal entered an order amending the judgment and an order for writ of possession of the leased premises, and plaintiff appealed. The District Court of Appeal, Finley, J. pro tem., held that provision in the sublease authorizing cancellation "for causes not otherwise mentioned in this lease" did not unambiguously authorize cancellation for any reason whatsoever, but referred to generally recognized causes of the same general nature or comparable class as those mentioned in preceding paragraphs; and that the trial court did not have jurisdiction to enter the orders appealed from after filing of notice of appeal.

Reversed.

1. Declaratory Judgment 🔑369, 393

In action for declaratory judgment interpreting sublease by partners, wherein parties stipulated that sublessee would testify and partner would deny that partner told lessee he could stay as long as sublessors had their lease, trial court's failure to make finding on whether such conversation occurred was reversible error.

2. Landlord and Tenant 🔑104
Partnership 🔑153(3)

Where partnership's execution of sublease and one partner's sale to sublessee of store on subleased premises were parts of the same transaction, promise by such partner that sublessee could remain on premises as long as partners kept their lease, if made with intent that it should not be kept, even though with secret object of benefiting himself personally, would be a fraud for which partnership would be responsible and hence such promise could be considered one of the terms of the sublease, precluding partnership from exercising alleged right to terminate sublease for unspecified reasons. Civ.Code, §§ 1541, 1572, subds. 4, 5, 1574, 1640; Code Civ.Proc. § 1856; Corporations Code, §§ 15013–15015.

3. Fraud 🔑12

A representation not merely promissory but falsely representing a state of mind at a given moment constitutes "fraud."

See publication Words and Phrases, for other judicial constructions and definitions of "Fraud".

4. Contracts 🔑238(2)

Estoppel to invoke statute providing that written contract can be altered only by written contract or executed oral agreement arises irrespective of fraudulent intent, if effect of setting up the statute would be to perpetrate a fraud. Civ.Code, § 1698.

5. Declaratory Judgment 🔑393

Trial court's finding in declaratory judgment action that particular language in lease was not ambiguous was not binding upon appellate court.

6. Appeal and Error 🔑842(1)

Whether a writing is ambiguous is a question of law, and lower court's finding thereon is not binding on appellate court.

7. Landlord and Tenant 🔑104

Provision in sublease authorizing cancellation for "causes not otherwise mentioned in this lease" did not unambiguously authorize cancellation for any reason whatsoever, but referred to generally recognized causes for cancellation of the same general nature or comparable class as those mentioned in preceding paragraphs.

8. Contracts ⇨152

It is not ordinarily court's function to determine why any particular language was used, but to determine as nearly as possible what parties meant by language they did use, giving effect if reasonably practicable to every provision and part thereof. Civ. Code, § 1641; Code Civ.Proc. § 1858.

9. Contracts ⇨143

Court should so construe every provision of a written instrument as to give force and effect, not only to every clause but to every word, so that no clause or word may become redundant, unless such construction would be obviously repugnant to intention of framers of instrument, to be collected from its terms, or would lead to some other inconvenience or absurdity. Civ.Code, § 1641; Code Civ.Proc. § 1858.

10. Contracts ⇨318

Provisions in a contract will be construed, if possible, to avoid forfeiture. Civ. Code, § 1442.

11. Contracts ⇨322(1)

The burden of establishing right to forfeiture is on the party claiming such right. Civ.Code, § 1442.

12. Contracts ⇨318

Perpetuities ⇨6(1)

Forfeitures of estates and restraints upon alienation should not be enforced except when terms of the conditions are so plain as to be beyond province of construction. Civ.Code, § 1442.

13. Contracts ⇨156

In interpretation of contracts, word of general meaning used after words of a specific class shall be deemed to include only things that refer to and are akin to the specified class.

14. Costs ⇨172, 203

Under sublease providing for sublessee to pay lessor a reasonable attorney's fee as part of costs in case of suit for declaratory relief to determine rights of parties thereunder, attorney's fees were properly taxed as costs against sublessee, though sublessors were not plaintiffs and did not file cost bill.

15. Declaratory Judgment ⇨384

In action for declaratory relief, equity having once obtained jurisdiction will dispose of the entire controversy.

16. Appeal and Error ⇨445

Declaratory Judgment ⇨391

Under declaratory judgment that sublessee should surrender premises upon return of his security deposit, compliance with such condition precedent and the giving of required 60-day notice could be shown by affidavit on ex parte application, and where this was done the making of ex parte order for writ of possession was not error in itself but was improper where notice of appeal had been filed. Code Civ. Proc. § 2009.

17. Appeal and Error ⇨460(1)

The filing of appeal does not stay a judgment for delivery of possession of realty in absence of a stay bond. Code Civ. Proc. § 945.

18. Appeal and Error ⇨440

Filing of notice of appeal divests trial court of jurisdiction to alter, amend or modify its judgment, even as a part of proceedings in ruling on motion for new trial filed by appellant after filing notice of appeal. Code Civ.Proc. § 945.

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Joseph T. Curley, Marvin C. Hix, San Francisco, for appellant.

George V. Curtis, San Francisco, for respondents.

FINLEY, Justice pro tem.

This appeal is from a declaratory judgment interpreting the provisions of a lease; from a subsequent order amending the judgment, which order was made after notice of appeal from the judgment was filed, and from an order for a writ of possession of the leased premises, made after a notice of appeal from the amended judgment was filed.

Respondents, as partners, held a master lease on a store at 570 Market Street, San Francisco. Respondent De Marco was the owner of a smoke shop in front of the store. In June of 1950 De Marco agreed to sell the smoke shop to appellant, and a lease was prepared by respondents and executed by the parties, subleasing the smoke shop premises to appellant from July 1, 1950 to December 25, 1953. On October 17, 1951 respondents delivered a letter to appellant stating that they were cancelling the lease and giving notice to vacate the premises January 1, 1952. There followed a dispute over the lease provisions concerning the right in respondents to cancel, and this action seeking declaratory relief was filed by appellant, the lessee. The trial court made findings and entered judgment that respondents were entitled to give the notice, and that appellant was under a duty to surrender the lease and the leased premises upon refund to him by lessors of One Hundred Fifty ($150) Dollars deposited with lessors as security for the performance of the terms of the lease. Costs were awarded to respondents. The court also awarded to respondents Five Hundred ($500) Dollars attorney's fees. Appellant filed notice of appeal and several days later a motion for a new trial, together with a motion to set aside the judgment. The motion for a new trial was heard and denied. Although no cost bill had been filed by respondents, the court, in the order denying the motion for a new trial, amended the judgment by directing that the attorney's fees be a part of the costs, and by adding to the requirement that the $150 be returned to appellant, the further requirement that he receive sixty (60) days' notice of cancellation of the lease as conditions precedent to imposing upon appellant the duty to surrender. Notice of appeal from this amended judgment was filed. Later, upon *ex parte* application by respondents and without notice to appellant, the court, upon an affidavit by respondents' attorney that the required conditions had been complied with, made an order directing the issuance of a writ of possession and directing the sheriff to enforce the provisions of the judgment. Appellant also appealed from this order.

No point is made of the fact that after the first notice of appeal was filed a notice of motion for a new trial was later filed and heard, and as a part of the order denying the motion the trial court amended the findings and judgment.

The points urged for reversal are as follows:

"1. Failure of the court to make a finding on the issue of the conversation between plaintiff and defendant De Marco, requires a reversal.

"2. The court ignored all rules of construction of a lease in deciding that paragraph 27th of the lease was not ambiguous and that it could be cancelled at the mere desire of the defendant lessors to do so.

"3. A judgment for attorney's fees can be awarded to a lessor only when he is the plaintiff, and only as a part of the costs upon a proper cost bill being filed and judgment was therefore erroneous in that the lessors were not plaintiff and they did not file any cost bill, if it is assumed they were otherwise entitled to attorney's fees '*as a part of the costs of such suit.*'

"4. The order for the writ of possession to issue was void."

The appeal was presented on a settled statement in lieu of reporter's and clerk's transcripts. This settled statement sets forth a stipulation concerning the facts, which stipulation was entered into at the time of trial in lieu of taking testimony. Whether the conversation referred to in point 1 above actually took place was the only disputed issue of fact. In this alleged conversation appellant claims to have questioned the interpretation of paragraph 27th of the lease and to have asked De Marco what it meant and that De Marco's reply was: "Forget it. You can stay here as long as we have our lease." De Marco denies that this conversation took place.

Paragraph 27 of the lease reads as follows:

"In the event that the Lessor desires to cancel this lease on or after January 1, 1952, *for causes not otherwise mentioned in this lease,* he shall be permitted to do so upon mailing to the Lessee to the address hereinabove named a sixty (60) day notice of the desire so to do; and the Lessee agrees to surrender this lease, and the premises covered thereby, together with all of his interests therein, upon the refund to him by the Lessor of the sum of One Hundred Fifty ($150.00) and no/100 Dollars, desposited by Lessee as security hereunder, as in paragraph 'Twenty-Eighth' hereof provided, less any unpaid rentals or charges against Lessee." (Emphasis added.)

Respondents interpret the provisions of this paragraph to mean that they were entitled to cancel the lease upon their mere desire to do so. Appellant contends that they could cancel only for some actual cause, probably a cause of the kind and character indicated in the lease but not specifically mentioned. He also claims that if there is an ambiguity the alleged conversation with De Marco which he claims took place the day before the lease became effective should have been considered by the court in determining what the parties intended.

The first point to decide is whether, if the alleged conversation did take place, it could affect the decision. If it would not, then it would not be error for the trial court to have failed to make a finding concerning it.

[1] Assuming that it took place, we cannot agree with appellant that the effect of the alleged conversation would be to explain an ambiguity in the lease. The expression, "Forget it. You can stay here as long as we have our lease," does not explain the lease but either extinguishes the right in lessors to cancel under the terms of the provision questioned, or works an estoppel which would deny lessors the privilege to claim the right of cancellation under that provision. For all practical purposes the effect would be the same.

Section 1640 of the Civil Code provides: "When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded."

Section 1856 of the Code of Civil Procedure reads: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2. Where the validity of the agreement is the fact in dispute.

"But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

Actual fraud, so far as the term is applicable here, is defined in section 1572 of the Civil Code as follows:

"Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: * *

"4. A promise made without any intention of performing it; or,

"5. Any other act fitted to deceive."

Section 1574 of the Civil Code provides: "Actual fraud is always a question of fact."

[2, 3] A study of the language of these code sections makes it fairly obvious, we believe, that, should the fact be established that the oral promise claimed by appellant was actually made by respondent De Marco, it could, as a matter of law, affect the decision of the trial court. The effect of the promise, if made, would not be to vary the mutual obligations owing under the lease, but to deprive the lessors of a unilateral right to terminate it after a certain date for unspecified reasons. It is true that the promise is alleged to have been made by De Marco after the lease had been signed by the parties, but according to the complaint it was before appellant had taken possession of the premises or had paid the full purchase price for the store, or had paid any rent under the lease. It may be said that after the lease was signed the obligations thereunder were fixed so that subsequent representations or promises would make no difference, or that there would be no consideration moving from the lessee for the oral promise by De Marco. But the purchase of the "business, furniture, fixtures, goodwill and name," as set forth in the complaint was a separate transaction quite outside the scope of the lease, and the fact that appellant assumed possession of the business and paid the purchase price after the alleged promise was made might well be viewed as consideration for the promise. There is, of course, the further fact that De Marco, as an individual, owned and sold the business to appellant, while the lease was with De Marco and Shapona as partners. But appellant alleges and respondent De Marco admits that the execution of the lease and the bill of sale of the store were all a part of the same transaction, and even if there was no consideration moving to the partnership, adequate to bind the partners to a promise, De Marco as a partner could, under the law, commit a fraud on behalf of the partnership, and if he made a promise on its behalf which he did not intend should be kept, even though his secret object was to induce appellant to benefit him personally by proceeding with his purchase and by paying the balance of the purchase price to him, De Marco, this would still be a fraud for which the partnership would be responsible. Sections 15013–15015, Corporations Code; Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal.App.2d 796, 167 P.2d 518; Gift v. Ahrnke, 107 Cal.App.2d 614, 237 P.2d 706. A representation not merely promissory in nature but falsely representing a state of mind at a given moment constitutes fraud. Scaroon Manor Operating Corp. v. W. P. & L. Realty Corp., 136 Misc. 910, 241 N.Y.S. 229; Benson v. Hamilton, 126 Cal.App. 331, 14 P.2d 876.

It follows that, as a matter of law, the alleged oral promise by De Marco, if made, could have been found by the trial court to amount to a fraud upon appellant, and, under the provisions of Section 1640 of the Civil Code, the "real intention of the parties * * * regarded" and the "erroneous parts of the writing disregarded," or the lease could, under the provisions of section 1856 of the Code of Civil Procedure, be considered not to contain all the terms of the agreement on account of the fraud or because of "imperfection of the writing * * * put in issue by the pleadings" between the parties, and the substance of De Marco's promise could have been considered by the court as one of the terms of the lease.

Further, if the language in the case of Hooke v. Great Western Lumber Co., 54 Cal.App. 681, 202 P. 492, represents a correct statement of the law this case might be considered as falling within the provisions of section 1541 of the Civil Code, which provides: "An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration."

Although the words "debtor" and "creditor" are used in this section, it has been applied in many cases not involving that relationship, in the sense that the mere owing of money was involved. That section was under consideration by the court in Hooke v. Great Western Lumber Co., supra, 54 Cal.App. 681, 202 P. 492, which was an action to recover damages for breach of an agreement to deliver certain lumber products. The defendant offered to prove by oral testimony that the performance of the contract had been waived by the plaintiff and that the contract had been by mutual agreement abandoned. The trial court refused to hear evidence upon these questions upon the ground that the contract, being in writing, a waiver or abandonment thereof, could only be shown by a writing. The court stated, 54 Cal.App. at page 682, 202 P. at page 492: "It is a general rule that a written contract, as well as one not in writing, may be discharged *or modified* by a subsequent oral agreement, and that the parol evidence rule does not exclude oral evidence thereof. [Citing Beach v. Covillard, 4 Cal. 315; Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964; Guidery v. Green, 95 Cal. 630, 30 P. 786; Arsenio v. Smith, 50 Cal.App. 173, 194 P. 756.]" (Emphasis added.)

We do not believe that these California cases support inclusion of the words "or modified" in the rule as stated in the quotation above or that the inclusion of those words was necessary or proper to a decision therein since the modification of a contract was not involved in Hooke v. Great Western Lumber Co., supra, 54 Cal. App. 681, 202 P. 492. That case has been cited a great number of times in support of the proposition that a written contract as well as one not in writing may be *discharged, cancelled* or *superseded* by a subsequent executory oral agreement. The exact language quoted above is quoted without comment in Haberman v. Sawall, 72 Cal.App. 576, 237 P. 776, and Haumeder v. Lipsett, 90 Cal.App.2d 167, 202 P.2d 819. Neither of these cases involved the *modification* of a written agreement by a subsequent oral agreement. The Haberman case involved a total abandonment and termination by verbal agreement. Haumeder v. Lipsett was an appeal from a summary judgment based upon the pleadings and involved an alleged oral agreement concerning a non-negotiable note, and although in the Haumeder case the language above set forth was quoted from the Hooke case, the court said, 90 Cal.App.2d at page 174, 202 P.2d at page 822: "Defendants contend that section 1698 of the Civil Code applies. This section provides that a contract in writing can be altered by a contract in writing or an executed oral agreement and not otherwise. However, the evidence, when produced, might show that the agreement was not to *alter* the note but to cancel it." (Emphasis added.)

The words *"alter"* and *"modify"* are synonymous. It would therefore seem that the court indicated pretty clearly that if "the evidence, when produced" would have shown an agreement to alter or modify the note that it would have been in conflict with the provisions of section 1698 of the Civil Code and therefore ineffective as a *contractual* modification.

The extinguishment or waiver of a right to cancel under one particular provision in a lease would undoubtedly amount to a modification or alteration thereof and an attempt to do so by oral agreement would seem to fall within the provisions of section 1698 of the Civil Code. But, assuming such a promise by the lessor coupled with a change of position by the promisee in reliance thereon and a subsequent attempted violation by the promisor, could not the doctrine of equitable estoppel be invoked in aid of the promisee? In Vol. 1, Witkin's Summary of California Law, p. 57, this doctrine is stated as follows: "Where the defendant by his words or conduct represents that he proposes to stand by the oral contract, and the plaintiff, in reliance thereon, changes his position, the defendant will be *estopped* to set up the bar of the statute." See, Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88; Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770; Grant v. Long, 33 Cal.App.2d 725, 92 P.2d 940; Nicolds v. Storch, 67 Cal.App.2d 8, 153 P.2d 561; Dean v. Davis, 73 Cal.App.2d 166, 166 P.2d 15.

[4] Furthermore, in order for the doctrine to apply it is unnecessary to show an antecedent fraud. The estoppel arises, irrespective of such fraudulent intent, if the effect of setting up the statute would be to perpetrate a fraud. Seymour v. Oelrichs, supra, 156 Cal. 782, 106 P. 88.

Thus, upon several theories the decision here could turn on the question of whether respondent De Marco did or did not make the alleged promise to appellant. The stipulation between counsel was that if appellant took the stand he would testify that the promise was made and that if respondent De Marco took the stand he would deny it. The stipulation presented a material issue of fact and it was reversible error for the trial court not to make a finding on it. Tucker v. United Railroads, 171 Cal. 702, 154 P. 835; De Garmo v. Goldman, 19 Cal.2d 755, 123 P.2d 1; Due v. Swartz, 22 Cal.App.2d 217, 70 P.2d 716.

[5] Turning now to the dispute over interpretation of the cancellation provision in paragraph 27th of the lease, it is noted that respondent takes the position that the trial court having found: "That the language 'for causes not otherwise mentioned in this lease' contained in Paragraph Twenty-seventh of said lease is not ambiguous," that this finding is binding upon

an appellate court. This, however, is not the law.

[6] Whether or not a writing is ambiguous is a question of law, and the lower court's finding on this issue is not binding on the appellate court. Leonard v. Huston, 122 Cal.App.2d 541, 265 P.2d 566; 4 Cal. Jur. 10 Yr.Supp.; 1943 Rev.Sec. 192, p. 148; Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13; Lane-Wells Co. v. Schlumberger, etc., Corp., 65 Cal.App.2d 180, 150 P.2d 251.

[7–9] We do not agree with the finding by the trial court that the language "for causes not otherwise mentioned in this lease" as the same appears in paragraph twenty-seventh of the lease is not ambiguous. As will be seen from a reading of this paragraph, which is hereinabove set forth in full, the language just quoted stands by itself and refers to nothing in particular which could be pinned down as a cause actually envisioned by the parties. What do the words "not otherwise mentioned" mean in context as they appear? Otherwise than how? If we exclude the word "otherwise," the ambiguity would still remain for would the word "causes" refer to any reason whatsoever at the mere whim of lessors or must it indicate some cause ordinarily recognized under the law as a valid cause for cancellation? Lessors prepared the lease and if they simply desired to reserve unto themselves the option to cancel it at any time on or after January 1, 1952, for any reason at all, or even without reason, that option could easily have been so stated in simple, clear and unambiguous terms and would have been perfectly valid if agreed to by the lessee. 51 C.J.S., Landlord and Tenant, § 91, p. 656; O'Connor v. West Sacramento Co., 189 Cal. 7, 207 P. 527. Not having done so it must be considered that lessors had some other purpose in mind in using the language they did. It is ordinarily not the court's function to determine why any particular language was used, but to determine as nearly as possible what the parties meant or intended by the language they did use, giving effect if reasonably practicable to every provision and part thereof. La Lumia v. Northern Cal. Packing Co., 75 Cal.App.2d 917, 172 P.2d 94. As was said in Hyatt v. Allen, 54 Cal. 353 at page 358: "* * * it is our duty to so contrue every provision of a written instrument as to give force and effect, not only to every clause but to every word in it, so that no clause or word may become redundant, unless such construction would be obviously repugnant to the intention of the framers of the instrument, to be collected from its terms, or would lead to some other inconvenience or absurdity." See, also, section 1641, Civil Code; section 1858, Code of Civil Procedure; Cummins v. Bank of America, 17 Cal.2d 846, 112 P.2d 593; Manasse v. Ford, 58 Cal.App. 312, 208 P. 354; Purdy v. Buffums, Inc., 95 Cal.App. 299, 272 P. 770.

[10–12] It is a general and well-established rule of construction that provisions in a contract will be construed, if possible, to avoid a forfeiture. Section 1442, Civil Code; O'Morrow v. Borad, 27 Cal.2d 794, 167 P.2d 483, 163 A.L.R. 894; Universal Sales Corp. v. California etc., Mfg. Co., 20 Cal.2d 751, 128 P.2d 665; Ballard v. MacCallum, 15 Cal.2d 439, 101 P.2d 692; Milovich v. City of Los Angeles, 42 Cal. App.2d 364, 108 P.2d 960; Nelson v. Schoettgen, 1 Cal.App.2d 418, 36 P.2d 665; Quatman v. McCray, 128 Cal. 285, 60 P. 855; McNeece v. Wood, 204 Cal. 280, 267 P. 877. A right in a lessor to cancel for "causes", meaning just anything, would amount to a forfeiture imposed at will by the lessor. Furthermore, the burden of establishing the right to a forfeiture is upon the party claiming the right. As stated in Burns v. McGraw, 75 Cal.App.2d 481 at page 485, 171 P.2d 148 at page 150: "'We have paid due regard to the rules of law that, where there is a claim made that a forfeiture of rights under a written instrument has occurred, the burden is upon the party making the point "to show that such was the unmistakable intention of the instrument"(Quatman v. McCray, 128 Cal. 285, 60 P. 855); and that the courts tenaciously cling "to the rule that forfeitures of estates and restraints upon alienation should not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction" (Randol v. Scott, 110 Cal. 590, 42 P. 976). * * *' The code section just mentioned [sec. 1442, Civ.Code], provides that 'A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.'" See, also, Ser-Bye Corp. v. C. P. & G. Markets, 78 Cal.App.2d 915, 179 P.2d 342. In Cleary v. Folger, 84 Cal. 316 at page 321, 24 P. 280 at page 281, the court said: "Forfeitures, as such, are not favored by the courts, and are never enforced if they are couched in *ambiguous* terms." (Emphasis added.)

[13] Another rule of interpretation applicable here is stated in Nattini v. Dewey, 96 Cal.App.2d 545 at page 547, 216 P.2d 46 at page 47, wherein the court was considering a contract containing language authorizing its cancellation for certain specified reasons followed by the words, "'or by reason of other conditions beyond the control of the Arrowhead Alpine Club.'" The court said, 96 Cal.App. at page 548, 216 P.2d at page 48: "In the interpretation of contracts it is the rule that a word of general meaning used after words of a specific class shall be deemed to include only things that refer to and are akin to the specified class. (Pasadena University v. Los Angeles County, 190 Cal. 786, 790, 214 P. 868.) Therefore it is a reasonable construction of the contract that the phrase 'by reason of other conditions beyond the control of' refers to such a class of occurrences as * * * [naming some of those specified]."

In view of the considerations discussed above we must interpret the words "for causes not otherwise mentioned in this lease" appearing in paragraph twenty-seventh of the lease involved here to refer to generally recognized causes for cancellation of the same general nature or comparable class as those mentioned in the preceding paragraphs and not to just anything that the lessors might choose to denominate or consider to be "causes," regardless of how trivial and inconsequential they might be.

[14] The point that the trial court erred in awarding attorney's fees to the lessor as a part of the costs we find to be not well taken.

Paragraph thirteenth of the lease, so far as it is applicable here, reads as follows: "That in case suit shall be brought * * for declaratory relief to determine the rights of the parties hereunder, the Lessee will pay to the Lessor a reasonable attorney's fee which shall be fixed by the court as a part of the costs of such suit * *."

The case of Lewis & Queen v. S. Edmondson & Sons, 113 Cal.App.2d 705 at page 708, 248 P.2d 973 at page 975, was an action brought on a labor and material bond which contained this provision: "* * * and also in case suit is brought upon this bond, a reasonable attorney's fee to be fixed by the Court". The court also called attention to section 4207 of the Government Code, applicable to the situation there, which reads in part: "Upon the trial of any such action, the court shall award to the prevailing party a reasonable attorney's fee, *to be taxed as costs,* and to be included in the judgment therein rendered". (Emphasis added.) The court then went on to say, 113 Cal.App.2d at pages 708–709, 248 P.2d at page 975: "It is likewise settled that the trial court has power to determine what are reasonable attorney's fees without any testimony on the subject and without making any specific finding. (Rosslow v. Janssen, 136 Cal.App. 467, 470(1), 29 P.2d 287; City of Los Angeles v. Los Angeles-Inyo Farms Co., 134 Cal.App. 268, 274(4), 25 P.2d 224.)

"In the present case the judge had before him the entire record of the proceedings which had taken place and there was no abuse of discretion in fixing the attorney's fee in the sum of $3,500.

"Fourth: *Was it error for the trial court to award plaintiffs attorney's fees in the judgment in the absence of either a motion to have such fees taxed as costs, or a claim therefor in the cost bill which they filed?*

"No. Where, as in the present case, a statute provides that 'a reasonable attorney's fee, to be taxed as costs' shall, under certain specified conditions, be awarded to plaintiffs, such language does not expressly or impliedly require that a cost bill be filed pursuant to the provisions of section 1033 of the Code of Civil Procedure, but if the attorney's fees are fixed by the court and included in the judgment, such procedure is adequate. This is a proper method of allowing plaintiffs attorney's fees. (Sunset Lumber Co. v. Smith, 95 Cal.App. 307, 319 (19), 272 P. 1068.) In the present case the foregoing procedure was properly followed by the trial court." See, also, Pehau v. Stewart, 112 Cal.App.2d 90 at page 97, 245 P.2d 692.

[15, 16] Turning now to a consideration of the order for the writ of possession and directing the sheriff to enforce the provisions of the judgment; were the judgment valid the order for the issuance of the writ would not have been invalid for in an action for declaratory relief, equity having once obtained jurisdiction of a cause will dispose of the entire controversy. 10 Cal.Jur., § 40, p. 496; Lyon v. Goss, 19 Cal.2d 659, 123 P.2d 11. The judgment declared that appellant was under a duty to surrender the premises upon the return of his $150 security deposit. Compliance with this condition precedent and also the giving of the 60-day notice could properly be shown by affidavit on an *ex parte* application. Sec. 2009, Code Civ.Proc.; Howland v. Scott, 215 Cal. 301, 9 P.2d 824; Adams v. Bell, 219 Cal. 503, 27 P.2d 757; Peers v. Stoll, 32 Cal.App.2d 511, 90 P.2d 119. This was done and the making of an *ex parte* order for writ of possession was not error in and of itself.

[17] Furthermore, the filing of an appeal does not stay a judgment for delivery of possession of real property in the absence of a stay bond. Sec. 945, Code Civ.Proc.

[18] The filing of a notice of appeal, however, divests the trial court of jurisdiction to later amend or modify its judgment even though this amendment or modification came about as a part of the proceedings in ruling on a motion for a new trial filed by appellant after filing his notice of appeal.

In the case of In re Shafter-Wasco Irr. Dist., 55 Cal.App.2d 484 at page 486, 130 P.2d 755 at page 757, the rule is stated as follows: "When the notice of appeal is properly filed it has the effect of removing the cause from the jurisdiction of the trial court. 'It was no longer pending therein for the purpose of amending the judgment or of vacating it for errors apparent on the face of the record. The consent of the parties could not reinvest the court with jurisdiction of that subject-matter.' Kinard v. Jordan, 175 Cal. 13, 164 P. 894, 895. After a timely and valid notice of appeal has been given the jurisdiction of the trial court as to any matter relating to the correctness or validity of the judgment is suspended and the power to determine those questions rests in the court in which the appeal is pending. Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 P. 805; Field v. Hughes, 134 Cal.App. 325, 25 P.2d 241; Linstead v. Superior Court, 17 Cal.App.2d 9, 61 P.2d 355." See, also, Hanley's Estate, 23 Cal.2d 120 at page 123, 142 P.2d 423, 149 A.L.R. 1250; Associated Lbr., etc., Co. v. Superior Court, 79 Cal.App.2d 577, 180 P.2d 389; Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal.App.2d 815, 167 P.2d 523.

We hold, therefore, that the attempted modification of the original judgment after notice of appeal had been filed was a nullity.

For the above reasons the judgment and the orders appealed from are reversed.

PETERS, P. J., and BRAY, J., concur.

123 Cal.App.2d 722

WAHYOU et al. v. OSTROVSKY

Civ. 8415.

District Court of Appeal, Third District, California.

March 8, 1954.

Action for purchase price of meat and meat products allegedly purchased by defendant from plaintiffs. The Superior Court, Solano County, Greenwood, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to sustain trial court's finding that defendant was indebted to plaintiffs for meat and meat products sold and delivered by plaintiffs to defendant at defendant's special instance and request.

Judgment affirmed.

1. Pleading ⚷129(2)

Where defendant, in his answer, did not deny allegation in complaint that, at all times mentioned in complaint, defendant was doing business under stated fictitious firm name, such allegation would be taken as true, and no finding or evidence thereon would be required. Code Civ.Proc. § 462.

2. Appeal and Error ⚷994(3), 1012(1)
Evidence ⚷594

The trial court is sole judge of weight and effect of testimony and of credibility of witnesses and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so.

3. Evidence ⚷590

In passing upon credibility of witness, jury is entitled to consider his interest in result of case. Code Civ.Proc. §§ 1847, 2061, subd. 3.

4. Evidence ⚷594

Generally, uncontradicted testimony may not be disregarded but should be accepted by court as proof of fact asserted therein, but the most positive testimony may be contradicted by inherent improbabilities contained therein, by other circumstances in evidence, or by witnesses' manner in testifying.

5. Sales ⚷359(1)

In action for purchase price of meat and meat products allegedly purchased by defendant from plaintiff, evidence was sufficient to sustain trial court's finding that defendant was indebted to plaintiffs for meat and meat products sold and delivered by plaintiffs to defendant at defendant's special instance and request.

Leland S. Fisher, Vallejo, for appellant.

Forrest E. Macomber, Gordon J. Aulik, Stockton, for respondents.

SCHOTTKY, Justice.

This is an appeal from a money judgment for the purchase price of certain meat and meat products which the trial court found were purchased by defendant from plaintiffs.

The complaint was filed in San Joaquin County and the action was transferred to Solano County. The complaint contains three counts, i. e., a common count for goods sold and delivered, an open book account, and an account stated. Each count alleges that at all times mentioned therein appellant was doing business under the fictitious firm name and style of "Quality Meat Market." Appellant did not deny this allegation. Following a trial by the court, sitting without a jury, the court found in accordance with the allegations of the complaint, and judgment for respondents was entered accordingly.

Appellant bases his argument for a reversal of the judgment upon three grounds: First, that there is nothing in the record to indicate that the account sued on was incurred by him, his employees or agents; second, that the record shows that prior to delivery of the merchandise in question respondents "were in receipt of" actual knowledge that it was not being purchased by appellant, his employees or agents; and third, that the trial court erred in holding that actual knowledge of a change of ownership of the meat market, imparted to respondents' agent prior to the time when the obligation sued upon was incurred, was not binding on respondents.

Before discussing these contentions we shall give a brief summary of the evidence as shown by the record.

Respondents are partners doing business as the Daylite Market. They are engaged in the wholesale distribution of meats and their main office is located in Stockton, California. Appellant operates a retail grocery business under the name of Quality Market, in Vallejo, California. A retail meat department or market, known as the Quality Meat Market, was operated in conjunction with appellant's business and one of the chief questions involved in this appeal is whether or not this retail meat operation was being conducted by or for appellant during the time when the purchases in question were made from respondents. The record shows that appellant was operating the meat market in June, 1949, when the first purchases were made from respondents. At that time James Sales was employed by appellant to manage the meat market. Thereafter, respondents continued to sell and deliver meat to the market until July, 1951, at which time a balance of $1,418.68 was owing and unpaid to respondents.

There is testimony showing that on October 31, 1949, appellant leased the meat market business to Sale and Vernon Bleamel who thereafter conducted it as a partnership venture until April 5, 1951, when Bleamel withdrew from the partnership, leaving Sale as the sole owner of the business. Sale continued on in the meat market until late in July, 1951, when he closed, apparently because of his inability to redeem certain checks which he had given to respondents over a forty-five day period and which the drawee bank refused to honor for lack of funds. Appellant and Sale and Bleamel each testified to the lease and the taking over of appellant's meat market business, although Sale was not certain whether this was done in 1949 or 1950. There was no written lease, but appellant and Bleamel testified that the rental was $100 per month, and the latter also testified that he and Sale took possession on October 31, 1949. Although Sale and Bleamel did not have a written agreement covering their partnership, their operation of the Quality Meat Market as a partnership venture is corroborated by the notice of dissolution of partnership which they had published in a Vallejo newspaper on April 6, 1951, and which was later filed in the office of the county clerk. Sale admitted that he owed the unpaid balance of $1,418.68, stating that it was incurred during his operation of the meat market after dissolution of the partnership.

There is no direct testimony refuting the claimed change in ownership and operation of the meat market business, but there is evidence which will support inferences to the contrary. The record shows, in this regard, that the business was continued under the same name as before; that the business license, apparently issued by the city of Vallejo, was retained and renewed in appellant's name; none of the signs in the market was changed; no notice of intended transfer was published or recorded; and Sale, who had managed the operation for appellant, continued on in the meat market. No written notice of the change in ownership was sent to respondents, although the testimony of appellant and Sale and Bleamel is to the effect that respondents' salesman, Jack Peters, was told of the change in ownership and operation when he was at the market on October 31, 1949 (the day when the change allegedly took place), and Sale then placed an order with him. It appears that Sale had not done the ordering prior to this time, but he placed all of the orders thereafter. The orders were given to respondents' salesman, and the checks in payment were given either to the salesman or to respondents' driver. In evidence are the customer's copy of the invoice for Sale's first order, and the cancelled check given in payment. The invoice shows that the order was billed to "Quality Market," and the check was signed "Quality Meat Market, Vernon Bleamel." There is no showing that Peters, the salesman, ever told his principals of the change in ownership. The account was carried under the name of Quality Meat Market, on respondents' books. No change in ownership is indicated on the ledger sheets, although respondents' credit manager testified that a new ledger sheet would have been set up for the account if notice of the change had been received at the home office. Apparently Peters left respondents' employ during the early part of 1950; he did not appear at the trial.

Leon Rahe was the salesman to whom Sale gave the worthless checks. He admitted that he did not take the matter of payment up with appellant personally, but explained that appellant was in the hospital at the time. Rahe apparently took over the Vallejo territory, as salesman for respondents, on May 15, 1951. There is a conflict in the evidence as to what was said regarding ownership of the meat market when Rahe and Sale first met. Sale testified that Peters brought Rahe to the meat market and introduced Sale as the owner. Rahe testified that he went alone, introduced himself, and nothing was said regarding the ownership. This was more than a year after Peters left respondents' employ.

[1] As to appellant's contention that there is no evidence in the record to support a finding that the account sued on was incurred by appellant or his employees or agents, it is to be noted that the complaint alleges that at all times mentioned therein appellant was doing business under the fictitious firm name of "Quality Meat Market." Appellant did not deny this in his answer, so the allegation must be taken as true. Code Civ.Proc. § 462. No evidence was required to prove this fact, and no finding thereon was necessary, City of Los Angeles v. City of Huntington Park, 32 Cal.App.2d 253, 265, 89 P.2d 702; Welch v. Alcott, 185 Cal. 731, 754, 198 P. 626, but the trial court did make a finding consistent with this admission, and it made a further finding that within two years last past appellant, doing business under that name, became indebted to respondents in the sum of $1,418.68 for meat and meat products sold and delivered by the latter to the former, and that the whole of said sum was due, owing and unpaid. It is a fair inference that if appellant was doing business under the name of Quality Meat Market at the time the purchases in question were made, Sale and Bleamel were not doing business under the same name at the same time and place. Too, the evidence shows that the account was carried under the name of Quality Meat Market on respondents' books. The only check in evidence shows that payment, at least in that instance, was made by check signed "Quality Meat Market, Vernon Bleamel." It does not appear how the worthless checks, given by Sale, were signed, the testimony merely showing that they "were drawn upon James Sale," they "were made out by James Sale," and they "were James Sale's checks." The fact that Bleamel signed his name to the check in evidence does not necessarily show a change in ownership of the business; he may have been authorized by appellant to write checks for meat purchases. There is other evidence from which the continued ownership and operation of the business by appellant may be inferred, e. g., the failure to change the owner's name in the business licenses, the use of the same business name and signs, and the continued presence of Sale who had managed the department of appellant.

[2, 3] We do not believe that the testimony of appellant and of Sale and Bleamel regarding the change in ownership and operation compelled the trial court to find that the purchases in controversy were not made by or for appellant. For as stated by this court in Norgard v. Estate of Norgard, 54 Cal.App.2d 82, at page 89, 128 P. 2d 566, at page 569:

> "* * * The trial court is the sole judge of the weight and effect of testimony and of the credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for doing so. Davis v. Judson, 159 Cal. 121, 113 P. 147. As was said by our Supreme Court in the very recent case of Blank v. Coffin, 20 Cal.2d [457, 461], 126 P.2d 868, 871: 'There are many reasons why a jury may refuse to believe a witness. Section 1847 of the Code of Civil Procedure provides: "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character

for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility." Section 2061, subd. 3 of the Code of Civil Procedure provides: "That a witness false in one part of his testimony is to be distrusted in others." In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case. See cases collected in 27 Cal.Jur. 180, § 154.'"

[4] And as we said in Davis v. Judson, 159 Cal. 121, at pages 128, 130, 113 P. 147, at page 150:

> "It is insisted by appellants that this testimony of Wilson stood uncontradicted, and that the court had no right arbitrarily to reject it and find to the contrary. While it is general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness's own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy. * * *
>
> "So that, within the rule as we have stated, while the trial court had the statement of Wilson that he was sure that he had obtained a deed from the trustees, and although there was no direct testimony impeaching him or contradicting his statement, still the conduct of Wilson, as disclosed by his other testimony and the other circumstances in evidence, was such that the court had a right to conclude that it was inconsistent with the execution of any conveyance to Wilson, and warranted the rejecting as improbable his statement that such a conveyance had been made."

[5] Applying the test of these authorities to the evidence in the instant case, and to the inference which may reasonably be drawn from such evidence, we are satisfied that there is ample support in the record for the finding that the appellant was indebted to respondents for meat and meat products sold and delivered by respondents to appellant at appellant's special instance and request. Our conclusion upon this point makes it unnecessary to discuss the remaining contentions of appellant.

The judgment is affirmed.

PEEK, J., and PAULSEN, J. pro. tem., concur.

123 Cal.App.2d 763

PAHLKA et ux. v. McCORMICK.

Civ. 15603.

District Court of Appeal, First District,
Division 2, California.
March 10, 1954.

The Superior Court of the State of California in and for the City and County of San Francisco, Albert C. Wollenberg, J., entered judgment adverse to defendant, and defendant appealed. The District Court of Appeal, Dooling, J., held that where case was submitted to court on agreed statement of facts, and there was therefore no trial of any issue of fact, no new trial could be granted, and motion for new trial was not a valid motion and did not extend 60 day period after entry of judgment within which notice of appeal could be filed.

Appeal dismissed.

1. New Trial 🔑2

A new trial can only be granted where there has been a trial on issues of fact.

2. New Trial 🔑2

Where case is submitted on agreed statement of facts, there can be no new trial granted because, when facts are all agreed on, there can be no issue of fact before court for decision.

3. Appeal and Error 🔑345(1)
New Trial 🔑2

Where case was submitted to court on agreed statement of facts, and there was therefore no trial of any issue of fact, no new trial could be granted, and motion for new trial was not a valid motion and did not extend 60 day period after entry of judgment within which notice of appeal could be filed. Rules on Appeal, rules 2(a), 3(a).

◆

Robert H. Fouke, Robert A. Wertsch, John Alfred Davis, San Francisco, John D. Gallaher, San Francisco, of counsel, for appellant.

John A. Putkey, San Francisco, for respondents.

DOOLING, Justice.

Under the authority of Reeves v. Reeves, 34 Cal.2d 355, 209 P.2d 937, the appeal in this case must be dismissed.

The clerk's transcript shows that judgment in the action was entered on April 7, 1952. A motion for new trial was made and denied on June 4, 1952 and notice of appeal was filed on July 3, 1952.

[1, 2] The case was submitted to the court on an agreed statement of facts. There was therefore no trial of any issue of fact. It is reaffirmed in the Reeves case following a host of earlier decisions, that a new trial can only be granted where there has been a trial on issues of fact. Reeves v. Reeves, supra, 34 Cal.2d at pages 358–359, 209 P.2d at pages 938–939. Specifically where the case is submitted on an agreed statement of facts there can be no new trial granted because when the facts are all agreed upon there can be no issue of fact before the court for decision. Gregory v. Gregory, 102 Cal. 50, 36 P. 364, cited in the Reeves case; Quist v. Sandman, 154 Cal. 748, 99 P. 204.

[3] Since no new trial could be granted in this case the motion for new trial was not a "valid motion" within the meaning of Rules on Appeal, Rule 3(a) and did not extend the 60 day period after entry of judgment within which a notice of appeal may be filed under Rule 2(a). Reeves v. Reeves, supra, 34 Cal.2d at page 359, 209 P.2d at page 939.

Appeal dismissed.

NOURSE, P. J., and KAUFMAN, J., concur.

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123 Cal.App.2d 764

CRAMER

v.

CERCIAT FRENCH LAUNDRY & DRY CLEANERS et al.

Civ. 15639.

District Court of Appeal, First District, Division 2, California.
March 10. 1954.

The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., entered judgment from which plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that when reference to transcript disclosed that appeal was limited to the order denying plaintiff's motion for new trial, appeal would be dismissed.

Appeal dismissed.

1. Appeal and Error 🔑110

An appeal does not lie from an order denying a new trial.

2. Appeal and Error 🔑782

Where parties had briefed appeal on assumption that it was taken from judgment, but transcript disclosed that appeal was limited to order denying motion for new trial, appeal would be dismissed, since appeal does not lie from order denying new trial. Code Civ.Proc. § 963, subd. 2.

Dreyfus, McTernan & Lubliner, Leslie Lubliner, Jarvis, Miller & Decker, Charles W. Decker, San Francisco, for appellant.

Boyd, Taylor & Reynolds, San Francisco, for respondents.

NOURSE, Presiding Justice.

Both parties have briefed this appeal on the assumption it was taken from the judgment. However, reference to the transcript discloses that the appeal is limited to the order denying plaintiff's motion for a new trial.

[1, 2] As it is settled beyond question, sec. 963, subd. 2, Code of Civil Procedure, that an appeal does not lie from an order denying a new trial, this appeal must be dismissed, and it is so ordered.

DOOLING and KAUFMAN, JJ., concur.

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123 Cal.App.2d 782

GILBERT
v.
YELLOW CAB CO. et al.

Civ. 15719.

District Court of Appeal, First District, Division 1, California.

March 12, 1954.

Hearing Denied May 6, 1954.

Action for personal injuries sustained by plaintiff when struck by defendant corporation's taxicab operated by co-defendant. From an order of the Superior Court in and for the County of Monterey, Anthony Brazil, J., granting defendants a new trial on all the issues after a jury's verdict and judgment thereon for plaintiff, he appealed. The District Court of Appeal, Fred B. Wood, J., held that the trial court's refusal of plaintiff's requested instruction to the jury on the last clear chance doctrine did not require reversal of the order, in the absence of showings in the record that plaintiff presented such doctrine to the court on the hearing of the motion for new trial and as to whether the court applied the doctrine to the evidence in deciding the motion or found the evidence insufficient to support the jury's implied findings that defendant was negligent and that plaintiff was not contributorily negligent.

Order affirmed.

1. Appeal and Error ⇨1011(1)

In action for injuries to pedestrian struck by taxicab, where there was evidence to support either a finding that defendant cab driver was not negligent or a finding that plaintiff was guilty of negligence proximately causing injuries, plaintiff's contrary testimony merely produced a conflict in evidence to be resolved by trier of facts.

2. New Trial ⇨70

In considering defendants' motion for new trial on ground of insufficiency of evidence to sustain jury's verdict for plaintiff, trial judge was trier of facts, had function of weighing and evaluating evidence, and was not bound by verdict.

3. Appeal and Error ⇨977(3)

Granting of motion for new trial rests within trial judge's discretion to such extent that appellate court will not interfere, unless abuse of such discretion clearly appears.

4. Appeal and Error ⇨933(1)

On appeal from order granting motion for new trial, all presumptions are in favor of order, which will be affirmed, if sustainable on any ground.

5. New Trial ⇨71

In considering motion for new trial, trial court is not bound by conflict in evidence and does not abuse its discretion in granting motion when there is any evidence to support judgment for moving party.

6. New Trial ⚷71

Where only conflict in evidence is in opposing inferences deducible from uncontradicted probative facts, trial court, on motion for new trial, may draw inferences opposed to those accepted by jury and thus resolve conflicting inferences in moving party's favor.

7. Appeal and Error ⚷1015(1)

An appellate court will reverse trial court's order granting new trial on ground of insufficiency of evidence to sustain jury's verdict only where there is no substantial evidence to support contrary judgment as matter of law.

8. Appeal and Error ⚷1067

In action for injuries to pedestrian struck by defendant's taxicab driven by codefendant, trial court's refusal of plaintiff's requested instruction to jury on last clear chance doctrine did not require reversal of court's order granting defendants motion for new trial on ground of insufficiency of evidence to sustain jury's verdict for plaintiff, in absence of showing that plaintiff presented such doctrine to court on hearing of motion and as to whether court applied doctrine to evidence in deciding motion or found evidence insufficient to support jury's implied findings that defendant was negligent and that plaintiff was not contributorily negligent.

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Ernest E. Emmons, Jr., San Francisco, Charles P. Scully, San Francisco, for appellant.

Rosendale, Thomas, Muller & Talcott, Salinas, for respondents.

FRED B. WOOD, Justice.

In this action for personal injuries sustained by plaintiff when hit by a taxicab owned by defendant Yellow Cab Company, a corporation, and operated by defendant Richard E. Byers, verdict and judgment were for plaintiff in the sum of $5,000. Defendants were granted a new trial "on the ground of the insufficiency of the evidence to sustain the verdict," with directions that the new trial be had "on all of the issues in the action."

Plaintiff has appealed. He predicates prejudicial error upon asserted lack of evidence sufficient to support a judgment for the defendants and upon the trial court's refusal of his requested instruction on last clear chance.

There is evidence which would support a finding that the driver of the cab was not negligent or a finding that plaintiff was negligent and that his negligence was a proximate cause of the injury. The accident occurred at the intersection of Main and Gabilan Streets in Salinas. Main runs north and south, Gabilan east and west. Visibility was good. Plaintiff was afoot, going north on Main in the west crosswalk. Byers was driving west on Gabilan.

Byers testified that he was traveling in the right inner lane on Gabilan, next to the center line; he stopped at the intersection, the signal being red; he waited for the light to turn green, glanced to the right and the left, and then proceeded to cross the intersection at approximately 5 miles per hour, looking straight ahead; he first saw plaintiff when plaintiff was about 3 feet to the side of the front of the cab and then applied the brakes as "quick as possible"; plaintiff was running; the speed of the car at impact was approximately 3 miles per hour; the impact occurred about 3½ to 4 feet north of the center line of Gabilan Street; he was 1½ or 2 feet from plaintiff when he applied his brakes; he traveled less than a car length after the impact; his brakes were in good condition.

A police officer who witnessed the accident testified that plaintiff entered the crosswalk at a time when the signal was red; plaintiff was running; just before the accident plaintiff ran to his left and threw up his hands to fend off the cab. The witness saw plaintiff on the left fender, not with his hands on top of the hood. The cab left skid marks of 8′ 5″ for the right and 6′ 2″ for the left wheels, beginning at the westerly line of the crosswalk. He estimated the cab's speed at about 10 or 15 miles per hour and that the impact was north of the center line of Gabilan and 10 or 11 feet west of the west crosswalk.

Mary Hedburg, who was driving east on Gabilan approaching Main, testified that when the light was green for her and the cab, plaintiff crossed in front of her, running. Mrs. Daggett, a passenger in the Hedburg car, testified that the plaintiff crossed the street against the red light, running.

Betty Vosti, driving north on Main, testified that she stopped for the red light at the intersection, that at the time of the accident the lights controlling traffic on Main Street were red.

A bus driver, traveling south on Main, testified that he had stopped at the north crosswalk and completed the loading of passengers; he could not proceed because the light was red on Main; he first noticed plaintiff after the light had turned red and just before plaintiff left the curb; that plaintiff was running and did not stop running until he was hit.

Plaintiff testified that prior to the accident he was walking north along Main Street on the west sidewalk; when he reached the southwest corner of the intersection and stopped he saw the bus he was planning to take, across Gabilan at the northwest corner of the intersection; the light was green; he looked to the right and left, saw no car approaching on Gabilan from either direction, and then walked northerly in the crosswalk across Gabilan; he was looking north while crossing; he was a little more than half way across when the cab hit him; he did not see the cab before it hit him.

[1-7] Here is evidence that would support a finding that the cab driver was not negligent or a finding that plaintiff was negligent and that his negligence was a proximate cause of the injury. Plaintiff's testimony merely produced a conflict in the evidence, to be resolved by the trier of the facts. The trial judge when considering the motion for new trial was a trier of the facts; had the function of weighing and evaluating the evidence; was not bound by the jury's verdict. The "settled rule" is that "the granting of a motion for a new trial rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears. All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. In re Estate of Green, 25 Cal.2d 535, 542, 154 P.2d 692; Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010. The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party, for 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.' Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689, 697; Malloway v. Hughes, 125 Cal.App. 573, 580, 13 P.2d 1062." Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358–359, 170 P.2d 465, 467.

[8] Yet, plaintiff contends that the trial court's refusal to give his requested instruction on last clear chance requires a reversal of the order for new trial. His reasoning seems to be that the evidence calls for application of the doctrine of last clear chance; the trial court's refusal of the requested instruction to the jury means that the court later decided the motion for new trial without applying that doctrine; hence, the motion was erroneously grounded upon evidence that plaintiff was negligent and that his negligence was a proximate cause of the injury.

There are several fallacies in this argument. Even if the requested instruction should have been given,[1] it does not appear from the record which plaintiff has furnished (1) that plaintiff presented the last clear chance doctrine to the court upon the hearing of the motion for new trial, (2) whether the court in deciding the motion did or did not apply that doctrine to the evidence before him, or (3) whether the court found the evidence insufficient to support an implied finding of the jury that defendant was negligent or insufficient to support an implied finding that plaintiff was not contributorily negligent.

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[1] We need not and do not hold that it should have been given. (See discussion of the "must have seen" rule in Jobe v. Harold Livestock Comm. Co., 113 Cal.App.2d 269, 274, 247 P.2d 951, 954.)

In this state of the case, a reviewing court could not reverse the order for new trial because of the last clear chance doctrine unless able to say that all elements of that doctrine were present *as a matter of law.* The presence of those elements depends upon evaluation of testimony and the drawing of inferences. For example, the cab driver testified he did not see plaintiff until the latter was within 3 feet of the cab. Did that afford the driver a *clear* chance to avoid the accident? Plaintiff says the driver must have seen him in plenty of time because the driver was looking straight ahead and visibility was good. But if plaintiff ran across, starting after the lights had turned (red for him and green for the cab driver), it can not be said that the *only* reasonable inference is that the driver did see him. The trial judge may well have believed the cab driver and have determined, as trier of the facts, that there was no basis in fact for the "must have seen" rule.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

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123 Cal.App.2d 620

STRANGMAN v. ARC-SAWS, Inc. et al.

Civ. 19833.

District Court of Appeal, Second District, Division 3, California.

March 2, 1954.

Hearing Denied April 28, 1954.

Action against officer of a corporation and the corporation in which plaintiff invested $10,000 on officer's recommendation. The Superior Court, Los Angeles County, William R. Gallagher, J., rendered judgment for plaintiff in the sum of $10,000 plus interest, and defendants appealed. The District Court of Appeal, Shinn, P. J., held that facts found warranted judgment against officer as well as against corporation.

Judgment affirmed.

1. Limitation of Actions 🔑13

In action against officer and corporation in which plaintiff invested money on officer's recommendation, facts found, including finding that plaintiff's failure to make inquiry was due to his confidence in individual defendant, who was then plaintiff's attorney, warranted conclusion that defendants were estopped to rely upon defense of statute of limitations; and findings were sustained by evidence. Corporations Code, § 25000 et seq

2. Courts 🔑125

The Superior Court of Los Angeles County is a court of general jurisdiction.

3. Licenses 🔑18½(22)

Where money was obtained from individual as part of plan to solicit money from general public to be repaid out of corporate profits and conditional promise of stock was an inducement to making of loan, transaction involved issuance of a "security", within code section defining that term for purposes of corporate securities law. Corporations Code, § 25008.

See publication Words and Phrases, for other judicial constructions and definitions of "Security".

4. Limitation of Actions 🔑58(1)

Where officer of corporation had been negligent in impliedly representing to plaintiff that transaction did not involve issuance of security and that accordingly no permit was necessary, cause of action against officer and corporation did not accrue, as contended, when corporation's written promise to repay loan was made to plaintiff. Corporations Code, § 25000 et seq.

5. Attorney and Client 🔑129(1)
Licenses 🔑39.18

In action against officer of a corporation and the corporation in which plaintiff invested money on officer's recommendation, facts found warranted judgment against individual defendant for breach of duty owed, in such defendant's capacity as plaintiff's attorney and confidential advisor, and for active participation in illegal security transaction.' Corporations Code, § 25000 et seq.

◆

Joseph Doyle, George L. Duke, Beverly Hills, for appellants.

Louis T. Fletcher; Jacob Chaitkin and Douglas J. Stapel, Pasadena, for respondent.

SHINN, Presiding Justice.

Plaintiff recovered judgment against Arc-Saws, Inc., a corporation, and George L. Duke in the sum of $10,000 plus interest, and defendants appeal.

The court found the following material facts: Defendant Duke, an attorney at law, was in the month of January, 1947, and ever since has been an officer and director of defendant corporation; he was then attorney for plaintiff, who reposed the utmost confidence and trust in him; in January, 1947, the corporation, being in need of additional capital, undertook to solicit funds from the public; Duke solicited funds from plaintiff and recommended that plaintiff invest money in the corporation, promising that he would act as his attorney in the transaction; Duke promised plaintiff that if he would invest $10,000 he would be repaid from profits of the corporation and would receive 10 per cent of certain stock therein; Duke concealed from plaintiff the fact that he was a director and officer and interested in the corporation; by reason of the representations, promises and concealments of Duke plaintiff invested the sum of $10,000 delivering the same to Duke as secretary of the corporation; plaintiff received a writing reading as follows:

"'February 13, 1947

"Mr. Walter J. Strangman
"1120 South Main Street
"Los Angeles 15

"Dear Mr. Strangman:

"We wish to express our sincere thanks for the confidence you have evidenced in the persons composing this company and in the future of our enterprise.

"This acknowledges the receipt from you of the sum of Ten Thousand Dollars as a loan to the corporation. This will be repaid to you from the profits of our operation upon a pro rata basis with the others who have advanced funds for the same purpose.

"The interests of all the individuals interested in Arc-Saws, Inc., are the same, and we assure you that everything possible will be done to accomplish an early and complete success.

"Yours very truly,
"Arc-Saws, Inc.
"By Frank Alexander (Signed)
Frank Alexander
"FA/ld
"c/c George L. Duke'"

It was found that the writing constituted a promise to issue a security; no permit was ever issued authorizing the corporation to sell or issue stock or evidence of debt such as promised to plaintiff, which fact was well known to the corporation and to Duke. From January, 1947, to August, 1951, Duke repeatedly assured plaintiff that his interest in the corporation was fully protected; that its prospects were excellent and that it would soon begin to pay dividends. Plaintiff would not have invested in the corporation had it not been for the representations and concealments of Duke and the confidence and trust which plaintiff reposed in him; the representations of Duke were false and were made negligently without Duke's having made any inquiry nor any attempt to inform himself whether said representations were true or false. There were certain additional findings stated as conclusions of law, namely, that Duke was guilty of gross negligence in failing to inform plaintiff that he was an officer and director of the corporation and financially interested therein and that his representations and statements representing the corporation's affairs were made as positive statements in a manner not warranted by the information he had on the subject; that his implied representation that the corporation was not required to have a permit was a false representation negligently made, and constituted constructive fraud upon plaintiff; that he was not guilty of actual fraud.

On February 13, 1947, the following letter was given to Duke and a copy sent to plaintiff:

"'February 13, 1947

"George L. Duke
"650 So. Grand Ave.
"Los Angeles 14

"Dear Mr. Duke:

"Please refer to the contract which I have with the individual stockholders of Arc-Saws, Inc., and the said corporation providing for the transfer to me of all the stock outstanding upon the payment of the sum of $16,000.00. Ten shares of stock have been issued.

"This will be your authority and you are hereby instructed to issue and deliver one share of the said stock to Walter J. Strangman of Los Angeles and also one share of said stock to yourself. It is understood that such transfers cannot be made until the above sum has been paid in full as agreed. I hereby acknowledge receipt of a full and adequate consideration for the said two shares of the capital stock of Arc-Saws, Inc.

"Yours very truly,
"Frank Alexander (signed)
"Frank Alexander
"1151 So. Broadway
"Los Angeles 15

"FA/ld
"c/c Mr. Walter J. Strangman
"I hereby accept the above instruction.
"George L. Duke (signed)
2/13/47'"

This appears to have been Duke's authority for his promise that one share of stock would be issued to plaintiff from the ten shares that apparently had been issued to Alexander.

[1, 2] The first point on the appeal is that the complaint did not state facts which would give the superior court or any court jurisdiction of the action. There is no merit in this point. The superior court is a court of general jurisdiction.

[3] The next point is that the letter to plaintiff was not a security within the meaning of the Corporate Securities Act, Corporations Code, § 25000 et seq. No authority is cited for this proposition. As part consideration for the loan plaintiff was promised one share of stock in the corporation. It is asserted that the condition upon which Alexander was to receive stock was never met and that stock was never issued to plaintiff. There was, however, a conditional promise of stock which the court found was an inducement to the making of the loan. Furthermore, the court found that the money was obtained from plaintiff as a part of a plan to solicit loans from the public to be repaid out of profits. The transaction clearly involved the issuance of a security as that term is defined by section 25008, Corporations Code.

[4] The next point is that in an action based upon an alleged violation of the Corporate Securities Act a plaintiff does not avoid the defense of the Statute of Limitations if he fails to protect his rights when he has knowledge of the possibility of loss of his money through the failure of the enterprise. The only rule of law cited in support of this assertion is that knowledge of facts sufficient to put a prudent person on inquiry is the equivalent of actual knowledge. So far as the defense of the Statute of Limitations is concerned the court found that plaintiff failed to make inquiry as to the truth of the statements of Duke because of the confidence and trust reposed in him and plaintiff's reliance upon Duke's representations. Plaintiff did not learn of the falsity of the representations until August 9, 1951 when he consulted with his attorney. The court concluded that the corporation and Duke were estopped to rely upon the defense of the Statute of Limitations. The facts found warranted the conclusion and the findings had support in the evidence.

The final point is that "Where a written promise to repay a loan is based upon a reasonable belief that no permit is necessary, the right of action accrues upon the date the written promise was made." It is said: "The evidence is abundantly clear that the defendant Duke honestly felt that no permit was required for the Strangman transaction and that such a conclusion was then reasonable." Duke testified that he had organized about a dozen corporations and was somewhat familiar with the Corporate Securities Act; that he did not have any idea that a permit was required or that the transaction was illegal. He admitted, in answer to a question by the court, that his actions constituted an implied representation to plaintiff that the transaction was legal but he did not state any reason for believing that a permit was not required. There was evidence that he had previously obtained a permit for financing of the company upon a somewhat similar plan but we do not find in his testimony any statement that he believed the permit to be still in force and there was no evidence that it was in force. The court found that Duke was guilty of negligence in impliedly representing to plaintiff that no permit was required. No question is raised as to the sufficiency of the evidence to justify this finding.

[5] There is no merit in the appeal. The most that can be said in Duke's favor is that the evidence discloses that he put forth earnest efforts to make a success of the corporation and that he had faith in its future. The fact that he deceived himself does not excuse the deceit of plaintiff as established by the findings. Liability was imposed for breach of duty Duke owed to plaintiff as his attorney and confidential advisor and for his active participation in an illegal transaction. See Auslen v. Thompson, 38 Cal.App.2d 204, 101 P.2d 136. In our review of the record we find nothing to indicate that Duke acted with dishonest motives but the facts found warranted a judgment against him as well as against the corporation.

The judgment is affirmed.

WOOD, J., concurs.

VALLÉE, J., did not participate.

Hearing denied; SCHAUER, J., dissenting.

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123 Cal.App.2d 704

WINCHELL et al. v. LORENZEN.

Civ. 8295.

District Court of Appeal, Third District, California.

March 8, 1954.

Rehearing Denied March 31, 1954.

Hearing Denied May 6, 1954.

Cross actions for damages resulting from collision between plaintiffs' automobile and defendant's truck. The Superior Court, Sonoma County, McGoldrick, J., entered judgment on verdict for defendant on plaintiffs' action and for plaintiffs on defendant's action, and plaintiffs appealed. The District Court of Appeal, Schottky, J., held, inter alia, that where list of trial jurors for year 1951 had been selected by board of supervisors in manner provided by law, such list was the legal and proper list until it either was exhausted or the time had come in January, 1952, for selection of new list, and fact that county in question, after selection of 1951 jury list, was determined to be county of more than 80,000 population, as to which counties statute directed that jury list be made by majority of judges of superior court, did not cancel or invalidate existing list.

Affirmed.

1. Jury ⚷62(1)

Where list of trial jurors for year 1951 had been selected by board of supervisors in manner provided by law, such list was the legal and proper list until it either was exhausted or the time had come in January, 1952, for selection of new list, and fact that county in question, after selection of 1951 jury list, was determined to be county of more than 80,000 population, as to which counties statute directed that jury list be made by majority of judges of superior court, did not cancel or invalidate existing list. Code Civ.Proc. § 204.

2. Jury ⚷110(9)

Where, before jury was selected, plaintiff raised question as to validity of jury list since it had been made by board of supervisors, rather than by majority of superior court judges, and, upon being told by court that such judges were using old list until new list could be made available, agreed that method of selection met the objection and stated that he was concerned about possibility that defendant after adverse verdict might raise question of invalidity, and opposing counsel assured plaintiff that defense was satisfied with selection, plaintiffs acquiesced in selection of jury from existing list, and could not, after verdict for defendant, raise objection to jury list. Code Civ.Proc. § 204.

3. Trial 🔑133(6)

In action arising out of automobile accident, while it was improper for defense counsel, in examination of one plaintiff as adverse party, to ask whether such plaintiff had entered plea of guilty or not guilty to citation received in the accident for violation of Vehicle Code section relating to movement of vehicles and signalling, admonition by court to disregard question prevented prejudice to plaintiffs. Vehicle Code, § 544; Code Civ.Proc. § 2055.

4. Appeal and Error 🔑1170(1)

Reversal of judgment because of errors will not be ordered unless entire record shows that such errors have resulted in miscarriage of justice. Const. art. 6, § 4½.

5. Appeal and Error 🔑1170(6)

Only in extreme cases is it impossible for court, when acting promptly and speaking clearly and directly on the subject, to correct impropriety of act of counsel and to remove any effect his conduct or remarks would otherwise have by instructing jury to disregard such matters. Const. art. 6, § 4½.

6. Appeal and Error 🔑1170(6)

Trial court's denial of plaintiffs' motion for new trial, based upon alleged misconduct of defense counsel, indicated that trial court had concluded that no prejudice was suffered by plaintiffs by reason of the alleged misconduct. Const. art. 6, § 4½.

7. Appeal and Error 🔑1170(6)

The trial court's conclusion as to whether verdict is probably due wholly or in part to misconduct of counsel should not be disturbed unless, under all circumstances appearing, it is plainly wrong. Const. art. 6, § 4½.

8. Appeal and Error 🔑1170(6)

Burden is on appellant to show that misconduct of counsel complained of is sufficiently prejudicial to justify reversal. Const. art. 6, § 4½.

George E. Dilley and John R. Jacobson, Santa Rosa, for appellants.

Geary, Spridgen & Moskowitz, Santa Rosa, for respondent.

SCHOTTKY, Justice.

Plaintiffs above-named, husband and wife, filed an action against defendant for personal injuries and property damage alleged to have been sustained by them in a collision between automobile operated by plaintiff husband and a truck operated by an employee of defendant. Defendant in his answer denied any negligence on the part of his employee, pleaded the contributory negligence of plaintiffs, and defendant also cross-complained against plaintiffs for damage to and loss of use of his truck. Thereafter plaintiffs filed a memorandum to set the case for trial and demanded a trial by jury.

The case was set for trial and thereafter, on October 25, 1951, plaintiffs gave notice of their intention to move to challenge the validity of the existing jury lists on the ground that the names contained in the lists were selected by the county board of supervisors, rather than by a majority of the superior court judges of the county as required by section 204 of the Code of Civil Procedure. This motion was heard and denied on November 2nd, the trial court holding that the existing method of selecting the jury was legal and not subject to challenge.

The names of the jurors comprising the panel in the case were drawn on November 27th, the trial date having been set over to December 3rd. The parties were represented by counsel at the drawing, Mr. Dilley appearing for plaintiffs and Mr. Achor for defendant. Before any names were drawn, the following colloquy occurred:

> "The Court: Are you gentlemen ready to proceed with the drawing of a

jury for Monday's case, Winchell vs. Lorenzen?

"Mr. Dilley: Yes, Your Honor.

"The Court: And, is Mr. Moskowitz here today, or are you ready to proceed, Mr. Achor?

"Mr. Achor: Yes, we are ready to proceed, Your Honor.

"The Court: Very well, you will draw a jury in the case of Winchell vs. Lorenzen, Madam Clerk.

"Mr. Dilley: We raise this motion in regard to the selection of the jury and I also want to point out, so that it will appear of record, so that if there is any significance to the date of the inception of the period when the new jury is to be selected by the Court rather than by the Supervisors. I understand that the date is sometime in November, set by the Legislature.

"The Court: No, the date which changes the method of selecting the jurors was September the 22nd, simply because that was the date that the new census became effective. There is nothing in the new law that says that the Judges cannot select the jurors at this time for the interim cases between now and the time of the new list, in other words, the matter of selection is up to the Judges and it doesn't say in what manner we shall select the jurors, it just says that the Judges shall select the jurors, therefore we have the old available list to do our selecting from and we felt that that would meet any challenges that were made in this matter. It will be a month or two or three before the new list is available.

"Mr. Dilley: By the statement in the record, the Court has exercised his discretion and has selected the list of names from this list?

"The Court: That is right.

"Mr. Dilley: That is something I didn't understand before.

"The Court: The basis of this is that it wouldn't make any difference in the method of selecting the jurors, and in other words, we are selecting now from the old list, which I think meets the objection—

"Mr. Dilley: —I am inclined to agree with the Court on that.

"The Court: I can assure you that the new list is in the course of development.

"Mr. Dilley: I am concerned about a possible Plaintiff's verdict and then having the Defendant raise the question of the invalidity of this.

"The Court: If anything is raised about it, well, I am sure that the attorneys for the Defendants would waive it at the outset and you mentioned that matter and—

"Mr. Dilley: (Interrupting) Would you waive any objections to the jury at this time?

"Mr. Achor: Well, I don't know that there is any objections made to the jury and we take the position to take the jury as drawn as correct and I think perhaps that that is shown without requiring an express waiver, that is on the matter that we may have waived by our resisting your motion and taking the position that the list as now selected is valid.

"The Court: I think that is the rule, you see, if he resists your motion well—

"Mr. Dilley: (Interrupting) Thank you, Judge.

"The Court: (Continuing) And, I feel that there is no danger at all in this method. Now, you have perfected your record all the way through and the Court that there couldn't possibly be any advantage taken so the Clerk will draw forty-five names.

"Mr. Achor: We will be happy to receive the list when it is filed.

"The Court: Very well, draw forty-five names."

The record does not show that plaintiffs made any further objections to the use of the jury list at the time of the drawing, or to the panel as drawn. The case came on for trial on December 3, 1951, with most of the prospective jurors in attendance. The court's minutes show that members of the jury panel were examined as to their qualifications by both parties, and that some of them were challenged for cause, while others were excused by peremptory challenge. Both plaintiffs and defendant eventually announced satisfaction with twelve of the prospective jurors, and the latter were thereupon sworn to try the cause. Counsel for the parties made opening statements and the trial proceeded. It does not appear from the record that plaintiffs objected to the panel or to the jury as finally constituted, either during the selection of the jury or later during the trial.

The trial was concluded on December 6, 1951, with the jury returning a verdict that plaintiffs take nothing by their complaint and that defendant take nothing by his cross-complaint. Following the entry of judgment plaintiffs made a motion for a new trial upon the ground of irregularity in the selection of a jury and also upon the ground of errors of law occurring at the trial. Plaintiffs did not include the insufficiency of the evidence as a ground for a new trial. The motion for a new trial was denied and plaintiffs have appealed from the judgment and from the order denying their motion for a new trial.

Appellants' first contention is that they were deprived of their right to a trial by jury. They argue that "the failure of the trial court to select a jury in accordance with law and imposing a jury selected by means not authorized by law upon plaintiffs and appellants was a denial of a trial by jury and is reversible error." They base this contention upon their construction of section 204 of the Code of Civil Procedure and refer to the jury list in the instant case as having been prepared by the board of supervisors and not by a majority of the Superior Judges as required by said section 204.

Section 204 of the Code of Civil Procedure, as it was in effect at the time of the trial in the instant case, and as it has been in effect for many years, provides:

> "In the month of January in each year it shall be the duty of the superior court in each of the counties of this State to make an order designating the estimated number of grand jurors and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court, and the trial of causes therein, during the ensuing year; * * * and immediately after said order designating the estimated number of trial jurors shall be made, the board of supervisors shall select, as provided in Sections 205 and 206 of this code, a list of men and women to serve as trial jurors in the superior court of said county during the ensuing year, or until a new list of jurors shall be provided.
>
> "In counties and cities and counties having a population of 80,000 inhabitants or over, such selection shall be made by a majority of the judges of the superior court; * * *."

By the amendment of section 28020 of the Government Code at the 1951 session of the Legislature the population of Sonoma County was determined to be 103,405, and appellants contend that thereupon and thereafter no jury chosen from a list of names selected by the board of supervisors pursuant to an order of the superior court made in January could be a lawful jury.

[1, 2] We find no merit in this contention. It appears that in January, 1951, a list of trial jurors was selected by the board of supervisors and that this list was the list being used when Sonoma County was determined to be a county of more than 80,000 in population. The list of trial jurors for the year 1951 had been selected in the manner provided by law, and we believe this list was the legal and proper list until it either was exhausted or the time had come in January, 1952, for the selection of a new list. We do not believe that the fact that Sonoma County, after the selection of the 1951 jury list in January, 1951, was determined to be a county of more than 80,000 in population, canceled or invalidated the existing list of jurors. There is nothing in section 204 of the Code of Civil Procedure

which either compels or justifies such a conclusion. Furthermore, we think it is clear from the colloquy hereinbefore quoted, between court and counsel at the time of the drawing of the venire for the jury in the instant case, that appellants acquiesced in the selection of the jury from the existing list. The court explained to counsel what had been done and counsel for plaintiffs replied that he did not understand it before, that he was inclined to agree with the court that the method of selection met the objection, and that he was concerned about a plaintiff's verdict and the possibility that defendant would raise the question of invalidity. He was assured by opposing counsel that the defense was satisfied with the selection. It is difficult to understand how appellants can reconcile their statements to the court when the jury was drawn and their failure to make any further objection to the jury or jury list until after the jury decided against them, with their position upon this appeal. If it was their intention to preserve and urge the contention that a jury from the list in question was not a lawful jury, in fairness to the court and opposing counsel they should have made such position clear. It is to be noted that appellants make no contention that the trial jurors were biased, prejudiced, incompetent or otherwise unfit to serve as jurors. Nor do they contend that the evidence is insufficient to support the verdict.

[3] The remaining contention urged by appellants is that "The question asked of the plaintiff and appellant by the attorney for defendant and respondent concerning a traffic citation given plaintiff was prejudicial under the circumstances notwithstanding the admonition of the court to the jury to disregard the question and colloquy following it."

The alleged misconduct of respondent's counsel occurred during his examination of appellant Fred D. Winchell as an adverse party under section 2055 of the Code of Civil Procedure. The portion of the examination in question here is set out in the affidavit in support of the motion for new trial. It shows that after the witness admitted that he was able to drive his car and had driven it to Santa Rosa a few times since the accident, counsel then asked him: "Now, Mr. Winchell, you have never entered a plea of guilty either guilty or not guilty to a citation which you received in this accident for the violation of Section 544 of the Vehicle Code?" Appellants' counsel immediately remarked that the question was a proper ground for mistrial, to which the court replied: "No, if he has entered a plea of guilty it might be pertinent." Respondent's counsel then attempted to explain why he thought the question was proper, but he was interrupted by appellants' counsel who said: "I believe it is improper, particularly in the state of the record, of the two citations which are pending." The court then admonished the jury to disregard the colloquy between court and counsel and not to consider it in any way whatever, and then excused the jury while the propriety of the question was argued by counsel. Respondent's counsel pointed out that a plea of guilty would be admissible as a admission against interest and he admitted that the matter of the citation could not be gone into if a plea of not guilty had been entered. He offered to prove, however, that the witness had not entered any plea, and he argued that that in itself was an admission against interest—that it was the same as if the witness had stood silent when someone made an accusation against him in his presence. It appears that the citation was issued about eighteen months before the trial. The trial judge ruled that the proffered testimony was inadmissible, but he cleared respondent's counsel of any charge of bad faith in the matter. The jury was recalled and the court again admonished the jurors to disregard the incident.

While it was no doubt improper for counsel for respondent to include in his question a statement that appellant husband had received a citation for violation of section 544 of the Vehicle Code, we believe that the admonition by the court to disregard the question prevented any prejudice to appellants, particularly where the instant action itself was concerned with the accident in controversy.

[4] Reversal of a judgment on account of errors will not be ordered unless the en-

tire record shows that such errors have resulted in a miscarriage of justice. Const., art. VI, § 4½; Hill v. Hill, 82 Cal.App.2d 682, 696, 187 P.2d 28. We do not have a transcript of the evidence in this case, and we cannot assume that the weight of the evidence was so evenly balanced that prejudice probably resulted. Appellants do not contend that the verdict is unsupported by the evidence. For as stated in Woods v. Pacific Greyhound Lines, 91 Cal.App.2d 572, at page 574, 205 P.2d 738, at page 739:

> "We are of the opinion the motion for a new trial was properly denied. In the absence of a transcript of the testimony, we are unable to determine whether the alleged irregularities of procedure were prejudicial. Const., Art. VI, Sec. 4½. We may not presume they were prejudicial."

[5–8] It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of an act of counsel and remove any effect his conduct or remarks would otherwise have. Tingley v. Times Mirror Co., 151 Cal. 1, 23, 89 P. 1097. Moreover, the reference by appellants' counsel to two citations was equally improper. Appellants cited the alleged misconduct as one of the grounds for the motion for a new trial, as is shown by counsel's affidavit in support of the motion. The trial court denied the motion, and in doing this the court must be deemed to have concluded that no prejudice was suffered by appellants by reason of the alleged misconduct. Lafargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538. The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such misconduct, and the trial court's conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong. Lafargue v. United Railroads, supra, 183 Cal. at page 724, 192 P. at page 540. The burden is on appellants to show that the misconduct complained of is sufficiently prejudicial to justify a reversal. Hill v. Hill, supra, 82 Cal.App.2d at page 696, 187 P.2d at pages 36, 37. This, appellants have failed to do.

The judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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123 Cal.App.2d 753

DAVIS v. DAVIS et al.

Civ. 19813.

District Court of Appeal, Second District, Division 2, California.

March 9, 1954.

Action for divorce, involving question of division of the property of the parties. The Superior Court of Los Angeles County, Allen W. Ashburn, J., denied husband's motion for new trial, and entered judgment, and husband appealed. The District Court of Appeal, Fox, J., held that evidence supported determination that certain apartment premises were the community property of the parties, notwithstanding fact that deed conveyed it to husband and wife as joint tenants.

Judgment affirmed.

1. Divorce 🔑184(10)

A finding on conflicting affidavits in support of motion for new trial in divorce suit, that husband had not been lulled into not procuring legal counsel by any advice from attorney for wife as to lack of necessity therefor, was binding on reviewing court.

2. Husband and Wife 🔑256

Fact that deed of property to husband and wife named them as joint tenants did not preclude finding that the property was in fact community property, when it appeared that it had been purchased from community earnings, since it is the intention of the parties rather than the form of the conveyance that determines the character of the property.

3. Husband and Wife ⚷264

In divorce suit, wherein controversy existed as to whether an apartment house conveyed to husband and wife as joint tenants was in fact community property, evidence supported finding that the apartment house was in fact community property.

4. Husband and Wife ⚷272(1)

Where husband and wife had shared joint bank account equally, fact that wife had withdrawn amount therefrom, allegedly for use for family needs, did not compel conclusion that balance of funds was the separate property of husband, as his one-half interest of mutually divided community property.

5. Divorce ⚷254

Interlocutory divorce decree, stating that certain property "should be awarded" to wife and other property to the defendant, when considered with further provision that at time of entry of final decree the court should grant such other and further relief as might be necessary to a complete disposition of the action, did not amount to an attempt to make a present award of the community property to the respective parties, but merely indicated that the particular manner of the award should be effective only upon the entry of the final decree, with the language purporting to make a present final disposition being mere surplusage.

6. Appeal and Error ⚷110

An order denying a motion for new trial is not appealable.

◆

John E. Sisson, Los Angeles, for appellant.

Jerrell Babb, Los Angeles, for respondent.

FOX, Justice.

Plaintiff and defendant were married in April, 1940. In October, 1951, plaintiff sued for divorce upon the grounds of extreme cruelty and desertion, seeking also the custody of their two children then four and six years of age, an order for their support, and an award to her of all the community property. Defendant filed an answer in propria persona in which he denied all of plaintiff's allegations except that he was an able-bodied man regularly employed, that the parties had two minor children, and that plaintiff was a fit and proper person to have their custody. This answer was prepared by counsel for plaintiff in accordance with defendant's directions as an accommodation to him since he desired to represent himself but did not know how to draw an answer. At the trial defendant acted as his own attorney, examining and cross-examining witnesses. He also testified. While he did not seriously contest the divorce, he did discuss with the court the property, its acquisition and character, encumbrance and income; also, his own and his wife's earnings, being respectively approximately $425 and $235 per month, and the amount to be paid for the support of the children. The testimony disclosed that all the property of the parties had been acquired since their marriage as a result of their earnings. In response to inquiries from the court, defendant stated he understood what community property is. He conceded the 1947 Plymouth car he drove and the six unit apartment house, which he valued at $32,500 and on which they owed $6,778, was community property. Plaintiff occupies one of these units. One other unit is furnished. The income of $360 per month is required to operate the property, pay taxes and upkeep, and make the monthly payments. Defendant claimed, however, as his separate property, two savings accounts totaling $2,140 and a cashier's check for $1,259.94. He contended these sums represented his share of certain funds which he and his wife had previously divided. He asserted she had spent her share. Plaintiff countered with the claim that the funds were required for her and the children to live on and to replace furniture defendant had disposed of. Defendant also had a television and some workshop tools and equipment. Plaintiff had a television, and a 1950 Chrysler which, however, was not fully paid for.

The court granted plaintiff an interlocutory decree of divorce on the ground of extreme cruelty, awarded custody of the children to her with right of reasonable visitation on the part of defendant, ordered him to pay $50 a month for the care and maintenance of each child, and found all the above mentioned property to be community. In disposing of the property the decree provides that the apartment house, subject to the indebtedness, the furniture, the Chrysler and the television in plaintiff's possession shall go to her, while the savings accounts, the cashier's check, the Plymouth, workshop tools and equipment, and the television in defendant's possession shall go to him.

Thereafter defendant employed an attorney. A motion for a new trial was made supported by an affidavit of defendant in which he charged the attorney for plaintiff induced him not to procure legal representation by pointing out the lack of necessity therefor and the great expense thereof. He further claimed he had an agreement with plaintiff's attorney that the trial would be upon the desertion cause of action. Counsel for plaintiff denied these charges. He is supported by the affidavits of plaintiff, Doris Bailor and John E. Miller. As newly discovered evidence, defendant attached to his affidavit a photostat of the deed by which the apartment house property was acquired, showing it to be in the names of plaintiff and defendant "as joint tenants." In ruling on the motion for a new trial the judge filed a memorandum which, *inter alia,* stated: "The court finds the charges made by defendant against plaintiff's attorney, Mr. Babb, to be untrue." The court did, however, under the authority of section 662, Code of Civil Procedure, revise the disposition of the community property, so as to award to plaintiff an undivided two-thirds interest (instead of all) in the apartment house property and to defendant an undivided one-third interest therein. The motion for a new trial was thereupon denied. Defendant appeals from the judgment and the order denying his motion.

Defendant contends that (1) he was prevented from having a full and complete adversary proceeding upon the merits; (2) the judgment is contrary to the law; and (3) the trial court abused its discretion.

[1] In support of his first point defendant says: that "he was lulled into a situation of not procuring legal counsel, and further, that the trial proceeded upon a basis contrary to his understanding of the agreement made by such attorney (Mr. Babb) with him prior to the trial." This argument is based wholly upon his own affidavit. The simple answer to it is that the trial court found defendant's charges against Mr. Babb "to be untrue," and such finding on conflicting affidavits is binding on appeal. Warren v. Warren, 120 Cal. App.2d 396, 261 P.2d 309.

[2, 3] Defendant argues that the judgment is contrary to the law because the court found the real property to be community although the deed to him and his wife was "as joint tenants." There can be no doubt that the property was purchased from community earnings. In such circumstances it is the intention of the parties rather than the form of the conveyance that determines the character of the property. Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905; Faust v. Faust, 91 Cal.App.2d 304, 308, 204 P.2d 906; Perkins v. West, 122 Cal.App.2d 585, 265 P.2d 538. Defendant told the court that he understood what community property is. He then stated three times that the real property is community. This clearly justifies an inference that he intended this property to be so classified. Plaintiff also considered it to be community. Such evidence furnishes ample support for the court's finding on this issue and is binding on appeal. DeBoer v. DeBoer, 111 Cal.App. 2d 500, 505, 244 P.2d 953.

[4] Defendant insists the savings accounts and the cashier's check represent his "one-half interest of already mutually divided community," and is therefore his separate property. Plaintiff denied that she and defendant shared their joint bank account equally through the years and declared she had to use the particular money she drew out of the account for family needs. Under such circumstances the court was not required to find these funds were the separate property of defendant.

[5] Defendant also contends that the interlocutory decree is contrary to the law

and in excess of the court's jurisdiction in that it undertakes to make a present award of the community property to the respective parties. While the court drew the conclusion that certain property "should be awarded" to the plaintiff and other property to the defendant, the decree uses the present tense in specifying how the property is to be divided. It appears, however, that the trial judge intended to provide that the property should be awarded to the respective parties in a particular manner but that this should be effective only upon the entry of the final decree. The interlocutory decree specifically provides that at the time of entering the final decree *"the court shall grant such other and further relief as may be necessary to a complete disposition of this action."* The part of the decree relating to the award of the property must be read in conjunction with the italicized provision, supra. When so read, the result is that the interlocutory decree determines "the manner in which the community property is to be assigned at the time of entry of the final decree. The language in the interlocutory decree purporting to make a final disposition of the community property will be disregarded as surplusage." Johnston v. Johnston, 106 Cal.App.2d 775, 781–782, 236 P.2d 212, 216; Webster v. Webster, 216 Cal. 485, 493, 14 P.2d 522. While this court could modify the decree and affirm it as modified, Slavich v. Slavich, 108 Cal.App.2d 451, 457, 239 P.2d 100; Dowd v. Dowd, 111 Cal.App.2d 760, 765, 245 P.2d 339, it is not necessary to take this action when the decree is considered in its entirety, Lo Vasco v. Lo Vasco, 46 Cal.App.2d 242, 247, 115 P.2d 562.

Although defendant says the trial court abused its discretion he fails to point out any particular item in support thereof. Our examination of the record does not disclose any basis for his complaint.

[6] There is no appeal from an order denying a motion for a new trial. Blair v. Williams, 109 Cal.App.2d 516, 521, 240 P.2d 1043. The appeal from the order is dismissed. The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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123 Cal.App.2d 696

MULLER
v.
JUSTICE'S COURT OF THIRD TP., SAN MATEO COUNTY et al.

Civ. 15792.

District Court of Appeal, First District,
Division 1, California.

March 8, 1954.

Petition for writ of prohibition to restrain justice's court from taking further proceedings in misdemeanor action. The Superior Court, County of San Mateo, Edmund Scott, J., entered judgment denying the petition, and petitioner appealed. The District Court of Appeal, Fred B. Wood, J., held that judge of justice's court, upon being presented with verified complaint, charging defendant with violation of Penal Code section making it a misdemeanor for any person to connect pipe with water main with intent to defraud or avoid payment for water so taken, was not required as prerequisite to filing complaint and issuing process thereon, to examine case, take evidence, and determine therefrom whether there was reasonable and probable cause to believe that the offense charged had been committed and that defendant had committed it.

Affirmed.

1. Criminal Law ⟹217

All that is required for judge of justice's court to issue warrant for arrest is that the judge have before him a verified complaint and that he examine it and be satisfied therefrom that the alleged offense has been committed and that there is reasonable ground to believe that defendant committed it. Pen.Code, §§ 499, 691, 740, 1425, 1427.

2. Criminal Law ⟹217

Judge of justice's court, upon being presented with verified complaint, charging defendant with violation of Penal Code making it a misdemeanor for any person to connect pipe with water main with intent to defraud or avoid payment for water so taken, was not required, as prerequisite to filing complaint and issuing process thereon, to examine case, take evidence, and determine therefrom whether there was reasonable and probable cause to believe that offense charged had been committed and that defendant had committed it. Pen.Code, §§ 499, 691, 740, 1425, 1427.

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William Muller, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Question: When a verified complaint charging a violation of section 499 of the Penal Code is presented to the judge of a justice's court, must be the judge before filing the complaint and issuing process thereon examine the case, take evidence and determine thereform that there is reasonable and probable cause to believe that the offense charged has been committed and that the defendant committed it?[1]

The answer is "No," demonstrated by the provisions of certain sections of the Penal Code.

Section 499 expressly declares that violation of its provisions is a "misdemeanor." Justice's courts have jurisdiction in "criminal cases amounting to misdemeanor only". § 1425. "Inferior courts" include justice's courts. § 691. "Except as otherwise provided by law,[2] all public offenses triable in the inferior courts must be prosecuted by written complaint under oath and subscribed by the complainant. Such complaint may be verified on information and belief." § 740.

[1, 2] "When a complaint is presented to a judge of an inferior court [in this case, the judge of the justice's court] of the commission of a public offense appearing to be triable in his court, he must, if satisfied therefrom that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, issue a warrant, for the arrest of the defendant." § 1427. All that is here *required* is that the judge have before him a verified complaint, that he examine it and be satisfied *"therefrom"* that the alleged offense has been committed and that there is reasonable ground to believe that the defendant committed it; no requirement that the judge take or receive additional evidence with or without the defendant present and confronting witnesses and adducing evidence in his own behalf.

The next step is the arraignment of the defendant, §§ 976, 988–990, who may demur prior to entry of plea. § 1004. If his demurrer is overruled he may plead, § 1007, in person or by counsel. § 1429. If he pleads "not guilty" the case is at issue and proceeds to trial.

In this process there is no supplemental, ancillary, or incidental inquiry concerning the nature of the offense and its commission, except, for example: (1) If the defendant pleads guilty the justice's court "may, before entering such plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense", and if it appears to the court that a higher offense has been committed than charged in the complaint the court may order the defendant to be committed or admitted to bail, to answer any indictment or information which may be found or filed charging him with such higher offense, § 1429; and (2) If the defendant pleads "not guilty by reason of insanity" the issue of sanity is determined by the superior court, at the proper stage of the proceedings and under the circumstances stated in section 1429.5. Neither of those exceptions is applicable here. Appellant did not plead "guilty"; nor did he plead "not guilty by reason of insanity."

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[1] In the instant case such a complaint, charging such a violation by appellant within the territorial jurisdiction of a justice's court, was presented to and filed by the judge of that court, whereupon a warrant of arrest for the apprehension of appellant was issued.

Appellant then moved the justice's court to set the complaint aside upon the ground, among others, that before filing the complaint and issuing the warrant of arrest the judge received no evidence (as was required, prior to the 1951 amendment of §§ 806 and 813 and repeal of §§ 811 and 812 of the Penal Code, when a complaint charging a felony was presented to a magistrate) showing reasonable or probable cause to believe that the offense charged had been committed or that appellant had committed it.

Upon denial of that motion, appellant petitioned the superior court for a writ of prohibition to restrain the justice's court from taking any further proceedings in the misdemeanor action.

From the judgment denying that petition, the present appeal was taken.

[2] We know of no exception applicable to the instant case.

Appellant, it would appear, has confused the procedure for a misdemeanor prosecution (governed by the sections above cited) with the procedure for the institution of a felony charge by complaint before a magistrate (governed by §§ 806, 813–815, and 858–883). The distinctions between these two methods are basic and have obtained since early days in this state. See Ex parte Blake, 155 Cal. 586, 587–591, 102 P. 269, and In re Roth, 3 Cal.App.2d 226, 230, 39 P.2d 490. There have been some changes since the Blake and Roth cases were decided but none of significance in the present inquiry. Although there has been some renumbering of sections, the misdemeanor prosecution procedure is substantially the same as before. As to the preliminary examination of a felony charge, the 1951 repeal of §§ 811 and 812 and amendment of §§ 806 and 813 appear at most to have dispensed with the taking of "depositions" by the magistrate before issuing the warrant of arrest (former §§ 811 and 812) now requiring him to issue the warrant if "satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it", § 813 as amended in 1951, and making no significant changes in the subsequent steps of the preliminary examination procedure.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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123 Cal.App.2d 597

INDIA PAINT & LACQUER CO.
v.
UNITED STEEL PRODUCTS CORP.

Civ. 19292.

District Court of Appeal, Second District,
Division 2, California.

March 2, 1954.

Rehearing Denied March 31, 1954.

Hearing Denied April 29, 1954.

Action by paint company against Venetian blind stripping manufacturer for value of paint and enamel sold and delivered to manufacturer. Manufacturer cross-complained for damages allegedly caused by defective paint sold by paint company. The Superior Court of Los Angeles County, Allen W. Ashburn, J., entered judgment for manufacturer for difference between its damages and debt it owed paint company for paint sold and delivered, and paint company appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to establish that a latent condition in paint company's paint was responsible for stickiness of manufacturer's stripping.

Judgment affirmed.

1. Sales ⚿441(2)

In action by paint company against Venetian blind stripping manufacturer for value of paint and enamel sold and delivered to manufacturer, wherein manufacturer cross-complained for damages caused by defective paint sold by paint company, evidence was sufficient to sustain trial court's finding that paint company had made express oral warranties that its paint or baking enamel would be absolutely suitable for manufacturer's use.

2. Sales ⚿260

Any affirmation of fact or any promise by seller relating to goods is an express warranty if natural tendency of such affirmation or promise is to induce buyer to purchase the goods, and if buyer purchases such goods relying thereon. Civ.Code, § 1732.

3. Evidence ⚿397(2)

Parol evidence is not admissible for purpose of varying or contradicting express terms and conditions of a written contract, but such rule is applicable only where writing is one which, by legal construction, shows upon its face that it was intended to express the whole contract between the parties.

4. Sales ⚷28

Documents, which were labeled "shipping copy invoices", but which were actually only receipts attesting to delivery of merchandise, and which, apart from finely-printed language of disclaimer and limitation of liability, contained only data concerning date of shipment and quantity of particular item delivered, did not constitute final repository of written agreement between buyer and seller, and disclaimer and liability provisions would not be given effect in absence of showing that they were known by, or brought to attention of, purchaser or its agents.

5. Sales ⚷28

Even if shipping document, which contained language of disclaimer or limitation of liability concerning goods sold, would be regarded as an invoice, such would not ipso facto transform document into a contract between buyer and seller unless so intended by them or unless such effect was given to it by application or operation of principle of contract law.

6. Sales ⚷28

An invoice, standing alone, is not a contract, and buyer is ordinarily not bound by statements thereon which are not part of original agreement.

7. Sales ⚷260

Where sales transactions are entered into on basis of anterior warranties, an attempt to disclaim the binding effect of such warranties upon or after delivery of goods by means of language on an invoice, receipt, or similar notice is ineffectual unless buyer assents or he is charged with knowledge of nonwarranty as to such transactions.

8. Sales ⚷441(2)

In action by paint company against Venetian blind stripping manufacturer for value of paint and enamel sold and delivered to manufacturer, wherein manufacturer cross-complained for damages allegedly caused by defective paint sold by paint company, evidence was sufficient to establish that manufacturer did not have knowledge of disclaimer and limitation statements contained in receipts attesting to delivery of such merchandise.

9. Appeal and Error ⚷1010(1)

In action by paint company against Venetian blind stripping manufacturer for value of paint and enamel sold and delivered to manufacturer, wherein manufacturer cross-complained for damages allegedly caused by defective paint sold by paint company, where there was substantial support for trial court's finding that language of disclaimer and limitation of liability contained in receipts attesting delivery of such merchandise was ineffectual and not binding upon manufacturer, the District Court of Appeal could not disturb such findings.

10. Customs and Usages ⚷14

Existence of custom of nonwarranty was not competent to change contract between buyer and seller where they had made it with reference to an express warranty.

11. Sales ⚷441(4)

In action by paint company against Venetian blind stripping manufacturer for value of paint and enamel sold and delivered to manufacturer, wherein manufacturer cross-complained for damages allegedly caused by defective paint sold by paint company, evidence was sufficient to establish that latent condition in paint company's paint was responsible for stickiness of manufacturer's stripping.

12. Appeal and Error ⚷971(2)
Evidence ⚷546

It is for trial court to determine, in exercise of sound discretion, competency and qualification of an expert witness, and trial court's ruling will not be disturbed upon appeal in absence of abuse of such discretion.

13. Evidence ⚷546

In action for value of paint and enamel sold and delivered, wherein buyer cross-complained for defectiveness of the paint, permitting witness, who, although he was without academic or professional degree, had operated his own paint research laboratory for more than 20 years and had acted as consultant for major paint manufacturers including seller, to express an opinion concerning likelihood of stickiness occurring on buyer's product when painted with paint, seller had provided for buyer's equipment did not constitute an abuse of trial court's discretion.

14. Sales ⟾441(4)

In action by paint company against Venetian blind stripping manufacturer for value of paint and enamel sold and delivered to manufacturer, wherein manufacturer cross-complained for damages allegedly caused by defective paint sold by paint company, evidence was sufficient to sustain trial court's finding that flash fires and sticky stripping were due to latent defect in the paint.

15. Sales ⟾441(1)

In action by paint company against Venetian blind stripping manufacturer for value of paint and enamel sold and delivered to manufacturer, wherein manufacturer cross-complained for damages allegedly caused by defective paint sold by paint company, evidence was sufficient to sustain trial court's finding that paint company had full knowledge of manufacturer's processes.

16. Appeal and Error ⟾1010(1)

In action by paint company against Venetian blind stripping manufacturer for value of paint and enamel sold and delivered to manufacturer, wherein manufacturer cross-complained for damages allegedly caused by defective paint sold by paint company, trial court's resolution, against paint company, of conflicting evidence on factual questions whether manufacturer had maintained reasonably normal and constant conditions in operation of its equipment and processes, was, when reduced to a finding, binding upon the District Court of Appeal.

17. Sales ⟾441(4)

In action by paint company against Venetian blind stripping manufacturer for value of paint and enamel sold and delivered to manufacturer, wherein manufacturer cross-complained for damages allegedly caused by defective paint sold by paint company, evidence was sufficient to establish that stripping returned from manufacturer's customers was sufficiently identified as having been produced at plant which used paint company's paint.

18. Appeal and Error ⟾989

The District Court of Appeal is not at liberty to usurp the fact-finding function.

19. Damages ⟾62(4)

Where, on two or four occasions, insulated cars were used by manufacturer to ship sticky Venetian blinds as part of an experiment in an attempt by manufacturer to cooperate in seeking to alleviate and abate paint stickiness problem, but manufacturer was not cognizant of fact that such shipments were of defective material since such condition was latent and manufacturer had been lulled into groundless security by paint company's repeated assurances that each paint reformulation had overcome factor engendering the stickiness, paint company's claim that manufacturer had enhanced its damages by making such shipments was groundless.

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Chapman, Frazer & Lindley, and John S. Frazer, Los Angeles, for appellant.

Robert H. Dunlap, Pasadena, and Samuel Reisman, Los Angeles, for respondent.

FOX, Justice.

India Paint and Lacquer Company, hereinafter referred to as "India," sued United Steel Products Corporation, hereinafter refered to as "United," to recover the value of certain paint or baking enamel sold and delivered to United. By its amended cross-complaint United sought damages from India for its losses (1) due to sticky paint, and (2) for losses occasioned by flash fires in its baking oven, due to allegedly defective paint sold by India to it. United based its right to recover upon a breach of both implied and express warranties.[1]

After a trial of more than five weeks[2] the court awarded United damages in excess of $104,000, and determined that United owed India more than $20,000 for paint sold and delivered. The court thereupon rendered judgment in favor of United in the net amount of $84,000. It is from this judgment that India appeals.

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[1] The counts based on negligence were withdrawn at the trial.

[2] The Reporter's Transcript covers 3,358 pages; 210 exhibits were received in evidence, and the briefs total 366 pages.

In 1940 United was engaged in the manufacture of aluminum and steel Venetian blind stripping. Its plant was located on Alameda Street, in Los Angeles. The material manufactured by United consisted of metal strips upon which enamel was applied on both sides through a baking process, and thereafter the stripping was rolled, layer upon layer, into coils. This stripping is known generally as either "coiled Venetian blind stock" or "slats" and is customarily coiled without any other inner layer or wrapper between the successive layers of enameled stripping, so that the surfaces of the successive coils came directly in contact with each other.

In the latter part of 1940 United employed Lloyd Pollett, placing him in charge of its painting and baking department. Prior to that time United did not purchase any of its paint or baking enamel from India, but purchased its requirements from other paint concerns. United was satisfied with the paint products it was then buying. At that time Lloyd's brother, Chester, was employed as a paint salesman by India, and their uncle, Burton Pennington, was the president and principal owner of India. Shortly after Lloyd was employed by United several conversations were had between him, his brother Chester, and Mr. Pennington looking toward securing United's paint business for India. Conferences occurred wherein India solicited the paint business of United, offering to sell to United paint or enamel that would be absolutely suitable and proper for use by United on its Venetian blind stripping material in the manufacturing process employed by United. It was stated to Mr. Bayer, president of United, by both Pennington and Chester Pollett on behalf of India, that "Our paint is guaranteed. We know your requirements. We know your oven, and we know what type of paint to give you for your business." Shortly thereafter United started buying enamel from India. From some time in 1941 until July, 1949, with very few exceptions, United purchased all of its paint requirements for baking enamel from India and became India's largest customer. However, shortly after the start of the war in December, 1941, because of the lack of available metal, United ceased manufacturing Venetian blind stock and consequently stopped buying paint. In 1945, United resumed its Venetian blind manufacturing business and once more started buying enamel from India. About this time India reiterated the representations made at the inception of the business relationship, that its product was guaranteed to produce satisfactory results. About this time United moved its place of business to Avalon Boulevard, in Los Angeles. United also maintained a plant at Jeffersonville, Indiana, but that plant did not use India's products.

In January, 1949, United encountered increasingly strong competition in the sale of its products, and had been offered paint by an eastern concern at a lower price. United advised India of this situation. At this time India's vice president, Ray Sahm, told United that he did not believe India could lower the price of the paint it was then furnishing United but India might be able to reduce the price by reformulating the paint. United admonished India to be sure that the paint was as good as they were then furnishing. To this Mr. Sahm replied: "You don't have to worry about this. Our paint is always good. We will always give you a guarantee, and you don't have to worry about anything." A short time thereafter Chester Pollett brought to United's plant a small batch of paint which was run through United's equipment at his request. Chester took a coil of the stripping back to India for testing. Later India advised United that the new batch was all right, and the price would be $3.75 a gallon instead of the former price of $4.30 a gallon.

During the entire period that United purchased paint or enamel from India, United had no laboratory and employed no chemists. India, however, was familiar with United's equipment and had access to it. United always purchased from India by ordering the paint by colors and never ordered any paint or enamel from India by designation of number or formula.

The first deliveries of paint at the new price were on February 4, 1949. United immediately commenced the use of the new paint in its usual operations and soon began shipping out its completed product. About the middle of March, 1949, United began to receive complaints from its customers to the effect that the stripping stuck together and the paint peeled from the surface of the slats as the coils were unwound. Samples showing the sticky or "tacky" condition of the stripping were returned to United by its complaining customers. These samples were turned over to India with the demand that this condition be corrected. Thereafter India's representatives advised United that they were incorporating a material into the paint that would harden the surface so that there would be no more trouble with sticking. Based upon these assurances, United continued to purchase paint from India.

Complaints about the sticky condition of the stripping continued. As each complaint was received United immediately communicated with India and requested that India do something to remedy the situation. On each occasion United was informed that India had put some further substance into the paint that would overcome the sticking. During the period from about the middle of March, 1949, to the first of July India supplied a number of different formulations of the paint or enamel to United, each of which it assured United would eliminate the sticking problem. United, however, was not advised as to the ingredients that went into any of the paint. After the stripping material was manufactured with the use of the paint furnished by India no immediate difficulty appeared and when the slats were used promptly no defect was encountered. However, if a painted coil was allowed to remain unused for a period of weeks a delayed-action defect appeared in that the painted surfaces of the coils began to stick together. This difficulty applied to both the steel and the aluminum stripping.

Based upon India's assertions as to the quality of its enamel, United guaranteed its product to its customers, and therefore United found it necessary to accept the return of the sticky stripping, and issued full credit therefor. Although United attempted to salvage the material in order to mitigate damages, it was unable to do so. By reason of the foregoing, United not only sustained loss on the material but other losses for freight for the return of the defective stripping, costs of investigation, and inspection trips. United showed it suffered substantial injury to its good will.

India's effort to solve the stickiness problem continued until about July, 1949. In the face of United's mounting dissatisfaction, Mr. Sahm informed United not to worry, "we are taking care of everything. Everything will be O.K." However, the promised relief did not materialize. Thereupon the business relationship ceased. United then began to purchase its paint from another concern and thereafter had no further problems with sticky stripping.

On August 5, 1949, United States Testing Corporation was engaged by United to compare the performance of India's paint with that of two of its competitors. United's equipment was stopped, cleaned, and then the regular manufacturing process was restarted under the supervision of Mr. Brennan of the testing concern. Six coils of aluminum stripping were started through United's equipment. New barrels of paint, supplied by India, Fuller, and Sherwin-Williams, were used in conducting the tests. The six strips were processed at the same time, with each brand of paint being applied to two of the strips. Two test runs were made. Samples of the test runs were taken by the testing concern, sealed, and remained in the possession of the testing corporation until the trial, when they were actually opened in court during the testimony of Mr. Brennan. When examined in court the unwinding of the coils to which India's paint had been applied was accompanied by a ripping or tearing sound and on inspection the stripping to which India's paint had been applied was found to be sticky or "tacky," with damaged surfaces plainly visible. On the other hand, when the samples painted with the other two brands of paint were uncoiled and inspected no stickiness was found and the stripping was in excellent condition.

For approximately three weeks in the latter part of May and the early part of June, 1949, United encountered a series of approximately 150 flash fires in its ovens. On these occasions the equipment would be in operation and suddenly the stripping in the larger oven would catch fire. After two of these flash fires had occurred India was advised of them and questioned as to whether there was anything wrong with the baking enamel. Mr. Canet, India's chemist, advised that the enamel was all right and suggested that perhaps United's oven had a defect which was causing the fires. Thereupon United dismantled and reassembled the oven on four different occasions. On the first of these, two loose connections were found, and were tightened. However, the flash fires continued intermittently during the remainder of this period. Finally toward the end of the three-week period in question, a representative of India disclosed to United that a check of the materials which were incorporated in the paint revealed that one of the ingredients had a flash point of 31 degrees Fahrenheit. United thereupon returned to India all the baking enamel it had on hand and the same was accepted by India and full credit issued therefor. India then reformulated its paint and the flash fires ceased.

India produced testimony by experts designed to counteract United's contention that a latent defect in its paint produced a "delayed-action" stickiness and caused the flash fires. The opinion of many of these experts was that both flash fires and stickiness could be caused by an improperly vented baking oven, resulting in saturation by solvent vapors emanating from substances used in the cleaning process. India introduced evidence to establish that lack of constant oven temperatures could cause sticking, as would lack of uniformity of thickness of the stripping, or a change in its rate of speed. It presented evidence tending to show that United's ovens were not properly vented and did not have equipment which would enable it to properly gauge and maintain constant conditions. Highly technical data was furnished by India's experts which, if believed by the court, would have absolved India of responsibility for the flash fires and would have attributed the sticky stripping to United's deficient operating methods.

Harold R. Harlin, one of United's experts, directly attacked India's formulas. He testified that all of the formulas in question were liable to stick when used in United's process. He asserted that because of alkyd resins in the formulas, unpolymerized materials would be left in the paint film, which superficially appeared well baked, and the subsequent migration of these materials would cause a delayed sticky condition. Harlan also imputed United's difficulty to the presence of an excessive amount of amine resins in India's formulas. Wayne D. Hawkins, another expert, regarded the lack of a "slick compound" in India's formulas as a cause of stickiness. India's experts upheld the use of slick and amine resins in the overall formulas.

At the beginning of the business relationship between the parties in 1940, when India delivered paint or baking enamel to United it was accompanied by a pink document called an invoice. It described the product and the quantity thereof but contained no prices or terms of sale. A day or two after the delivery of the purchased material a formal white statement was received, also denominated an invoice. This white document carried the same information as the pink and in addition showed the unit price and the total charges for each item and the aggregate amount of the purchase. At the time of the resumption of business relations between India and United, India's method of shipping to and billing United was as follows: a set of documents captioned "invoice" was prepared in quadruplicate, and labeled respectively "Office Copy," "Shipping Copy," "Customer's Copy" and "Salesman's Copy." Two of the so-called "invoices," the "Customer's Copy" and the "Shipping Copy," accompanied the delivery of material to United. In fine print, the smallest print used on the paper, there appears at the bottom of these documents, below the last of the horizontal lines, the following language: "Seller neither assumes nor authorizes any person to assume for it any other liability in connection with the sale or use of the materials sold hereunder, and there are no oral agreements or warranties collateral to or effecting this sale. No claim of any kind shall be greater in amount than the purchase price of the materials sold hereunder for which any damages are claimed." In addition, the document contains a description of the amount of the particular item transmitted to the customer, but not the price. The person receiving the goods would sign the "Shipping Copy" and retain the "Customer's Copy." A day or two later, India would mail to United a typewritten document different in form and size from the ones previously described, and bearing an elephant-head insigne. This document, also labeled "invoice," contained all the details of the sales transaction, including an itemization of price, which was absent on the other document. Also absent from this document was the language of disclaimer of warranty and limitation of liability, or any similar language. There was testimony that at no time had India called United's attention to the language of disclaimer, nor were United's agents aware of this disclaimer statement until shortly before the trial. In fact, India did not raise the disclaimer issue until approximately six days before the case was originally set for trial.

[1, 2] India's first contention is that the trial court erred in finding it had made express oral warranties that its paint or baking enamel would be absolutely suitable for use by United. This proposition is untenable. In treating a similar contention in the case of Stott v. Johnston, 36 Cal.2d 864, 869–870, 229 P.2d 348, 351, 28 A.L.R. 2d 580, the court stated: "'Any affirmation of fact or *any promise* by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.' * * * Under this section (Civ.Code, sec. 1732) no particular words are necessary to create a warranty, and whether the word 'warrant' was used in the parties' dealings is immaterial (citations) * * *." The holding of Stott v. Johnston is singularly apposite to the circumstances adduced in the instant case. The evidence shows that the oral warranties made in 1940 were renewed in 1945 when business relations between United and India recommenced. These were in the form of clear-cut statements that India "would absolutely guarantee" satisfactory performance. As late as January, 1949, immediately prior to United's difficulties with India's product, Mr. Sahm once again expressed plaintiff's policy in unequivocal language: that India would always guarantee the products it sold United. Mr. Bayer testified he wished such assurance with respect to the cheaper paint India was about to supply in order not to lose United's account to eastern competitors. The testimony fully supports the finding that the sales were consummated on the basis of express oral warranties.

In view of our conclusion that India's liability may be sustained by reason of its breach of an express warranty, it becomes unnecessary to discuss United's further claim that India's liability might likewise be predicated upon the breach of an implied warranty, Stott v. Johnston, supra, 36 Cal.2d at page 870, 229 P.2d at pages 351, 352.

India next attacks the court's finding that the statements on the documents accompanying the delivery of paint to United containing language purporting to disclaim the existence of warranties and limiting India's liability to the amount of the purchase price, are "meaningless and of no legal consequence." Correlated with this argument is India's objection that the court erroneously admitted evidence of alleged antecedent oral warranties which were in conflict with the written disclaimers previously alluded to. Both of these contentions are without substance.

[3] For India's arguments to prevail, it would be necessary to establish that the shipping documents it relied upon consti-

tuted a complete, integrated contract between the parties, under which circumstances the familiar rule that parol evidence is not admissible for the purpose of varying or contradicting the express terms and conditions of a written contract would apply. "But, in order for this rule to have any application, the writing must be one which by legal construction shows upon its face that it was intended to express the whole contract between the parties. (Citations.) It does not apply to a mere memorandum like the one we are now considering, and which does not of itself import any contract. (Citation.)" Kreuzberger v. Wingfield, 96 Cal. 251, 255, 31 P. 109, 110. In the Kreuzberger case, the court had before it a writing relating to the construction of a sidewalk which purported to be of a contractual nature. The court held that the writing was simply a memorandum and stated: "It contains no contract stipulations, and shows upon its face that it was only intended as an informal memorandum, and it must therefore be considered in connection with the oral negotiations which preceded it." 96 Cal. 255, 31 P. 110. The Kreuzberger case holds to the established principle that the parol evidence rule applies only when the writing to be protected is a complete contract and not a mere memorandum of a contract. In Mesibov, Glinert & Levy v. Cohen Bros. Mfg. Co., 245 N.Y. 305, 157 N.E. 148, 150, Justice Cardozo expressed the same rule as follows: "We do not overlook the difference in this connection between a contract in writing, and a note or memorandum of a contract. The one is subject to the parol evidence rule; the other may be shown by parol to be inaccurate or incomplete. (Citations.)"

[4] The handwritten documents accompanying India's shipments of merchandise, which are labeled "shipping copy invoices" but which are actually, as found by the trial court, bills of parcels, clearly do not represent anything more than receipts attesting to the delivery of merchandise. Apart from the finely-printed language of disclaimer and limitation of liability on the very bottom, they contain only data as to the date of shipment and the quantity of a particular item delivered to the purchaser. Their informality, incompleteness, and lack of contractual character show on the face of the documents. Professor Corbin, in discussing the legal effect of placing on a document express, written statements that there have been no extrinsic warranties, remarks: "The fact that a written document contains one of these express provisions does not prove that the document was ever assented to *or even became operative as a contract*. Neither does it exclude evidence that the document was not in fact assented to and therefore never became operative." (Italics added.) Corbin, Parol Evidence Rule, 53 Yale L.J. 603, 619. Similarly, the Massachusetts court made the following pertinent commentary with reference to documents sent to a purchaser upon delivery of goods: "The bills of parcels which were sent from time to time with the merchandise were susceptible of explanation by parol evidence, * * *. They were sent only as memoranda of the amount and value of the merchandise transmitted. (Citation.)" Schenck v. Saunders, 13 Gray 37, 41–42. It is patent that the court below, in admitting evidence of the oral warranties, correctly refused to accord to the cursory memorials of a delivery transaction the dignity of constituting the final repository of a written agreement between the parties. Likewise, it properly refused to give effect to the disclaimer and liability provisions therein in the absence of it being established that they were known by, or brought to the attention of, United or its agents. This is particularly true in view of the fact that the actual invoice, a typewritten document of completely different size, design and format than the shipping document, which was customarily sent out a day or two after the deliveries, contained the detailed terms of sale but no language of disclaimer or limitation of liability.

[5, 6] Furthermore, it is pertinent to observe that even if the shipping document is regarded as an invoice, as India contends, this would not *ipso facto* transform it into the contract between the parties, unless so intended by them or unless such effect is given to it by the application or operation of some principle of contract law.

The prevailing rule is that an invoice, standing alone, is not a contract, Campion v. Downey, 77 Cal.App. 125, 130, 245 P. 1098; Tanenbaum Textile Co. v. Schlanger, 287 N.Y. 400, 40 N.E.2d 225, 226; Hoffmann-La Roche, Inc. v. Weissbard, 19 N.J.Super. 210, 88 A.2d 238, 245; 48 C.J.S., Invoice, page 765; and a buyer is ordinarily not bound by statements thereon which are not a part of the original agreement. Kocher v. Cartman Tire Exchange, 108 Cal.App. 619, 620, 291 P. 856; Tanenbaum Textile Co. v. Schlanger, supra; Diepeveen v. Larry Vogt, Inc., 27 N.J. Super. 254, 99 A.2d 329, 330; Reliance Varnish Co. v. Mullins Lumber Co., 213 S.C. 84, 48 S.E.2d 653, 658. In Tanenbaum Textile Co. v. Schlanger, supra [287 N.Y. 400, 40 N.E.2d 226], the question presented was whether there was an agreement to arbitrate disputes arising out of the sale of goods, such arbitration agreements being required by statute to be in writing. There had been twenty separate sales of goods between the parties, the orders being placed by telephone. Immediately after each delivery of goods, invoices were mailed to the buyer, on each of which there was stamped in red ink: "All controversies arising from the sale of these goods are to be settled by arbitration." The buyer retained all of these invoices. The seller insisted that there arose thereby a contract to arbitrate. In rejecting this argument, the court admitted "that acceptance of a document which plainly purports to be a contract gives rise to an implication of assent to its terms despite ignorance of the content thereof. (Citations.) But that is not this case. An invoice, as such, is no contract. An invoice is a mere detailed statement of the nature, quantity and the cost or price of the things invoiced. (Citations.)" The court further held that the retention of the goods by the buyer did not of itself operate as an assent to the conditions on the invoice.

[7, 8] Where, as in the case at bar, sales transactions are entered into on the basis of anterior warranties, it is universally held that an attempt to disclaim the binding effect of such warranties upon or after delivery of the goods, by means of language on an invoice, receipt or similar notice, is ineffectual unless the buyer assents or he is charged with knowledge of nonwarranty as to the transactions. Keller v. Flynn, 346 Ill.App. 499, 105 N.E.2d 532, 535; Diepeveen v. Larry Vogt, Inc., supra; Manglesdorf Seed Co. v. Busby, 118 Okl. 255, 247 P. 410, 411; Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N.W. 484, 485, L.R.A.1918C, 391; Ward v. Valker, 44 N.D. 598, 176 N.W. 129, 131; Longino v. Thompson, Tex.Civ.App., 209 S.W. 202, 205; Ingraham v. Associated Oil Co., 166 Wash. 305, 6 P.2d 645; Edgar v. Joseph Breck & Sons Corp., 172 Mass. 581, 52 N.E. 1083; Reliance Varnish Co. v. Mullins Lumber Co., 213 S.C. 84, 48 S.E. 2d 653, 659; Gray v. Gurney Seed & Nursery Co., 62 S.D. 97, 252 N.W. 3, 6; Davis v. Ferguson Seed Farms, Tex.Civ. App., 255 S.W. 655, 662. In each of the last cited cases the courts were confronted with the question of whether the existence of an alleged warranty was extinguished by non-warranty statements or disclaimers of warranty printed on letters, invoices, or other literature sent with or after the shipment of goods. In each case it was held that where goods are sold subject to a warranty, the purchaser is entitled to rely upon this warranty despite the printed statements on the seller's invoices, at least until he has actual knowledge of the disclaimer, or because of the facts and circumstances surrounding the transaction he should be charged with such knowledge. The following language from Ward v. Valker, 44 N.D. 598, 176 N.W. 129, 131, epitomizes the prevailing view: "If the circumstances anterior to the invoices indicated the existence of a warranty, we cannot say that the printed statement (of disclaimer) on the invoice operated to extinguish it as a matter of law." The rule is also succinctly expressed in Gray v. Gurney Seed & Nursery Co., supra [62 S.D. 97, 252 N.W. 6], that "when the seller expressly warrants the goods, the purchaser is entitled to rely upon this warranty at least until he has actual knowledge of the disclaimer or because of the facts and circumstances surrounding the transaction should be charged with such knowledge."

The evidence fully demonstrates that the sales were made pursuant to express warranties and that United had no knowledge of the disclaimer and limitation statements.

The application of these principles is illustrated in two cases from our own courts, Campion v. Downey, 77 Cal.App. 125, 245 P. 1098, and Kocher v. Cartman Tire Exchange, 108 Cal.App. 619, 291 P. 856, in both of which a hearing was denied by the Supreme Court. In the Campion case, defendant gave evidence regarding oral agreements in connection with sales transactions, which was objected to on the ground that the contract was embodied in the invoice sent after the sale and that such written instruments could not be varied by parol. In rejecting the contention that the invoice was a contract and in upholding the admissibility of the oral evidence, the court stated, 77 Cal.App. at page 130, 245 P. at page 1100: "There is another reason why the evidence was properly admitted. The letter * * * inclosing the invoice constituted the written contract giving to appellant's contention the broadest interpretation the facts will warrant. However, that letter and invoice constituted merely what the books term a 'bill of parcels', and were not of such dignity as necessarily to indicate that all previous negotiations were merged in them. (Citation.) All of the courts seem to have made a distinction which is patent between a formal bill of sale and a bill of parcels when considering the rule (citations)."

In the Kocher case, supra, an examination of the briefs on appeal indicates that plaintiff-assignee sued on a claim arising out of two sales of tire tubes. The trial court found in favor of defendant's plea of breach of warranty. The transaction commenced with the signing of orders by defendant and a salesman, which did not contain the full particulars of the transaction. The order slip bore the following language: "Not Guaranteed. Seconds. Confirmation." Thereafter the tubes were delivered with invoices on which were written: "Duplicate Invoice. Second Tubes Not Guaranteed. Not Subject to Return or Adjustments." It was contended on appeal that the court's finding that a warranty was made and breached rested on improperly admitted parol evidence. The court, 108 Cal.App. at page 620, 291 P. at page 856, replied: "He (plaintiff) calls to our attention written orders signed by the defendants in which the defendants ordered so many tubes of such and such sizes. Those orders were signed by the defendants and by a salesman of the seller, but the orders do not purport to be contracts. No word indicating a sale is used. They name no price nor prices nor the total amount of the goods purchased. They specify red tubes and sizes. Nothing more * * *. Such orders were not contracts, they were but a portion of the evidence of the actual contract. (Citations.) * * * After the orders were placed the seller transmitted certain invoices on which it attempted to place certain additional covenants into the contract. Such additions were mere self-serving declarations on the part of the seller and were not binding on the purchasers. (Citation.) None of the additions or indorsements mentioned had the effect of precluding the defendants from introducing their defense and, it having been introduced, the most that can be said is that there is a conflict in the evidence as to the warranty."

[9] The rationale of the Campion and Kocher cases, as well as the doctrines announced in the cases previously adverted to, apply with equal force to the invoices in the case at bar, which India refers to as the "basic written document." Certainly it could not be said as a matter of law that United should have been aware of the finely-printed statements as to disclaimer and limitation of liability. Since the provisions are so located as to easily escape attention, and since there was testimony by United's officers and agents that they had never been cognizant of the disclaimer nor had it been called to their attention, there was substantial support for the court's finding that said language was ineffectual and not binding on United. This being so, we may not disturb these findings on appeal.

The group of authorities relied upon by India in support of its arguments that United was bound by the statements of disclaimer and limitation of liability and that it was of no consequence whether United's officers had read the statements, are clearly distinguishable. One category includes such cases as Taussig v. Bode & Haslett, 134 Cal. 260, 66 P. 259, 54 L.R.A. 774; U Drive, & Tour v. System Auto Parks, 28 Cal.App.2d, Supp., 782, 71 P.2d 354; Cunningham v. International Committee Young Men's Christian Ass'ns, 51 Cal.App. 487, 197 P. 140; Constantian v. Mercedes-Benz Co., 5 Cal.2d 631, 55 P.2d 841; William A. Davis Co. v. Bertrand Seed Co., 94 Cal.App. 281, 271 P. 123, in which disclaimer provisions and notices of limitation of liability were upheld. In these cases the statements were contained within the body of a document (such as a warehouse receipt, parking lot ticket, baggage check, etc.) which plainly purported to embrace the agreement between the parties, which thereupon became binding upon acceptance of the document regardless of whether the person accepting had actual knowledge of all the terms. They were an integral part of an accepted agreement embodied in a writing contractual in its nature, and could no more have been ignored than any other provisions of a written contract. Those cases, in considering the binding effect of a statement contained in an instrument delivered to the acceptor, represent an application of the rule stated by Professor Williston in his treatise on Contracts: "The sole question seems to be whether the facts present a case where the person receiving the paper should, as a reasonable man, understand that it contained the terms of the contract which he must read at his peril and regard as part of the proposed agreement. The precise facts of each case are important in reaching a conclusion." Vol. 1, p. 165.

The remainder of the cases cited are inapplicable since they differ materially from the factual context here present. In C. Lomori & Son v. Globe Laboratories, 35 Cal.App.2d 248, 95 P.2d 173, plaintiff obtained judgment for breach of warranty in the sale of anti-hog cholera virus and serum. A motion for a new trial was granted on the ground of insufficiency of the evidence. In affirming, the court held that the alleged warranty was *conditional* upon use of the medicine in the recommended fashion, and since there was great conflict as to the cause of the death of the hogs, the sanitary conditions on plaintiff's farms, and on the question of whether he used the medicine as prescribed, a new trial was properly granted. By way of dictum, the court discussed whether defendant's disclaimer of liability on the labels of its bottles relieved it of liability in view of its conditional warranty. The court pointed out that plaintiff admitted he read the labels and was therefore upon notice that defendant did not guarantee prevention of hog cholera under all circumstances. In Gibson v. California Spray-Chemical Corporation, 29 Wash.2d 611, 188 P.2d 316, an action to recover damages for loss of an apple crop occurring from spraying mildewed trees with a chemical compound purchased from defendant, the court found that no express warranty had ever been made, that plaintiff knew full well the product he was purchasing was still in an experimental stage, and that he was put on notice of a disclaimer at the time of the sale to him. Hoover v. Utah Nursery Co., 79 Utah 12, 7 P.2d 270, did not involve an express warranty. The issue before the court was whether seeds purchased in a container on which was printed language of nonwarranty was nonetheless subject to an implied warranty. The court stated the evidence showed a universal custom not to warrant seed and sustained the trial court's finding that the sale was made pursuant to that long-established custom, thus excluding any implied warranty. Hawkins v. Frick-Reid Supply Corporation, 5 Cir., 154 F.2d 88, involved an action to recover the purchase price of an allegedly defective drill pipe on the grounds of breach of an express and implied warranty. The invoice was here treated as the contract between the parties and the dispute was simply as to the construction of the language therein. The trial court had granted a summary judgment in defendant's favor on the ground that the drill pipe was *machinery* or *machinery parts,* and hence not covered by the term *material* within the meaning of the warranty statements in the invoice clause. The case was reversed upon the ground that since the drill pipe might either be regarded as material or machinery, a question of triable fact was presented which precluded the rendition of a summary judgment. Apparently neither party disputed that their transactions were governed by the language of the invoice, the sole controversy relating to the meaning of such language.

[10] The next point raised by India relates to its testimony that there was a general custom not to warrant paint. India contends that when a custom of the trade not to warrant is shown, it thereby establishes an intention not to warrant and eliminates any claim of an implied warranty. Though this may be true as an abstract proposition of law in the absence of an express warranty, it has no pertinency in a situation where express oral warranties have in fact been made. Miller v. Germain Seed & Plant Co., 193 Cal. 62, 66, 222 P. 817, 32 A.L.R. 1215; Webster v. Klassen, 109 Cal.App.2d 583, 589, 241 P.2d 302; Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N.W. 484, 486, L.R.A.1918C, 391; Coates v. Harvey, Super.Ct., 2 N.Y.S. 5, 6; see Brandenstein v. Jackling, 99 Cal. App. 438, 445, 278 P. 880. The court stated in Miller v. Germain Seed & Plant Co., supra [193 Cal. 62, 222 P. 818]: "It is, of course, conceded that if there had been a written warranty *or an expressed oral warranty* of the character of the seed, the custom of the dealer in other cases not to give such a warranty would have no bearing upon the terms of the express warranty." (Italics added.) In Moorhead v. Minneapolis Seed Co., supra [139 Minn. 11, 165 N.W. 486], it is said: "Conceding the rule of law claimed, and that a custom not to warrant was conclusively proved, we are of the opinion that a vice-president and general manager having such charge of the company's operations and such general authority as is shown had implied authority to make a warranty binding the corporation." In the case at bar, the evidence shows the third renewal of the express warranty in January, 1949, was made by Ray Sahm, vice president of India. The existence of a custom of nonwarranty is not competent to change the contract of the parties as they themselves had made it with reference to an express warranty. Webster v. Klassen, 109 Cal.App.2d 583, 589–590, 241 P.2d 302; Coates v. Harvey, supra.

India argues that the evidence is insufficient to support the finding that the paint it sold to United caused the stickiness of its Venetian blind stripping material. We cannot agree. Prior to February, 1949, when India undertook to formulate a cheaper paint for United's operations, there was no trouble with sticky stripping. When this difficulty arose India revised its formula a number of times in an effort to remedy its product but the stickiness continued. India's experts testified that its preparations should not and would not stick if faithfully compounded and properly used. On the other hand, Mr. Harlan expressed a contrary opinion, saying, in effect, that the absence of slick in the particular formulation, the excessive amount of amine resin, and the preponderance of slowly curing soya resin, would have a definite tendency to cause these paints to stick when used in United's ovens. Upon examining a piece of "tacky" stripping that had been returned by one of United's customers, a representative of India concluded that the paint was at fault. After United stopped using India's paint, in late June or early July, and began using the product of another manufacturer, it had no further appreciable difficulty with sticking.

Furthermore, the test runs made by the United States Testing Corporation, under the supervision of Mr. Brennan, were practical service tests in the opinion of Mr. Harlan and "established convincingly," to use the words of the trial court in summing up the case, "the defective quality" of India's last effort to produce a satisfactory paint for United's operations. India, however, insists that these tests were not run under typical production conditions. It maintains that United's equipment was stopped and cleaned in preparation for the test; that a representative of the chemical company which furnished the chemicals for cleaning the equipment supervised the cleaning process and that the temperature was above normal. Cleaning the equipment was not out of the ordinary procedure. This was frequently done at the start of a new production run. To have the equipment cleaned before the tests were run was desirable and conducive to accurate performance results and the elimination of extraneous interference. There can be no valid objection to the supervision of the cleaning process by a disinterested third party persumably familiar with the cleaning substances used. As to the temperature, Lloyd Pollett testified that under normal procedure the temperature in the topmost thermometer in the large oven was usually 520 degrees Fahrenheit. Mr. Brennan testified that he had checked the temperatures in the baking ovens at the time the tests were run and found the top thermometer in the larger oven read 520 degrees Fahrenheit, which was exactly normal for that thermometer. The higher temperatures to which India refers were taken at different points in the oven and are therefore not comparable for the purpose of determining normalcy. The testimony supports the judge's comment that "The conditions under which the tests were made were normal and constant." There was, says the court, "no shifting of the paint pans as contended" by one of India's witnesses whom the court characterized as "quite unconvincing." The court further observed: "The claim that the oven was cooler in the center, enough cooler to affect the baking of the strips, does not impress the court at all * * *."

United's evidence also disclosed that immediately after the stripping material was coated with enamel, no immediate defect was apparent, and no stickiness was encountered if the stripping was used promptly. However, stickiness occurred within two or three weeks on the painted surface of coils which remained unused. This delayed-action phenomenon affected both the aluminum stripping rolled on United's mills which underwent the cleaning process and the steel stripping purchased outside which was not cleaned but was fed directly into the painting equipment.

[11] The foregoing evidence furnishes ample support for the finding that a latent condition in India's paint was responsible for the stickiness of United's stripping. From the mass of conflicting evidence the trial court was justified in drawing the inference that either India's experts were mistaken or there was some failure to properly compound the paint.

India, however, contends that Mr. Harlan was "not qualified" to express an opinion that its compounds here in question were "liable to stick" when used in United's process. Mr. Harlan is a consulting chemist from San Francisco who has operated his own paint research laboratory for more than 20 years. He has done work for every major paint manufacturer on the Pacific Coast including India. He had also rendered expert services for a number of companies in the Venetian blind manufacturing industry in connection with their baking enamels. In his practical experience he has had occasion from time to time to go into the subject of the constituents of baking enamels for Venetian blinds and to develop formulas that would produce satisfactory results in particular situations. As he explained, it was his job to make them work. True, as India points out, Mr. Harlan did not have an academic or professional degree. However, he had attended two well known universities. He was a "practical chemist" and experienced in this particular field. See Studerus Oil Co. v. Jersey City, 128 N.J.L. 286, 25 A.2d 502, 506.

[12, 13] It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness and its ruling will not be disturbed upon appeal without showing an abuse of that discretion. Pearce v. Linde, 113 Cal.App.2d 627, 630, 248 P.2d 506. There was clearly no abuse of discretion in permitting Mr. Harlan to express an opinion as to the likelihood of stickiness occurring on United's stripping when painted with the particular formulations India had provided for United's equipment and baking process.

India emphasizes that during the particular period involved not all of United's stripping developed a sticky condition. It is then argued that if India's paint were defective all the stripping on which it was used would have stuck. The evidence shows that sticking did not occur when the stripping was used fairly soon after it was painted. If, however, it remained in the coils for a number of weeks stickiness developed. In considering this question the trial court concluded that India's argument on this point "is answered primarily by the fact that this stickiness is a delayed process due principally to continued contact under pressure." This conclusion is not without justification. In this connection it should be pointed out that stickiness developed on both the aluminum and steel stripping. This would indicate the problem of sticking was not caused by the cleaning process applied by United to the aluminum stock since the steel stripping was pretreated and ready for the application of the baking enamel without cleaning. Yet stickiness also developed on the steel stripping.

[14] India vainly argues that the evidence is insufficient to support the finding that its paint was responsible for the flash fires. In May or early June, 1949, approximately 150 flash fires occurred in about a three-week period. Prior to that time there had been no trouble with such fires. India insisted there was nothing wrong with its paint—that the trouble must be with United's oven. As a result, United dismantled its oven four times. Nothing except a couple of loose connections upon the first dismantling was found to be wrong with it yet the flash fires continued to occur. India thereupon tested the ingredients being used in the paint it was then furnishing United and discovered in its own laboratory that one of the constituent elements "flashed fire" at 31 degrees Fahrenheit. India immediately provided United with a reformulated paint and the flash fires ceased. United returned the old paint on hand and India issued full credit therefor in the sum of $4,624.20. India's own laboratory demonstration, the fact that United had no such fires prior to this three-week period, that as soon as India changed its formula and eliminated the volatile substance these fires stopped, the conduct of India's representatives, and the absence of any defect in United's equipment, justify an inference that India's paint was at fault and support the court's finding to that effect. The court obviously was not impressed with India's expert witnesses in their attempt to prove that its paint could not have caused these fires.

Contrary to India's contention, the evidence fully sustains the finding that the flash fires and sticky stripping were due to a latent defect in its paint. As to the flash fire problem, there was nothing in the appearance of the paint or otherwise which suggested even its highly volatile character. This was not disclosed until it was in the process of being applied and baked. Clearly the defect was latent. Likewise there was nothing either before or after the application of the paint which indicated it would develop stickiness. When the stripping was finished it had a normal appearance and if used in a relatively short time there was no difficulty. The problem arose when the stripping remained in the coils a number of weeks and there was continued contact under pressure. This result was explained by Mr. Harlan on the theory that the paint contained materials that would produce a high surface hardness on the painted stripping and leave uncured or unpolymerized matter underneath the film which would then, under pressure, migrate to the surface and cause the sticking in the coils. The foregoing justifies an inference that the defect in India's product was latent and supports the finding to that effect.

[15] India challenges the sufficiency of the evidence to sustain the finding (1) that India had full knowledge of United's processes, and (2) that United maintained reasonably normal and constant conditions in the operation of its equipment and processes. This challenge, however, is not well founded. The evidence shows that the representatives of India and its chief chemist, Mr. Canet, inspected United equipment, its operations and the finished product, and had free access to its plant. Mr. Canet testified he made service calls to United about once or twice a week prior to the period here in question, and during that period even more frequently. Chester Pollett had seen a particular oven of United's possibly 200 times. There was a free exchange of information between officials of the two companies. India had full oppor-

tunity to acquire any knowledge respecting United's physical operations it required, and it availed itself of such opportunities. This was necessary because India was making paint for use in United's equipment. It had become India's largest customer. Naturally United wanted to turn out a good product. The quality of its enamel was an important factor in such a result. India of course desired to retain United's account. There were, therefore, persuasive business reasons for the close cooperation between the two companies and the familiarity of India with United's operations. The foregoing clearly justifies the finding that India had full knowledge of United's processes.

[16] In its attack upon the finding that United maintained reasonably normal and constant conditions in the operation of its equipment and processes, India points to certain changes in United's equipment and operating procedure. To enumerate the details of these asserted changes is unnecessary since the trial judge dealt fully with this question in announcing his decision at the conclusion of the trial, when he said: "The many attacks upon United's baking process are unconvincing. Some are misplaced as to time; some are of an insignificant nature; some are essentially attacks upon the design and construction of the oven, and others are disbelieved. They are adequately offset by the previous and subsequent experience, by the result of the Brennan tests, and by the oral evidence of Lloyd Pollett, and others." Thus the trial court has resolved the conflicting evidence on these factual questions against India. Such resolution, reduced to a finding, under elementary principles, is binding on this court.

[17] India claims the returned sticky stripping was not sufficiently identified as having been produced at United's Los Angeles plant. It suggests that some of this damaged stripping might have come from United's Jeffersonville plant. In considering this question the trial court pointed out that "India paint was not used at Jeffersonville and no trouble of that kind (stickiness) has been traced to that plant." The testimony of Lloyd Pollett supports this observation. India also suggests that it would be hard to tell United's white stripping from that of another manufacturer. However, each of the dealers who testified about returns said he had no difficulty in identifying the defective stripping which he had purchased from United. Further, Lloyd Pollett testified that as the coils were returned he would inspect either all or a representative sample, if there was a large shipment, and then the balance was checked by the receiving clerk. In making these examinations Mr. Pollett had in mind the possibility some of the returned coils might have been originally shipped from the Jeffersonville plant. Mr. Pollett was able to distinguish the coils manufactured at United's Los Angeles plant from those manufactured at Jeffersonville by the glossy character of the paint, the finish on the aluminum coil stock, and the rubber stamp on the outside of the carton showing the initials of the particular operators of the forming machines. In summing up the testimony on this point the trial court said Mr. Pollett "found all returns to be the product of the Los Angeles plant and made with India paint * * * Mr. Pollett authorized the credits himself, mostly after India had repudiated its liability. The returns and the credits began to be heavy in the month of August, 1949. The repudiation occurred, I think it may fairly be said, in July. Mr. Pollett would not, under these circumstances, have recklessly approved a lot of credits and repayments to United's customers. There is a presumption of good faith on his part, and the Court believes his testimony that he did find what he says he found." From the foregoing it is clear there is no substance to India's claim that the returned stripping was not sufficiently identified as having been produced at United's Los Angeles plant.

[18] The basic difficulty with this and other factual issues in this case is that India would have us re-evaluate the credibility of the witnesses, reweigh the evidence and draw inferences therefrom contrary to those drawn by the trial court. Under well established principles, we are not at liberty to usurp the fact-finding function.

[19] The record completely discounts India's claim that United enhanced damages by shipping out sticky Venetian blinds in insulated cars known as "reefers" when it knew of, or by the exercise of reasonable care could have discovered, this condition. These cars were used experimentally on two to four occasions in an attempt by United to cooperate fully in seeking to alleviate and abate the stickiness problem. It was not cognizant that its shipments were of defective material, since the condition was latent and it was lulled into a groundless security by India's repeated and unwarranted assurances that each reformulation had overcome the factor engendering the stickiness.

Other matters raised by India do not require discussion because they are inconsequential and could not justify a different result. This case was thoroughly and competently tried, and we find no reason to disturb the determination made below.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; SHENK, Acting C. J., and CARTER and SCHAUER, JJ., dissenting.

123 Cal.App.2d 657

WOGMAN et al.

v.

WELLS FARGO BANK & UNION TRUST CO. et al.

Civ. 15725.

District Court of Appeal, First District, Division 1, California.

March 4, 1954.

Hearing Denied April 28, 1954.

Action in equity against trustee of trust and guardian ad litem for unborn heirs to terminate trust. From an order of the Superior Court, City & County of San Francisco, Frank T. Deasy, J., terminating the trust, the trustee appealed. The Court of Appeal, Peters, P. J., held that time for termination of trust under terms thereof had not arrived, that trust provisions did not violate rule against restraints on alienation, that there had not been proper representation of unborn heirs and that other grounds did not exist for termination of trust.

Order reversed.

1. Trusts 🔑61(1)

Improper investment policies and abuse of powers by trustee are not grounds for termination of trust.

2. Wills 🔑686(1)

Whether testator fixed duration of testamentary trust in will was to be ascertained primarily by interpreting language used in decree of distribution and not from language of will, although will could be looked to if terms of decree of distribution were ambiguous. Probate Code, § 1021.

3. Trusts 🔑61(1)

Where decree of final distribution distributing corpus of testamentary trust to trustee provided that upon expiration of 21 years from death of testator or upon death of his wife, his daughter, and her husband, whichever should be longer, the trust should cease, interested parties were not entitled to have trust terminated on ground that testator had expressed intent in will that trust should exist for a maximum of 21 years. Probate Code, § 1021.

4. Perpetuities 🔑6(4)

A testamentary trust which was to last for 21 years or during specified lives in being, whichever should be longer, did not violate rule against restraints on alienation under statute prohibiting suspension for longer period than continuance of lives of persons in being or 25 years. Civ.Code, § 715.

5. Perpetuities 🔑6(2)

In determining whether rule against restraints on alienation has been violated courts cannot wait and see what actually occurs before determining validity of trust, but validity must be determined as of date of testator's death.

6. Perpetuities 🔑6(4)

Under statute prohibiting suspension of absolute power of alienation for period longer than continuance of lives of persons in being or for period exceeding 25 years, a testator is not required to choose between the two alternatives and make such choice effective as of time of his death, but may properly provide that trust shall last for whichever period turns out to be the longest. Civ.Code, § 715.

7. Perpetuities ⚷6(3)

The statute prohibiting suspension of absolute power of alienation for period longer than continuance of lives of persons in being or for period exceeding 25 years was intended to prevent suspension of alienation beyond lives in being or 25 years and was not intended to trap testators, nor was it punitive in nature. Civ.Code, § 715.

8. Perpetuities ⚷6(3)

Under statute prohibiting suspension of absolute power of alienation for period longer than continuance of lives of persons in being or for period exceeding 25 years, a restraint which may last for any time in excess of those periods is invalid, and if restraint does not last longer than the longest of the two periods, it is valid. Civ. Code, § 715.

9. Executors and Administrators ⚷315(6)

Where decree distributing corpus of testamentary trust was entered in 1929, validity of trust was conclusively established and issue of whether trust violated rule against restraints on alienation could not be litigated in suit commenced in 1950 seeking termination of the trust. Civ.Code, § 715.

10. Trusts ⚷61(1, 3)

Trust may be terminated in advance of time fixed by trust instrument where purpose of trust has been fulfilled, termination will help to effectuate testator's general intent, where there have been unforeseen and material changes in circumstances, and where all beneficiaries consent to such termination.

11. Trusts ⚷61(1)

Where testator's purpose as expressed in testamentary trust was that his daughter was to be an income beneficiary, but that she in no event was to get the corpus, there was no basis for terminating trust during daughter's lifetime, on ground that purpose had been fulfilled, in order that corpus might be transferred to daughter.

12. Trusts ⚷61(3)

Consent of all living beneficiaries of trust to termination thereof prior to time fixed by trust instrument was insufficient basis for termination in view of interest in the income of possible unborn children of 58 year old woman. Civ.Code, § 779.

13. Infants ⚷77, 115

Under statute authorizing appointment of guardian ad litem to represent persons not ascertained and not in being who might be interested in property it is incumbent on trial court in the first instance, and upon appellate court in the second, to determine whether such guardian has in fact acted to protect his wards. Code Civ.Proc. § 373.5.

14. Infants ⚷77

Where guardian ad litem was appointed to represent unborn and unascertained heirs in proceeding for termination of testamentary trust, but guardian ad litem, although filing an appearance, did not participate in any way in the trial, there was no true representation of the unborn heirs, and, in absence thereof, trust could not properly be terminated. Code Civ.Proc. § 373.5.

15. Trusts ⚷61(1)

Decrease in income from trust, increase of cost of living, death of alternative beneficiaries and desire of sole beneficiary, who was receiving income, to obtain corpus to buy a home, did not constitute changed circumstances justifying termination of trust, where termination would violate testator's intent.

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Edward W. Rosston, Heller, Ehrman, White & McAuliffe, San Francisco, for appellant.

Gordon McKenzie, Ruth E. Bates, Santa Rosa, for respondents.

PETERS, Presiding Justice.

Alta P. Wogman, the only child of Hans Petersen, a deceased trustor, her husband Walfrid, and their adult child Vincent, brought this action in equity against the trustee of the trust and the guardian *ad litem* for the unborn and unascertained heirs of Alta, to modify and/or terminate a trust created by the will of Hans Petersen, who died in 1928. Eggers, the guardian, filed an appearance, but in no other way participated in the proceedings. The trial court terminated the trust and ordered the corpus to be transferred, unconditionally, to Alta. The Wells Fargo Bank and Union Trust Co., the trustee of the trust, appeals. Eggers is not a party to this appeal.

When the testator died on July 11, 1928, he was 71 years of age, having executed his will in January of 1928. He was survived by his third wife Petra, then 58, by his daughter Alta, then 32, who was married to Walfrid. Alta and Walfrid had one child, Vincent, then 8 years of age. By the will the testator created a trust as to that portion of his estate that was his separate property. The value of the corpus of the trust estate at the time of the death of the testator was $29,000. At the time of trial (June of 1951) it was valued at $25,000.

The will provided that the trust was to last "for twenty-one (21) years from the date of my death and until the deaths of my wife, Petra C. Petersen, of my daughter, Alta Peterson Wagman, and of Walfrid M. Wagman, the husband of my daughter, Alta Petersen Wagman." It provided that the trust income should be disbursed as follows:

1. To pay $30 a month to Petra, during her life.

2. To pay the rest of the income (all of it upon the death of Petra) to his daughter Alta during her life.

3. If Alta died before the end of the trust to pay her share of the income to her children, and if she left no children, then to two designated sisters of the deceased. No express provision for the disposition of the corpus upon the termination of the trust was made in the will, although Alta was made residuary legatee. The trustee was not given any power to use any of the corpus for any purpose during the continuance of the trust.

The decree of final distribution was entered in September of 1929. No challenge was made by anyone of any of its terms. It distributed the corpus of the trust to appellant as trustee, generally provided for the purposes of the trust in language substantially similar to that used in the will, and provide for the period of duration and termination of the trust in the following language: "Upon the expiration of said period of twenty-one (21) years from July 11, 1928, the date of the death of said Hans Petersen, deceased, or upon the death of his surviving wife, Petra C. Petersen, his daughter, Alta Petersen Wagman, and Walfrid M. Wagman, the husband of his daughter Alta Petersen Wagman, whichever shall be the longer, said Trust shall cease and determine and the Trust Estate then remaining in the hands of said Trustee shall vest in and go to the heirs at law of Alta Petersen Wagman, in accordance with the laws of Succession of the State of California then in force."

Petra died in 1942, and the two sisters of the deceased named as alternate income beneficiaries to take if Alta died childless before the termination of the trust, died in 1928 and 1938, respectively.[1] The petition here involved was filed in 1950. At that time Alta was 55. Her son Vincent was 31, and was married, but childless. Thus, the only named income beneficiaries then alive were Alta and Vincent, and the only other income beneficiaries would be future children born to Alta who would share in the income if Alta predeceased Vincent or Walfrid. In addition, if Alta survives her husband and son and then dies, then a wholly new set of heirs at law, not necessarily unborn but not ascertainable until her death, would inherit the corpus.

At the trial the only witnesses, all called by respondents, were Alta, Vincent and the trust officer of appellant. Most of the evidence was directed towards showing the present financial condition of the Wogmans and the amount of income of the trust, respondents challenging the investment policies of the trustee. It was admitted that Alta and her husband are not destitute. Over the past four or five years they have averaged about $3,500 annually, including the income from the trust, which now runs to about $60 per month. Walfrid had been a farmer for some time, but for the six or seven years prior to trial he and his wife had been in the real estate business in Sebastapol, California. They do not own their own home, but do own an automobile. They wish to use a portion of the corpus to buy a home.

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[1] These facts as to the deaths of Petra, and the sisters are alleged in the petition here involved. These allegations are denied by the answer. There is no evidence in the record establishing these facts. The trial court found that these allegations were true. On this appeal both sides accept these findings. For the purposes of this appeal these facts will be accepted as true.

[1] There is much evidence as to the investment policies of the trustee in relation to the corpus of this trust. These policies, and whether the trustee abused its powers, are problems not involved on this appeal. The trust could not be terminated because of these matters, there being other less heroic remedies for such abuses, if they exist.

The trial court found that the will disclosed an intent on the part of the testator to protect his wife and daughter; that the wording of the will indicates that the trustor intended that the trust should continue for a maximum of 21 years; that no provision in the will was made for the vesting of the corpus; that Vincent and Walfrid have consented to the termination; that contingent beneficiaries are represented by a guardian *ad litem;* that the purposes of the trustor have been fulfilled; that it is in the best interests of all that the trust be terminated; that the trustee has had no interest in the trust since July 11, 1949, when the trust became void under section 715 of the Civil Code. The judgment decreed that the trust be terminated as of July 11, 1949, twenty-one years after the death of the testator, and the trustee was directed to transfer all of the corpus remaining to Alta.

From the findings it is quite apparent that the trial court was convinced, and so held, that under the terms of the will the testator had expressed an intent that the trust should exist for a maximum of 21 years, and that by terminating the trust as of July 11, 1949,[2] it was merely terminating the trust in accordance with its terms as set forth in the will. It is also clear that the trial court was also of the opinion, and so held, that if this was not the proper interpretation of the will, then the trust provision was invalid as a violation of the rule against remoteness of vesting contained in section 715 of the Civil Code. Both conclusions, in our opinion, are unsound.

[2] Whether the testator expressed an intent that the trust should last but 21 years, must be ascertained primarily by interpreting the language used in the decree of distribution and not from the language used in the will. It is true that where the terms of the decree of distribution are ambiguous the will may be looked to in order to clarify the ambiguity. Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 165 P.2d 15, 163 A.L.R. 838; Mitchell v. Bagot, 48 Cal.App.2d 281, 119 P.2d 758. But where the terms of the decree are clear, such terms control, regardless of the language of the will. Section 1021 of the Probate Code expressly provides that the decree of distribution "when it becomes final, is conclusive as to the rights of heirs, devisees and legatees." In Estate of Loring, 29 Cal.2d 423, 175 P.2d 524, it was held that this provision includes a beneficiary under a testamentary trust.

[3] In the instant case the decree of distribution is not ambiguous. In clear terms it is provided that the trust is to last for 21 years or until the death of the last survivor of three named individuals, whichever is the longest, at which time the corpus is to vest in the heirs at law of Alta. Thus, even if the will provided that the trust should terminate at the end of 21 years, the provisions of the decree would prevail. But the will does not so provide. It provides that the trust was to continue for 21 years from the death of the testator "and" until the deaths of the three named

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[2] This was precisely 21 years from the death of the testator. The decree of termination was entered October 20, 1952.

persons. The decree properly interpreted this provision.

The contention that, because the trust was to last for 21 years or the longer of three named lives in being, it violated the rule against restraints on alienation is equally unsound.

Section 715 of the Civil Code as it read at the time of the decree of distribution provided, so far as pertinent here:

"* * * the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows:

"1. During the continuance of the lives of persons in being at the creation of the limitation or condition; or

"2. For a period not to exceed twenty-five years from the time of the creation of the suspension."

[4-8] Respondents' theory is that because the instant trust is to last for lives in being or 21 years, whichever turns out to be the longest, the section has been violated. It is argued that, while the section provides for alternatives, the choice between such alternatives must be made at the time the trust is created, and cannot await the determination of which alternative in fact will permit the trust to last the longer period. There is no warrant for such an interpretation either in the language of the section or in the cases interpreting it. Cases such as Estate of Steele, 124 Cal. 533, 57 P. 564; Estate of Whitney, 176 Cal. 12, 167 P. 399; and In re Walkerly's Estate, 108 Cal. 627, 41 P. 772, involved interpretations of section 715 as it read prior to its amendment in 1917. At the time these cases were decided the statute contained no alternative, simply providing that the suspension of alienation could not be made for longer than lives in being. They held, quite properly, that if the trust provided that the power of alienation under any possibility could be suspended beyond lives in being it was invalid. You could not wait to see what factually might occur. Estate of Maltman, 195 Cal. 643, 234 P. 898, applied the same rule after the 25-year alternative was added to the section. It too held that if, under the terms of the trust, by any possibility, the period of alienation could be suspended beyond the longest period set forth in the statute, the trust was invalid. The courts cannot wait and see what set of facts actually occurs before determining the validity of the trust. Such validity must be determined as of the date of the testator's death. These principles are well settled. But respondents contend that not only must the validity of the trust be determined as of the death of the testator, but also that the testator must choose between the two alternatives set forth in the section and make such choice effective as of the time of his death. He cannot, according to respondents, provide that the trust shall last for whichever period turns out to be the longest. This is a strained, unnatural interpretation of the section. While validity must be determined at the time of death, in determining validity no reason exists why a trust should be invalidated where it does not violate the statute but simply provides for the longest of the two alternatives set forth in the statute. The purpose of section 715 is not to trap testators, nor is the section punitive in nature. Estate of Micheletti, 24 Cal.2d 904, 151 P.2d 833; Estate of Sahlender, 89 Cal.App.2d 329, 201 P.2d 69. The statute sets up two measures. If the restraint may last for any time in excess of these periods, it is invalid. If the restraint does not last longer than the longest of the two periods, it is not too long, and is valid. The obvious purpose of the statute is to prevent the suspension of alienation beyond lives in being or 25 years. If, as here, the trust must terminate within either of the two periods specified in the section, it does not violate that policy, even though it provides that such trust is to last for the longer of the two periods. This interpretation is implied in Estate of Sahlender, 89 Cal.App.2d 329, 201 P.2d 69; and Estate of McCollum, 43 Cal.App.2d 313, 110 P.2d 721; and is in accordance with the letter and spirit of the statute.

[9] Moreover, even if the trust did violate the section (which it does not), that issue cannot be litigated at this late date. The decree of distribution was entered in 1929, and for many years has been final. That decree of distribution conclusively es-

tablished not only the interpretation of the terms of the trust, but also its validity. Crew v. Pratt, 119 Cal. 139, 51 P. 38; Matter of Trescony's Estate, 119 Cal. 568, 51 P. 951; Smith v. Vandepeer, 3 Cal.App. 300, 85 P. 136; Estate of Loring, 29 Cal.2d 423, 175 P.2d 524; see cases collected 11B Cal.Jur. p. 796, § 1296. While it is true that the case of Wharton v. Mollinet, 103 Cal. App.2d 710, 229 P.2d 861, holds that the portion of a final decree creating an estate in conflict with the statutes is a nullity and may be attacked at any time, and so is contrary to the above cases, it is worthy of mention that no hearing in the Supreme Court was asked in that case, nor does the opinion cite or mention Crew v. Pratt or any of the numerous cases following it. Under such circumstances it is doubtful whether that case states sound law. If Crew v. Pratt and the cases following it are to be overruled, such should be done directly and not indirectly, and should be done by the Supreme Court and not by an appellate court.

[10] The next question is whether the trust was properly terminated for any of the other reasons set forth in the findings. Both sides agree that a court of equity, under proper circumstances, may terminate a trust in advance of the time fixed by the trust instrument. Generally speaking, such termination will be permitted where the purpose of the trust has been fulfilled, where such termination will help to effectuate the trustor's general intent, where there has been unforeseen and material changes in circumstances, and where all the beneficiaries consent to such termination. See cases collected 25 Cal.Jur. p. 293, § 150.

[11] Respondents argue that the purpose of the trust has been fulfilled and that termination will carry out the testator's intent. It is urged that under the provisions of the will the testator disclosed a primary purpose and intent to provide for the financial well-being of Alta. Then, basing their argument on the erroneous interpretation of the will and the trust found in the findings and already discussed, it is argued that the testator intended the trust to last for a maximum of 21 years and so contemplated that the trust might be terminated within Alta's lifetime. This claimed purpose and intent cannot be spelled out of the will or decree. Certainly, under the decree of distribution the intent of the testator and the purpose of the trust were expressed to be that Alta was to be an income beneficiary, but in no event was she to get the corpus, which was to go to her heirs at law upon her death. Under the terms of either the will or the decree, the only provision made in the trust for Alta is the gift of income for her life, with alternative gifts over if Alta should die before the termination of the trust, and Alta's life is made one of the measures for the termination of the trust in that in no event was the trust to end before her death. The testator wanted Alta to have an assured income for life. He certainly did not intend that she should have the corpus. This is made crystal clear by the fact that the testator did not see fit to confer on the trustee the power to invade the corpus even in the case of great need on the part of Alta. Thus, the termination of this trust and the transfer of the corpus to Alta not only would not carry out the purpose of the trust and effectuate the trustor's intent, but would do violence to them.

[12] Moreover, to authorize a court of equity to terminate a trust before the period provided in the trust has expired a minimum requirement is that all of the beneficiaries affected must consent. Alta, Walfrid and Vincent join in this action requesting a termination, so, of course, consent to it. But other possible beneficiaries have an interest. Upon Alta's death the corpus, pursuant to the terms of the decree of distribution, is to go to the heirs at law of Alta, a presently unascertainable group who, in this state, have an interest in the corpus of the trust by purchase and not by descent. § 779, Civ.Code. Moreover, the decree provides that if Alta predeceases Walfrid and Vincent, certainly a possible contingency, the income is to go to her children. While Alta has now only one child, Vincent, and he has consented to the termination, and while she is now nearly 58, so that the probability of having any more children is extremely remote, Estate of Sahlender, 89

Cal.App.2d 329, 354, 201 P.2d 69 such a legal possibility exists. Those possible unborn children have an interest in the income.

Jurisdiction over these unborn and unascertained heirs was secured by the appointment of one Eggers as their guardian *ad litem.* He is made a defendant in this proceeding. His appointment as guardian was made pursuant to the provisions of section 373.5 of the Code of Civil Procedure, first added to our statutory law in 1949. It provides: "If under the terms of a written instrument, or otherwise, a person or persons of a designated class who are not ascertained or who are not in being, may be or may become legally or equitably interested in any property, real or personal, the court in which any action, petition or proceeding of any kind relative to or affecting such property is pending, may, upon the representation of any party thereto, or of any person interested, appoint a suitable person to appear and act therein as guardian ad litem of such person or persons not ascertained or not in being; and the judgment, order or decree in such proceedings, made after such appointment, shall be conclusive upon all persons for whom such guardian ad litem was appointed. * *" This statute codified the rule of "virtual representation" that has been recognized in this state since at least 1910. County of Los Angeles v. Winans, 13 Cal.App. 234, 109 P. 640; see good discussion of the cases in Mabry v. Scott, 51 Cal.App.2d 245, 124 P.2d 659. Under that rule the appellate courts were required to examine the facts to see whether the persons not represented in court were actually represented by their guardian, or whether his appearance was a sham or the result of collusion or fraud. In Garside v. Garside, 80 Cal.App.2d 318, 328, 181 P.2d 665, 672, this limitation on the rule as it existed prior to 1949 was expressed as follows: "From the Winans case, and from the California cases postdating that case [citing them] it can be stated as a general rule that whether there has been a true and legal virtual representation depends upon the facts of each case, and if it appears that there has been such representation, and that the rights of unborns have been considered and preserved, the doctrine will apply. This is substantially the rule announced in the Restatement. (Restatement of Property, § 182.)"

[13] While the statute does not set forth this limitation in express language, it does contain language from which such limitation should be implied. It requires the court to appoint "a suitable person to appear and *act*" as guardian for those not present. Note that the guardian is required not only to "appear," but to "act" for the protection of those not present. It is incumbent on the trial court in the first instance, and upon the appellate court in the second, to determine whether such guardian has in fact acted to protect his wards. It follows that the rule in existence before the adoption of the statute, which rule required the appellate court to examine the record to see if those not present have in fact been truly represented, is still the law of this state.

What does the record show in this regard? It shows that on October 18, 1950, Eggers, at his own request, petitioned to be appointed guardian *ad litem* for the unborn and unascertained heirs in order to represent them in the pending termination proceeding. On the same day he was so appointed. He was then, in the amended petition filed the same day, made a defendant. The termination proceeding went to trial on June 27, 1951. On that day Eggers, as guardian *ad litem,* filed a written appearance, an admission of service, and a consent that the cause could proceed to trial. That is all the record shows. So far as the record shows, neither Eggers nor his counsel participated in any way in the trial. He has not joined in the appeal.

[14] It is at once apparent that Eggers did not expressly consent to the termination of the trust. For the legal effect of lack of consent see Estate of Van Deusen, 30 Cal.2d 285, 182 P.2d 565. Nor was his formal default taken. It is also apparent, if his failure to object amounted to an implied consent, that in no true sense were the unborn and unascertained heirs in fact represented. While the guardian did appear on their behalf, he did not "act" on their behalf. Yet the effect of the trial court's decree is to deprive some of these persons from ultimately getting the corpus of the trust.

There was no true representation of these unborn and unascertained heirs in this case. This alone would require a reversal.

[15] Nor do we think that the claimed change in circumstances here shown to exist justified the court, had the law otherwise been followed, in terminating the trust. The basic changes that have occurred since the decree of distribution are that it is claimed that the corpus has produced a smaller income than anticipated (although no showing was made as to what income was anticipated), and the testator's wife and his two sisters, alternative beneficiaries, have died. Alta is now middle aged, is the sole beneficiary now receiving the income, and is unable to buy a home, which she desires to do. While the income from the trust has decreased, the cost of living has increased. Such facts do not warrant the exercise of the power of terminating a trust contrary to the trust provisions in a case where such termination would, as already held, violate the main purpose of the trust and the intent of the testator. See Estate of Van Deusen, 30 Cal.2d 285, 182 P.2d 565.

The order appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

M & M LIVESTOCK TRANSPORT CO.
v.
CALIFORNIA AUTO TRANSPORT CO. et al.*

BAKER v. ALVES et al.
Civ. 4674, 4676.

District Court of Appeal, Fourth District, California.

March 12, 1954.

Rehearing Denied April 8, 1954.

Hearing Granted May 6, 1954.

Actions were brought to recover for damage to trucks in collision between several trucks. The Superior Court, Kern County, R. B. Lambert, J., entered judgments in favor of plaintiffs, and certain of the defendants appealed. The District Court of Appeal, Griffin, J., held that truck driver who attempted to overtake and pass tractor-trailer truck on blind curve on upgrade was contributorily negligent as a matter of law, and that question whether driver of cattle truck was contributorily negligent for following too closely behind trucks ahead was for Superior Court sitting without a jury.

One of the judgments reversed, and the other judgment affirmed.

1. Evidence 🔑5(2)

It is common knowledge that it is inherently dangerous for driver of automobile to attempt to pass a long tractor-trailer while going uphill and around a blind curve.

2. Automobiles 🔑244(42)

In action by owner of automobile carrier truck for damage to truck when owner of automobile carrier truck attempted to overtake and pass tractor-trailer truck on blind curve on upgrade and was struck by on-coming vegetable truck, evidence established as a matter of law that driver of automobile carrier truck was contributorily negligent. Vehicle Code, §§ 525, 528, 530.

3. Automobiles 🔑227

In action by owner of automobile carrier truck for damage to truck when owner of automobile carrier truck attempted to overtake and pass tractor-trailer truck on blind curve on upgrade and was struck by on-coming vegetable truck, last clear chance doctrine was not applicable under evidence.

4. Negligence 🔑83.5

The last clear chance doctrine presupposes that one injured was placed in such position of peril through his own negligence.

5. Automobiles 🔑172(2)

Section of the Vehicle Code providing that driver of motor vehicle shall not follow another vehicle more closely than is reasonable and prudent does not prevent driver from overtaking and passing another vehicle traveling in the same direction. Vehicle Code, § 531.

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* Subsequent opinion 279 P.2d 13.

6. Automobiles ⚷245(81)

In action by owner of cattle truck to recover for damage to cattle truck when on-coming vegetable truck struck automobile carrier truck head on and drove automobile carrier truck back into cattle truck, question whether driver of cattle truck was contributorily negligent in following too closely behind vehicles immediately preceding it was for trial court sitting without a jury. Vehicle Code, § 531.

◆

Conron, Heard & James, Bakersfield, for appellants.

Kenneth J. Thayer, Dorsett M. Phillips, Bakersfield, for respondent M & M Livestock Transport Co.

William A. Kurlander, San Francisco, for respondent Vern Baker.

GRIFFIN, Justice.

These consolidated actions, with others, for property damage to trucks, were tried before the court, sitting without a jury. In each case plaintiff obtained a judgment against defendants and appellants. Defendants concede that the finding of the court that they were negligent is supported by some evidence. No point is raised in this respect. Their only contention is that the finding of the court that plaintiff, in each action, was not guilty of contributory negligence contributing proximately to the cause of the accident, is not justified, and that such finding is not supported by the evidence since it shows, as a matter of law, to the contrary.

It has been stated that cases where the courts have held, as a matter of law, that the negligence of the plaintiff contributed proximately to the accident "are rare". Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826. We conclude, however, that if there is any case in which the evidence would justify a conclusion that the plaintiff was guilty of contributory negligence as a matter of law, the instant case most likely comes within that exception, as far as it affects the judgment rendered in favor of plaintiff Vern Baker.

As to the Baker case, the evidence shows that a collision between several trucks occurred on April 12, 1951, about 2 p. m., on a clear day on Highway 466, at a point approximately 1½ miles west of Clear Creek Station leading from Tehachapi to Bakersfield in what is described as mountainous terrain in the Tehachapi Mountains. At the point of impact the highway was approximately 27 feet wide with a shoulder of approximately 2½ feet on each edge thereof. There were steep embankments to ravines below on each side of the road. There was a broken marked center line and the highway ran generally in an east-west direction. The upgrade of the road traveling easterly averaged about 6 per cent. From the point of impact to the east, visibility was obstructed for 408 to 455 feet by a bank and curve in the highway. To the west of the point of impact visibility was unobstructed for a distance of about 680 feet.

Immediately prior to the accident, three trucks, all averaging 60 feet in length and 96 inches in width were proceeding upgrade towards Tehachapi. The Automobile Forwarding Service truck, a two-ton tractor-trailer type, driven by Charles French, was hauling a load of four cars. It was traveling in its proper east-bound lane. Before the accident French observed a cattle truck following him through his rear view mirror. Apparently it was a trailer-truck belonging to M & M Livestock Transport Co., which was empty and was being driven by one Lacert. Immediately before the accident French heard the approach of an unloaded top type automobile carrier truck driven by plaintiff Baker, which was overtaking him to his left in the west-bound lane. The evidence shows that Baker was traveling upgrade about 12 to 15 miles per hour and that French was traveling about 7 to 8 miles per hour; that these two vehicles traveled alongside each other a distance of 75 feet or more; that both east-bound vehicles were in motion and were parallel to each other or approximately so when the Peterbuilt tractor-trailer truck loaded with fresh vegetables, driven by one Madrid, and belonging to defendant Walter Alves, came into view traveling westerly from behind an embankment at a distance of about 400 feet. It appears that when French observed the predicament which presented itself, and knowing that Baker was going to be unable to clear his truck by proceeding toward the east-bound lane, French pulled his truck to his right a short distance, stopped, set his brakes, and jumped to safety out of the right-hand door of his truck. He testified that Baker's tractor had proceeded a short distance past his tractor and that he then noticed it "faltered", apparently due to some gear-shifting trouble, slowed up, and the driver, Baker, set his brakes; that his equipment was about two or three feet distant from the Baker equipment, which was still mainly in the west-bound lane; (another witness testified it was 6 feet); that being unable to stop, the Alves truck No. 1 collided first with the right front portion of the Baker truck and then struck the left portion of the French truck after forcing them both backward in a jackknife position; and that as a result a collision occurred with defendant M & M Livestock Transport Co.'s truck and trailer driven by Lacert, causing considerable damage by reason of the collision as well as by fire.

It appears that shortly after the Alves truck No. 1 collided, a similar Alves truck-trailer No. 2, driven by defendant Gonzales, came around the same turn, traveling west, and not being able to stop his equipment after skidding the tires a distance of 445 feet, struck Alves truck No. 1 and turned over on the east-bound lane.

The testimony as to the speed of the Alves truck No. 1 when it rounded the curve is varied. Madrid estimated it at from 35 to 40 miles per hour and that at the time of the actual impact he had slowed it down to 15 to 12 miles per hour. There is evidence that his truck caused skid marks for a distance of 250 feet. Baker estimated Madrid's speed at the time it struck his tractor at 50 miles per hour. The driver of the M & M Livestock Transport Co.'s truck estimated Madrid's speed at 35 to 40 miles per hour as it approached toward the scene of the accident. Another witness and his wife testified that they were following Madrid for some time in their car and the truck was going about 40 miles per hour; that Madrid rounded the curve in the road and that they followed him; that two trucks were coming east and they had the entire road blocked; that they witnessed the collision and then stopped their car to the right side of the highway about 40 feet from the point of collision; that Alves truck No. 2 came around the curve and ran into truck No. 1 and turned over.

Plaintiff produced a witness who claimed that this witness (the husband) on a later occasion, stated that he did not see the collision but that he came around the turn after the trucks had already collided; that the cars on the "wrong side of the line" were burning and the drivers had already "gotten out of the trucks". There was further testimony by Baker that this witness made a statement in his presence, that the Alves drivers had "nearly run him off the road". The witness denied any such statement.

At the close of plaintiffs' evidence, he produced a witness, a lawyer, approaching from the East, who claimed he was traveling west on the highway that day; that about one-half mile east of the point of collision two Alves trucks traveling close together overtook and passed him; that he was traveling 45 miles per hour and he estimated their speed at 10 to 15 miles per hour faster than he was going; that later he heard the impact and after rounding the curve saw the results of the collisions. No person was injured but the tractors and trailers suffered major damage.

Based upon the evidence produced the court found that the sole and proximate cause of the accident was the negligence of defendant Walter Alves and the drivers of the Alves vehicles (this was apparently based upon the speed of the trucks); that plaintiff Vern Baker was guilty of no negligence contributing proximately to the damage to his truck; found against Alves on his cross-complaint against Baker; and entered judgment for Baker for $4225.

Defendants argue that they were entitled to travel at a speed of 55 miles per hour under sec. 511 of the Vehicle Code, and accordingly plaintiff was bound to anticipate the presence of cars approaching from the east at such speed when endeavoring to overtake and pass another vehicle proceeding in the same direction.

Section 510 of the Vehicle Code establishes the basic speed law and it requires, notwithstanding section 511 of the Vehicle Code, that a person drive his car upon the highway at no greater speed than is reasonable and prudent, having due regard for the traffic on the highway, and in no event at a speed which endangers persons or property. Section 515 of the Vehicle Code provides that "No person shall operate upon any highway any of the following vehicles when equipped entirely with pneumatic tires at any speed in excess of 40 miles per hour: (1) Any motor truck and trailer. (2) Any motor truck alone or truck tractor with semi-trailer having a gross weight, of vehicle and load or of such vehicles and load of 25,000 pounds or more." Since defendants make no point of the sufficiency of the evidence to justify a finding of negligence against them, we will not labor the point.

As to Baker's actions and conduct, the evidence is in practically no dispute. He had been proceeding easterly in the eastbound lane and had been endeavoring to pass the French truck for some distance. On this curve he made the attempt. The French truck was proceeding uphill at about 7 or 8 miles per hour. Apparently Baker's truck would be, under any mathematical calculation, unable to pass it within any short distance traveling at 12 to 15 miles per hour. Apparently Baker mistook his ability to completely negotiate the operation of overtaking and passing the French truck within the required time under the conditions present. It is apparent that Madrid, with his 65,000 lbs. of cargo and equipment, had no opportunity to avoid the collision, even if he had been proceeding under the basic speed law or in conformity with sec. 515 of the Vehicle Code, when it was discovered that the highway was completely blocked by Baker's action at the time Madrid rounded the curve in the highway at a distance of only 400 feet or less from Baker.

To find that Baker was guilty of no contributory negligence, it seems to us, does violence to the sections of the Vehicle Code setting forth the legal principles involved.

Section 525 of the Vehicle Code provides:

> "(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:
>
> "(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement."

Section 528 provides:

> "The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to the limitations and exceptions hereinafter stated:
>
> "(a) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle."

Section 530 provides:

> "(a) Except when a roadway has been divided into three traffic lanes, no vehicle shall be driven to the left side of the center line of a roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction.

> "(b) No vehicle shall at any time be driven to the left side of the roadway under the following conditions:
>
> "1. When approaching the crest of a grade or upon a curve in the highway where the driver's view is obstructed within such distance as to create a hazard in the event another vehicle might approach from the opposite direction."

In Yeager v. Bray, 138 Cal.App. 328, 32 P.2d 396, after setting forth certain calculations of speed and time, it was held that the evidence produced showed a violation of these sections and unerringly pointed to negligence causing or contributing to the injury.

Plaintiffs rely principally upon the decision in Pohler v. Humboldt Motor Stages, Inc., 100 Cal.App.2d 571, 224 P.2d 440, 442, in support of the finding and judgment. There it was said, as to "the turning movement" on the highway: "All that is required is that he take the precautions which a reasonably prudent person would take under the circumstances reasonably appearing to him at the time." The facts there under consideration were substantially different from those presented in the instant case.

In Satterlee v. Orange Glenn School District, 29 Cal.2d 581, 177 P.2d 279, 283, in setting forth the legal principles applicable to the doctrine of contributory negligence as a matter of law, it is said:

> "An act or failure to act below the statutory standard is negligence *per se*, or negligence as a matter of law. And if the evidence establishes that the plaintiff's or defendant's violation of the statute or ordinance proximately caused the injury and no excuse or justification for violation is shown by the evidence, responsibility may be fixed upon the violator without other proof of failure to exercise due care. * * An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, but the presumption is not conclusive and may be rebutted by showing that the act was justifiable or excusable under the circumstances. Until so rebutted, it is conclusive."

No showing of justification or excuse for Baker's passing the truck under the circumstances here related is made.

In Bartuluci v. San Joaquin Light & Power Corporation, 21 Cal.App.2d 376, 69 P.2d 440, 445, it is said (quoting from Fernandes v. Sacramento City Ry. Co., 52 Cal. 45):

> "But when there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, the question of negligence is purely one of law. * * *"

[1, 2] As a matter of common knowledge, it would be inherently dangerous for the driver of a passenger car to try to pass such a long tractor and trailer while going uphill and rounding a blind curve, with such a limited view of the road ahead, and with the probability that other vehicles would be coming downhill at a greater speed. It would be much more dangerous, inherently, for the driver of a slow-moving and long tractor-trailer to attempt to do this. The uncontradicted portion of the evidence discloses an obviously dangerous situation which would be apparent to any person of ordinary prudence, regardless of whether or not the speed of the vehicle which happens to come downhill, around the turn, is greater than it should have been. Any inference deducible from the evidence presented points unerringly to the contributory negligence of the plaintiff Baker.

[3, 4] Plaintiff further contends that the judgment could be supported under the theory that defendants had the last clear chance to avoid the collision. Under the findings of no negligence on the part of the plaintiff, the photographs of conditions there existing, and the evidence produced, the last clear chance doctrine was not applicable. The rule presupposes that the one injured was placed in such position of peril through his own negligence. Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36.

As to the M & M Livestock Transport Co. case a different situation arises from the conflicting evidence produced. The testimony shows that there were several such empty cattle-carrying trucks belonging to that plaintiff and trailing each other in an easterly direction with truck No. 12 in the lead and No. 11 following it. They were preceded by the empty Baker car carrier. Apparently some of them had been awaiting an opportunity to overtake and pass the French truck. The driver of truck No. 11 (Shand) testified that just shortly before the accident, Baker attempted to pass the French truck; that he (Shand) was driving his truck about 350 to 400 feet behind the Baker truck at the time; that truck No. 12 was being driven along behind the Baker truck about 250 feet ahead of truck No. 11 and waiting to turn out and also pass by the French truck; that the front part of tractor-truck No. 12 was in the west-bound lane and that both drivers of trucks No. 11 and No. 12 were "keeping our distance" from the truck ahead, "which is the drivers' law"; that about that time, a distance of about 800 feet ahead, he first saw the approach of the first Alves truck coming around the bend; that when Baker and French stopped their trucks the drivers of both plaintiff's trucks also stopped their trucks and that the front of tractor-truck No. 12 was then about 10 feet to the rear of the French truck and that the Alves truck came down the center line and struck both the Baker and French trucks and drove the Baker truck back into truck No. 12 and caused the collision with it and the resultant fire; that no injury resulted to his truck No. 11.

The driver of truck No. 12 testified that he was driving behind the French truck "about 100 to 150 feet" when the Baker truck turned out and started to pass the French truck; that he then slowed down and got up to within 30 to 35 feet of them; that the Alves truck was not in sight at that time; that when the rear ends of both the Baker and French trucks were about even with each other, the Baker truck seemed to stop for some unknown reason; that it was then about 300 or 400 feet from the turn; that he then saw the Alves truck coming and he swerved his truck somewhat to his left so that the front wheel of tractor was over the center line a foot or two, and he then set his brakes and jumped out of his truck; that the Alves truck first hit the Baker truck and an explosion occurred, and the Baker truck collided with his tractor and jackknifed it against the truck bed.

[5, 6] It is defendants' contention that plaintiff violated section 531 of the Vehicle Code in following too closely behind the vehicles immediately preceding it and within less than 300 feet to the rear thereof. That section does not prevent overtaking and passing another vehicle traveling in the same direction. Apparently, this latter act was what plaintiff's driver was contemplating. A compulsory finding that this section was violated is not indicated. The evidence as to the location of truck No. 12 in respect to the trucks preceding it was in conflict. Whether the section had been violated and whether such claimed violation was the proximate cause contributing to the damage to plaintiff's truck No. 12 was a factual question for the trial court, and cannot be disturbed on appeal. Hosi v. La Vey, 102 Cal.App.2d 597, 228 P.2d 35; Church v. Headrick & Brown, 101 Cal.App.2d 396, 225 P.2d 558.

Accordingly, the judgment in favor of Vern Baker as against the defendants and appellants Walter Alves, Hanley H. Madrid, and Floyd Gonzales, is reversed. The judgment in favor of the M & M Livestock Transport Co. and against Walter Alves, Hanley H. Madrid and Floyd Gonzales, is affirmed. In action No. 4674, plaintiff M & M Livestock Transport Co. to recover its costs on appeal. In action No. 4676, defendants and appellants Walter Alves, et al., to recover their costs against plaintiff Vern Baker.

BARNARD, P. J., and MUSSELL, J., concur.

123 Cal.App.2d 712

TALBOT v. GADIA et al.

Civ. 8375.

District Court of Appeal, Third District, California.

March 8, 1954.

Action to quiet title to real and personal property and recover damages. The Superior Court, Sacramento County, Glenn, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Schottky, J., held that since plaintiff had acquiesced in transaction by which husband, since deceased, had taken legal title to the property in the name of himself and plaintiff as joint tenants as security for community funds advanced to defendant to purchase the property, plaintiff was bound by transaction and that defendant was properly given 60 days in which to tender amount owing plaintiff and obtain from her conveyance of title to the property.

Judgment affirmed.

1. Appeal and Error ⚿931(1)

On appeal, all conflicts in the evidence must be resolved in favor of prevailing party.

2. Mortgages ⚿32(3)
Trusts ⚿72

Where conveyance is executed from vendor directly to lender, to secure loan of the purchase money made by him to purchaser, legal title is held not only for lender as security, but also in trust for borrower for purpose of finally having title go to him, and lender is trustee of the legal title and also mortgagee for the money advanced for purchase.

3. Mortgages ⚿37(2)

Parol evidence is admissible to show that a conveyance of realty, though absolute in form, is in fact a mortgage.

4. Mortgages ⚿32(3)

Where money advanced for purchase of real and personal property was community property of lender and wife, title to the property was taken in name of lender and wife as joint tenants as security for the loan, and lender's wife was aware of transaction and accepted payments on account of loan after death of lender, the transaction constituted a mortgage, even though borrower never held legal title to the property, and lender's surviving widow, having accepted benefits of transaction, was bound thereby, and she did not take title to the property as surviving joint tenant or bona fide purchaser free from trust in favor of borrower.

5. Bills and Notes ⚿129(2)

Negotiable note, providing for payment one day after date, but also providing for annual interest at six per cent payable in advance and then upon default in interest payments for 30 days, the whole of the principal should become due and payable at option of holder, was ambiguous as to time of payment, and acceptance of payments of both principal and interest in varying amounts at irregular intervals indicated that the parties treated instrument as a demand note.

6. Evidence ⚿450(10)

Extrinsic evidence is admissible to explain an ambiguity in a negotiable instrument.

7. Bills and Notes ⚿116

The practical construction which the parties themselves place upon ambiguous language of a note is persuasive evidence of their intent.

8. Bills and Notes ⚿129(1)

Acceptance of payments of principal and interest on negotiable note in varying amounts at irregular intervals without regard to the time factor could properly be deemed a waiver of default, even if note was payable one day after date.

9. Contracts ⚿318, 322(3)

The law looks with disfavor upon forfeitures, and evidence tending to show waiver of a forfeiture will be favorably regarded, and the forfeiture will be avoided upon any reasonable showing.

10. Contracts ⚿322(3)

The amount of evidence required to establish a forfeiture is much greater than that required to establish a waiver, and the waiver may be implied from the acts and conduct of the parties.

11. Contracts 🔑318

Whether equity will interfere to prevent a forfeiture, provided for by contract to secure performance of obligations thereunder, depends upon whether compensation can be adequately made for breach of the obligation thus secured.

12. Quieting Title 🔑1

Equitable principles apply in a quiet title action.

13. Chattel Mortgages 🔑297
Mortgages 🔑600(1, 2), 604

Where holders of legal title to real and personal property as security for payment of note, providing for payment thereof one day after date, had accepted payments of principal and interest in varying amounts at irregular intervals without regard to time factor and prior to commencement of action to quiet title to such property, had never demanded payment of note in full except in escrow letter demanding payment in excess of amount actually owing trial court properly required holder of legal title to the property as surviving joint tenant to convey such property to debtor upon tender within 60 days of unpaid balance of principal and interest, taxes and insurance premiums and interest thereon. Civ.Code, § 3275.

14. Chattel Mortgages 🔑300
Mortgages 🔑608½

In action to quiet title to real and personal property, answer denying material allegations of complaint and setting up defense that defendant was owner of the property and that plaintiff held legal title as security for payment of a note was sufficient without filing cross-complaint to raise issues as to security nature of transaction by which title to the property was taken in name of plaintiff and her husband, since deceased, as joint tenants and right of defendant to the property upon payment of secured indebtedness, particularly in absence of demurrer to answer.

◆

Irving D. Gibson, Sacramento, for appellant.

White, Harber & Schei, Sacramento, for respondents.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendant seeking to quiet her title to certain real and personal property in the city of Sacramento and for damages resulting to plaintiff from the possession of said property by defendant. Defendant filed an answer denying the material allegations of the complaint and also setting up the defense that defendant was the owner of the property and that plaintiff held the legal title as security for the payment of the unpaid balance on a promissory note.

The case was tried by the court sitting without a jury, and the court found substantially in accordance with the affirmative allegations of the answer, and judgment was entered providing that if defendant tendered to plaintiff (a) $3,175 (the unpaid principal balance of the note) with interest from September 15, 1951, (b) $13.50 (fire insurance premium) and other insurance premiums paid by plaintiff since the trial, with interest at 6% from date of payment, and (c) taxes paid on property by plaintiff since date of trial, with interest at 6% from date of payment, then plaintiff would be required forthwith to convey and transfer the real and personal property to respondent by good and sufficient grant deed and bill of sale. The judgment also required that the tender be made within sixty days after entry of judgment or after judgment in favor of defendant becomes final, and it provided that if the tender was not so made then judgment would be entered quieting title in appellant. Plaintiff's motion for a new trial and her motion to vacate judgment and to enter another and different judgment were denied by the trial court, and plaintiff has appealed from the judgment.

[1] Appellant makes numerous contentions, but before discussing any of them we shall give a summary of the evidence as disclosed by the record, bearing in mind the familiar rule that all conflicts in the evidence must be resolved in favor of the prevailing party.

Appellant is the widow of Richard P. Talbot who for many years prior to his death in 1948 was an attorney at law practicing in Sacramento County. Appellant and said Richard P. Talbot had been married for more than forty years when the latter died. In 1945 respondent learned that the real property known as number 4100 32nd Street, in the city of Sacramento, was for sale, together with certain furniture and furnishings therein. The purchase price for the property was $6,450. Respondent made a $50 deposit on the purchase price and then consulted with attorney Talbot regarding the proposed purchase. Respondent had been a client of Talbot's for many years prior to this transaction and he asked Talbot to find out if everything was all right. Talbot told respondent, apparently after some investigation, that everything was all right and that if respondent wanted the property he could have it. Respondent did not have sufficient funds to pay the full purchase price and Talbot agreed to lend him $3,000 for that purpose. Attorney Talbot handled the details of the purchase, and the deed from the sellers was taken in his name, and that of his wife as joint tenants. The deed was dated March 12, 1945, and was recorded on March 15. A bill of sale for the furniture and furnishings was also given to Mr. Talbot, but it is not in evidence.

Respondent paid $3,450 of the purchase price, and Mr. Talbot paid the remainder, i. e., $3,000, from funds comprising community property belonging to him and appellant. On the same day that the deed to the Talbots was recorded, respondent went to Mr. Talbot's office where he and Talbot executed the following instrument:

> "This Is To Certify that Richard P. Talbot has advanced to Julian Gadia, residing at 4100–32nd Street, Sacramento, California, the sum of $3000.00 and that said Gadia paid for said property the sum of $6450.00 and said property is vested in the said Talbot and when said Gadia pays said Talbot the sum of $3000.00 and interest to date according to one promissory note of even date, said Talbot, his heirs or assigns is to deed said property to Julian Gadia or any person or persons he so designates.
>
> "This instrument is binding on the heirs and assigns of the parties hereto."

At the same time, respondent gave Mr. Talbot his promissory note for $3,000.00, bearing interest at the rate of 6% per annum. Appellant testified at the trial that her husband handled all of their financial transactions, but that she knew he was advancing money to respondent. When asked whether her husband told her that he had taken a deed to the property, she answered, "Well, that was my understanding he had to be secured some way."

Upon completion of the above transaction, respondent went into possession of the property and has been in possession since that time. Respondent made various payments on account of principal and interest on the March 15, 1945, promissory note, and may have received further advancements from Mr. Talbot, for at the time of the next transaction, in mid-September, 1947, the balance owing on the principal was $2,550, and interest had been paid to March 15, 1947. Respondent needed money for his barber shop and he asked Mr. Talbot to increase the principal amount of the loan to $3,500. The latter agreed to do so, and respondent signed a new promissory note for that amount, and he and Mr. Talbot executed a new instrument regarding the property. The note was dated September 15, 1947, and is as follows:

> "No. ———
> "$3500
>
> Sacramento, California
> September 15–1947.
>
> "*One (1) day* after date, for value received, *I* promise to pay to *Richard P. Talbot* or order, at Sacramento, California, the sum of *Thirty Five Hundred and 00/100 ($3500.00)* Dollars, in lawful money of the United States with interest thereon from *date* until paid, at the rate of six (6%) per cent per annum, said interest payable in advance in like lawful money. And in case said interest, or any part thereof, is not paid within 30 days after the same becomes due, then the whole of

> said principal sum shall forthwith become due and payable at the election of the holder of this note, without notice.
>
> "This note is secured by Deed bearing even date herewith.
>
> "Julian Gadia"

The instrument was dated the same day and is identical to the one which it superseded (quoted above), except for dates and amounts. It is as follows:

> "This Is To Certify and Richard P. Talbot has advanced to Julian Gadia, residing at 4100–32nd Street, Sacramento, California, the sum of $3500.00, and that said Gadia paid for said property the sum of $6450.00, and said property is vested in the said Talbot, and when said Gadia pays said Talbot the sum of $3500.00 and interest to date according to one promissory note of even date, said Talbot, his heirs or assigns are to deed said property to Julian Gadia or to any person or persons he so designates.
>
> "This instrument is binding on the heirs and assigns of the parties hereto."

On September 17 Mr. Talbot gave respondent a check for $837.50, so the new principal amount of the loan ($3,500.00) apparently covered the following: (a) Payment of the $2,550 unpaid principal balance of the old note; (b) payment of interest from March 15, 1947, to September 15, 1947 (½ of 6% of $2,550.00); and (c) an additional advance of $837.50.

Mr. Talbot died on January 12, 1948. His estate was probated in Sacramento County and his daughter, Dorothy Talbot Erich, was appointed executrix of his estate. The promissory note for $3,500 was listed as an asset of the estate and in due course of administration was distributed to appellant, together with all of the other assets of the estate. The real and personal property involved here was not included among the assets of the estate.

By payments made at various times by respondent and accepted by appellant or her predecessors in interest, the principal balance of the $3500 promissory note was reduced to $3,175. Interest due on the note was paid to September 15, 1951. In addition, respondent paid all taxes and insurance on the property, except county taxes for the fiscal year 1951–1952, which were due but not paid by either respondent or appellant, and a fire insurance premium in the amount of $13.50 paid by appellant on April 11, 1951. It appears that most of these payments were made by way of reimbursement to the estate which made the payments initially. Appellant testified that she knew respondent was making payments after her husband died.

On about February 13, 1951, appellant deposited in escrow a quitclaim deed to the property, with instructions that it be delivered to respondent if the latter would pay to appellant the sum of $4,552.52 on or before February 28, 1951. The $4,552.52 claimed by appellant included not only the unpaid principal balance of $3,175.00, but also property taxes (for which the estate had been reimbursed) with 7% interest thereon, the additional advancement of $873.50 (which had been included in the principal amount of the new note) with like interest, and attorney's and notary's fees. The parties being in disagreement as to the amount owing by respondent, and the latter having made no further payments, appellant commenced the instant action against respondent.

Appellant's many contentions may be summarized as follows: (1) That she, as surviving joint tenant, took title free from any claims of respondent to the property, (2) that respondent was in default when the action was commenced and therefore has no right to pay the note at this late date, and (3) that respondent did not properly plead his case, so that some findings (necessary for the judgment) are outside the issues.

[2–4] In support of her first contention appellant argues that since all of respondent's dealings were with Mr. Talbot, and she was not a party to the agreement that the property was to be deeded to respondent when the note was paid, and since she took title as surviving joint tenant and not by direct transfer from her husband or his estate, she is not bound by the obligations assumed by her husband in the transaction. However, as pointed out by respondent, and as found by the court upon uncontradicted evidence, the $3,000 which the husband, Mr. Talbot, advanced for the purchase of the property was community property of Talbot and appellant; title to the property was taken in the name of Talbot and appellant as joint tenants as security for the loan; and appellant was aware of the transaction, and accepted payments on account of said loan. It is clear, therefore, that whatever interest appellant has in the property arose out of the transaction which she now seeks to avoid, and that she is in no sense a bona fide purchaser, as she was fully aware of the transaction and fully acquiesced in it up to the time that she made her excessive demand for the balance due and brought the instant action to quiet title. When a conveyance is executed from the vendor direct to the lender, to secure a loan of the purchase money made by him to the purchaser, the legal title is held not only for the lender as security, but also in trust for the borrower for the purpose of finally having title go to him. Conway v. Moore, 70 Cal.App.2d 166, 172, 160 P.2d 865. The grantee thus holds a double relationship to the purchaser, being trustee of the legal title and mortgagee for the money advanced for its purchase. Parol evidence is admissible to show that a conveyance of real property, although absolute in form, is in fact a mortgage. Jensen v. Friedman, 79 Cal.App.2d 494, 498, 179 P.2d 855. There is no merit in appellant's argument that the transaction was not a mortgage because respondent never held legal title to the property and therefore had nothing to mortgage. Appellant who had knowledge of the transaction and accepted its benefits is not entitled to renounce it.

Appellant next contends that respondent was in default when the action was commenced and that he had no right to be relieved from such default by paying the balance due on the note. Appellant argues that the $3,500 note was payable one day after date of making, and that there was no allegation, proof or finding of waiver of time of payment. Appellant argues further that, payment not having been made in full, respondent was and is in default.

[5-7] There is no direct finding with respect to default by respondent, although there is a conclusion that any failure or delay on the part of respondent to make payment was excused or waived by acceptance of payments made. The promissory note, itself, is ambiguous as to time of payment. It provides for payment one day after date, but also provides for annual interest of 6% payable in advance, and that upon default in interest payments for thirty days the whole of the principal shall become due and payable at the option of the holder. This acceleration clause is meaningless if the whole of the principal sum is already due and payable, which would be the case if the note were a one day note. Extrinsic evidence is admissible to explain an ambiguity in a negotiable instrument the same as in any other contract. Steffen v. Refrigeration Discount Corp., 91 Cal.App.2d 494, 499, 205 P.2d 727; Trigg v. Arnott, 22 Cal.App.2d 455, 457, 71 P.2d 330. The practical construction which the parties themselves placed upon the language of the note is persuasive evidence of their intent. Vogel v. Bankers Bldg. Corp., 112 Cal.App.2d 160, 166, 245 P.2d 1069; Trottier v. M. H. Golden Construction Co., 105 Cal.App.2d 511, 516, 233 P.2d 675. In the instant case, the parties apparently treated the note as a demand note, for payments (both principal and interest) were made and accepted in varying amounts at irregular intervals during Talbot's lifetime and after his death. The record does not show that Talbot or appellant, as holders of the note, ever demanded payment in full, at least prior to appellant's escrow letter of February 13, 1951, and that letter required a payment in excess of the amount actually owing.

[8-13] Even assuming that it must be held that the note was payable one day after date, and that respondent was in default, it does not necessarily follow that appellant is entitled to a forfeiture. The record shows a course of conduct, both by Talbot and later by his administratrix, which may properly be deemed a waiver, in that they accepted payments of principal and interest without regard to the time factor. See Stevinson v. Joy, 164 Cal. 279, 285, 128 P. 751,

and Boone v. Templeman, 158 Cal. 290, 295–297, 110 P. 947, both involving installment contracts for the purchase of land. The law looks with disfavor upon forfeitures, and evidence tending to show the waiver of a forfeiture will be favorably regarded, and the forfeiture will be avoided upon any reasonable showing. The amount of evidence required to establish a forfeiture is much greater than that required to establish a waiver, and the waiver may be implied from the acts and conduct of the parties. Knarston v. Manhattan Life Ins. Co., 124 Cal. 74, 77, 56 P. 773, involving life insurance contract. The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured. Gonzales v. Hirose, 33 Cal.2d 213, 216, 200 P.2d 793, quoting from Pomeroy, Equity Jurisprudence. Equitable principles apply in a quiet title action. Gonzales v. Hirose, supra, 33 Cal.2d at page 217, 200 P.2d 793. In the instant case the obligation was to pay money, so that full restitution can be made by payment. In this case, as in Gonzales v. Hirose, supra, the result would be unconscionable if respondent be denied the relief granted by the trial court. The court's judgment also is in accord with the provisions of section 3275 of the Civil Code. See Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367, for a discussion of this code section.

The third contention of appellant which we shall discuss is that respondent (1) does not deny that legal title to the property is in appellant by reason of the joint tenancy deed, (2) shows by the defeasance agreement (annexed to the answer) that appellant is not a party thereto, and (3) pleads the note which is payable one day after date, admits that there is an unpaid balance owing on the note, and does not affirmatively plead a waiver of payment or extension of time by appellant. Appellant also suggests that the matter of the note and the defeasance agreement should have been presented by way of cross-complaint, rather than as a separate defense although when the question was raised at the trial her counsel stated that he was not objecting to the form of the pleading. Appellant complains that certain findings are not supported by the evidence or are on issues not raised by the pleadings, and that certain conclusions are not based on findings. Appellant's contentions in this regard are a repetition of her arguments that the transaction was neither a trust nor a mortgage, that she was not a party to it, and that respondent is in default and no waiver by her was pleaded or shown.

Respondent, in reply, contends that the pleadings are sufficient to put the case at issue and permit the introduction by him of any evidence which would show his rights in the property. He points out that the allegations of appellant's three causes of action are denied in the answer, except for the admission that respondent does claim an interest in the property, and that respondent's second defense sets up in detail the basis of his claim to the property. He contends that it was not necessary to file a formal cross-complaint and that the pleadings were sufficient to support the judgment rendered.

[14] We are satisfied that the pleadings were sufficient to raise all of the issues determined in the action. See Jensen v. Friedman, 79 Cal.App.2d 494, 505, 179 P.2d 855. It was not necessary that respondent file a cross-complaint, he having denied the claims of appellant and having declared affirmatively the basis of his claim to the property. Milton E. Giles & Co. v. Bank of America, 47 Cal.App.2d 315, 323, 117 P.2d 943; Rinker v. McKinley, 65 Cal.App.2d 109, 111, 149 P.2d 859. Furthermore, appellant did not demur to respondent's answer, and at the trial appellant's counsel stated: "There seems to be no cross-complaint here. There is merely the answer. And I suppose that under the answer, that these defenses can be set up, but it doesn't ask for any affirmative relief, except as it is stated in the allegations of the answer. Not that I am objecting to the form of the pleading particularly, because this is a suit in equity, but there is no cross-complaint, and necessarily the Plaintiff has filed no answer. But I assume all of these allegations are deemed to be denied."

No other points urged require discussion. The judgment is affirmed.

PAULSEN, J. pro tem., and PEEK, J., concur.

123 Cal.App.2d 758

HADLEY v. ELLIS et al.

Civ. 8320.

District Court of Appeal, Third District, California.

March 9, 1954.

Action for one-half of loss, which had been sustained in joint turkey raising enterprise carried on by parties and had been borne by plaintiff alone. The Superior Court, Merced County, R. R. Sischo, J., entered judgment against defendants for one-half of loss, and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that where only available ground of action, which was one seeking final account and settlement of joint enterprise in which parties had been partners, had been defectively pleaded, allowing amendment of complaint to remedy such defect was proper and did not result in introduction of new cause of action which, if new, would have been barred by statute of limitations, since amended complaint sought recovery upon same set of facts as did original complaint.

Judgment affirmed.

1. Partnership 🔑327(1)

In action for one-half of loss, which had been sustained in joint turkey raising enterprise carried on by parties and which had been borne by plaintiff alone, complaint, which contained no allegations concerning matter of an accounting, did not state an action at law or one in equity by one partner against other partners for accounting and ascertainment of liability for losses.

2. Partnership 🔑297

Generally, action at law will not lie in favor of one or more partners of dissolved partnership against other partners upon demand growing out of partnership transaction until there has been settlement of accounts and balance struck.

3. Limitation of Actions 🔑127(3)

Where, in action for one-half of loss, which had been sustained in joint turkey raising enterprise carried on by parties and which had been borne by plaintiff alone, only available ground of action, which was one seeking final account and settlement of joint enterprise in which parties had been partners, had been defectively pleaded, allowing amendment of complaint to remedy such defect was proper and did not result in introduction of new cause of action which, if new, would have been barred by statute of limitations, since amended complaint sought recovery upon same set of facts as did original complaint.

4. Pleading 🔑248(1)

A wholly different cause of action cannot be introduced by amendment of a complaint.

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Stephen P. Galvin, Merced, for appellants.

C. Ray Robinson, Merced, for respondent.

VAN DYKE, Presiding Justice.

On May 1, 1945, appellants, Bert Ellis and Florence Ellis, as first parties, and respondent Hadley, as second party, entered into a written agreement whereunder they agreed to jointly associate themselves in raising turkeys for the market. The agreement contained provisions that fixed the term of the joint enterprise as ending December 15 of that year and declared that it could not be extended save by another instrument in writing. Nevertheless in October the parties orally agreed that they would raise turkeys during 1946. (At the trial of this case the evidence was in dispute upon whether this oral agreement adopted the terms of the written agreement as to the conditions under which the further enterprise would be conducted or whether different terms were then agreed upon.) The 1945 venture resulted in a profit which was ascertained as to amount and divided, one-half to the appellants and one-half to respondent, as stipulated in the written agreement. The parties raised turkeys in 1946, but in November of that year a disease struck the flock and a loss occurred. Respondent had throughout both seasons kept the books for the parties, and when the 1946 operation was completed he ascertained that there had been a loss of over $14,000. He demanded that the appellants pay him one-half that sum. According to the undisputed testimony of both sides, respondent was, during both years, obliged to furnish and had furnished all the capital necessary for the business. Likewise he was to be reimbursed for his expenditures before the net profits were ascertained. According to the written agreement, and respondent testified that the oral agreement adopted all the terms of the written agreement, the parties were to bear losses equally, if losses occurred. According to the testimony of appellants, the oral agreement provided they were to share equally with respondent, if profits were made; but if losses occurred respondent was to bear them alone. Upon this issue the trial court found with respondent. The court gave judgment against appellants for one-half of the ascertained loss. From that judgment they appeal.

The complaint filed by respondent when the action was begun made the written agreement a part of the complaint by reference thereto. It was alleged that on May 1, 1945 the parties to that agreement had thereby associated themselves together as joint enterprisers for the purpose of raising turkeys for the market. Further allegations set out the completion of the venture, referred to the provisions of the agreement that if losses occurred appellants were obligated to sustain one-half thereof, and stated that the business had been terminated and that a loss had been incurred. It was alleged that demand had been made that appellants pay to respondent one-half thereof and that this had not been done. The prayer was for one-half of the sum alleged to have been lost. It is to be noted that the complaint did not specifically state that the loss had occurred during 1945, and, as we have seen, such was not the fact. Nevertheless, it would be a fair inference from the allegations of the pleading that the action was one to recover a loss occurring during 1945. When appellants answered they denied that a loss had been incurred in performance of the contract referred to in plaintiff's complaint and alleged on the contrary that a profit had been made which had been divided. As an affirmative defense, the answer further alleged that the contract referred to in the complaint had been fully performed and terminated, that it had not been renewed or extended, but that in October of 1945 the parties had orally agreed to engage in the business of raising turkeys during the season of 1946 under stipulations whereby respondent would furnish all the capital and appellants would furnish all the labor but would not be obligated to contribute any money or bear any expense.

Upon these pleadings and four years and ten months after the action had been commenced the cause came on for trial. Of course it at once developed that no loss had been suffered in 1945 and that the parties had raised turkeys in 1946. When respondent undertook to prove the conditions under which the business had been conducted in 1946 and to prove that losses occurred, he was met with an objection that the matter was without the pleadings. He thereupon sought and obtained leave of court to introduce the testimony and thereafter to amend to conform to proof. This request was granted. The amendment made added to the complaint the following allegation:

> "That on or about the 15th day of October, 1945, plaintiff and the defendants verbally agreed to continue to carry on and to conduct the business of raising turkeys * * * as set forth in said contract, attached hereto and marked Exhibit 'A' [being the same contract attached to the original complaint], for the additional period of One (1) year, and to and including the 15th day of December, 1946."

Respondent produced an accounting, taken from his books, of the operations of 1946, showing the loss alleged. Appellants did not challenge the accuracy of the account and the court found it to be correct.

Although stated in several ways, the contention of appellants on appeal is that the amendment introduced a new cause of action as to which the statute of limitations had run. If their premise be true, that is, if a new cause of action was in fact brought in by the amendment, then this new cause was barred since it did not become a part of the pleading until more than four years and ten months after the action was begun. However, we think that the premise is not sound.

To determine whether or not a new cause was brought in by the amendment we must consider the nature of the cause as first begun.

[1, 2] Respondent's complaint contained no allegations as to the matter of accounting, and as an action in equity by one partner against others for accounting and ascertainment of liability for losses his complaint was defective. But it was also defective as an action at law, since where there has been a partnership operation, as respondent alleged there had been, and where there has been no accounting, an action at law will not lie. "As a general rule, an action at law will not lie in favor of one or more former partners of a dissolved partnership against other partners on a demand growing out of a partnership transaction until there has been a settlement of accounts and a balance struck." 68 C.J.S., Partnership, § 374, p. 883. There are some exceptions to this general rule, but this case does not come within them. See 68 C.J.S., Partnership, § 110, pp. 552–553; 40 Am. Jur., pp. 449–450, § 460, and pp. 464–465, § 486.

[3, 4] Turning now to the facts shown as a basis for the amendment, we see that there had in fact been an accounting and settlement and distribution of profits from the 1945 operations; there had been no accounting as to the 1946 operations. The only cause of action, therefore, in fact existing and available to respondent as a ground of action was one seeking a final account and settlement of the joint enterprise which had been carried out and in which he and the appellants occupied the status of partners to and with each other. As we have said, this cause of action was defectively pleaded. Nevertheless, it was clear that the action was one whereby a former partner was suing the other members of the association for a sum of money which he claimed to represent one-half the amount of losses suffered in the transaction, the whole of which loss he had theretofore borne. Under such circumstances the court was fully justified in permitting the amendment to be made and that amendment did not introduce a new cause of action. As said in Frost v. Witter, 132 Cal. 421, 424–425, 64 P. 705, 706:

> "* * * it is obvious that the unqualified way in which the rule is sometimes stated—i. e. that a new or different cause of action cannot be introduced by amendment—cannot be accepted; for the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action, and in these, and often in the case of new parties, a new cause of action is in fact for the first time introduced. All that can be required, therefore (to use the language of Mr. Pomeroy), is that 'a wholly different cause of action' shall not be introduced; or, as said by the court in Shields v. Barrow, supra [17 How. 144, 15 L.Ed. 158], that 'a complainant (is not) at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment, or 'to strike out the entire substance and prayer of his bill, and insert a new case by way of amendment'; or, as expressed by this court in an early case, the matter of the amendment must not be 'entirely foreign to the original complaint.' [Nevada County & Sacramento] Canal Co. v. Kidd [28 Cal. 673, 681.]"

Similarly, in Stockwell v. McAlvay, 10 Cal.2d 368, 375, 74 P.2d 504, 507, it was said:

> "* * * The mere fact that a new cause of action is pleaded does not prevent the relation back of the amendment to the time of the original complaint. * * * It is only where the plaintiff seeks by amendment to recover upon a set of facts entirely unrelated to those pleaded in the original complaint."

In Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, at pages 717–718, 128 P.2d 522 at page 524, 141 A.L.R. 1358, the court held that an entirely different cause of action was not stated despite the fact that a fifth amended complaint alleged a cause of action for fraud while the original complaint was based on negligence. Said the court:

> "* * * Unless the amended complaint sets forth an entirely different cause of action from the original, however, the amended complaint, for the purposes of the statute of limitations, must be deemed filed as of the date of the original complaint. * * * The modern rule, where amendment is sought after the statute of limitations has run, is that the amended complaint will be deemed filed as of the date of the original complaint so long as recovery is sought in each complaint upon the same general set of facts."

Applying the foregoing rules, we think it clear that, although defectively stated in the first complaint, the recovery sought in both the original pleading and in the pleading as amended was upon the same set of facts, to-wit, the termination of a joint enterprise consisting in the business of turkey raising during 1946, in which period, and in which period alone, a loss had been incurred and for which period, and for which period alone, there had not been an accounting and settlement of the partnership affairs.

The judgment appealed from is therefore affirmed.

SCHOTTKY and PEEK, JJ., concur.

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123 Cal.App.2d Supp. 951

PEOPLE v. AMDUR.

Cr. A. 28.

Appellate Department, Superior Court,
Alameda County, California.
Feb. 23, 1954.

Defendant was convicted in the Municipal Court of the Berkeley-Albany Judicial District, Redmond C. Staats, Jr., J., of placing an obstruction upon a public sidewalk in violation of an ordinance, and he appealed. The Superior Court, Appellate Division, Wagler, P. J., held that exclusion of defendant's evidence as to unconstitutional application of a valid ordinance constituted reversible error.

Judgment reversed.

1. Municipal Corporations 🔑692

The public is entitled to the free and unobstructed use of the entire streets and sidewalks in a city for the purposes of travel, subject only to the reasonable and proper control of the municipality. Civ. Code, §§ 3479, 3480; Pen.Code, § 370.

2. Municipal Corporations 🔑692

Statutory declaration that the unlawful obstruction of the free passage or use in the customary manner of any public street or highway shall be a public nuisance does not mean that it is unlawful for both persons and property to be temporarily at rest upon a public street, but obstructions of a temporary nature, incidental to use for which street is primarily intended and which do not unduly and unreasonably interfere with rights of the public, are permissible, without the expressed conferring of such right. Civ.Code, §§ 3479, 3480; Pen.Code, § 370.

3. Municipal Corporations 🔑692

Even though an obstruction of a street or sidewalk is incidental to the primarily intended use, such an obstruction is subject to reasonable regulation by the municipality, since municipal authorities, as trustees for public, have duty to keep streets of their community open and available for movement of people and property, as the prime purpose to which the streets are dedicated. Civ.Code, §§ 3479, 3480; Pen.Code, § 370.

4. Municipal Corporations ⟹692

Obstruction of a street or sidewalk, not incidental to the primary intended use of the street or sidewalk, and not authorized by ordinance or otherwise, constitutes a public nuisance per se, even though the obstruction does not work a positive inconvenience to anyone. Civ.Code, §§ 3479, 3480; Pen.Code, § 370.

5. Municipal Corporations ⟹692

A card table placed upon a public sidewalk by a defendant constituted an "obstruction" within contemplation of statute declaring that the unlawful obstruction of free passage in customary manner of any public street shall be a public nuisance, in that such use of the sidewalk was not a use incidental to the primary use for which sidewalk was intended, and when defendant had received no authorization from municipal authorities for so placing the table, it constituted a public nuisance. Civ.Code, §§ 3479, 3480; Pen.Code, § 370.

See publication Words and Phrases, for other judicial constructions and definitions of "Obstruction".

6. Statutes ⟹188

The words of a statute are to be interpreted according to their common and ordinary acceptation.

7. Municipal Corporations ⟹120

Ordinances, like other statutes, must be given a reasonable construction, and they must be construed in such manner as to harmonize with other ordinances adopted by the same legislative body, if possible, and to aid the design and intent of that body, and to effectuate the evident objects and purposes of the law.

8. Constitutional Law ⟹48

The presumption of constitutionality protects every legislative act, and it is duty of courts to so construe legislative enactments as to uphold, if possible, their constitutionality. Civ.Code, §§ 3479, 3480; Pen.Code, § 370.

9. Municipal Corporations ⟹692

Provision of city ordinance prohibiting obstruction of sidewalks, except that the prohibition should not extend, inter alia, to anything for temporary use at such locations and under such conditions as might be authorized by resolution of city council, was not to be construed as requiring persons wishing to exercise fundamental right of freedom of speech upon public sidewalk to first obtain a permit from the city council, and ordinance would not on the basis of such an unreasonable construction be declared invalid. U.S.C.A. Const. Amends. 1, 14; Const. art. 1, § 9.

10. Highways ⟹165

Where a restriction of the use of highways is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. U.S.C.A.Const. Amend. 1.

11. Constitutional Law ⟹274

The right to exercise the civil liberties guaranteed by the First Amendment to the federal Constitution cannot constitutionally be made dependent upon the granting or denying of a permit by a city council. U.S.C.A.Const. Amend. 1.

12. Licenses ⟹21

The administration of an ordinance which regulates activities that are mere privileges may be left to the uncontrolled discretion of the licensing authority.

13. Municipal Corporations ⟹595, 597, 598, 625, 626

Even though an ordinance purports to give to city council an uncontrolled discretion in granting and denying permits, council cannot act arbitrarily or capriciously, and cannot discriminate among applicants, but the granting or denying of permits must be based upon considerations related to public health, safety, morals, or the promotion of the general wefare.

14. Municipal Corporations ⟹680(3)

City council with which defendant had filed application for permit to place card table upon sidewalk for distribution of certain literature was not entitled to consider the motives of defendant making the application in deciding whether permit should or should not be granted, nor could the political philosophy to be expounded by defendant be made the basis for denial, in absence of a question of clear and present danger being involved, except insofar as that philosophy might have had a bearing upon the question of public safety or convenience.

15. Licenses ⚷42(2)

When a license is refused by municipal licensing officer, although applicant has done all that is necessary to entitle him thereto, he has no right to proceed to do the act for which the license is required, and the wrongful refusal of the license cannot be availed of as a defense to a criminal prosecution for acting without a license, but proper procedure is to resort to the courts for relief from such unjust and arbitrary denial of license.

16. Constitutional Law ⚷46(3)
Municipal Corporations ⚷121

The constitutionality of a statute or ordinance may be raised by equitable suit for injunction and by action for declaratory relief, and such remedies are available if the statute or ordinance, though valid on its face, is applied in an unconstitutional manner.

17. Mandamus ⚷11

Mandamus, though not the accepted method for raising the question of constitutionality of an ordinance or statute, may be employed in a proper case.

18. Licenses ⚷22
Mandamus ⚷87

Where no constitutional question is involved, either certiorari or mandamus is an appropriate remedy to test the proper exercise of discretion by a local administrative body in denying a license to do a certain act. Code Civ.Proc. § 1094.5.

19. Municipal Corporations ⚷632

The fact that an ordinance is unconstitutional as written, or that it has been unconstitutionally applied, is available as a defense to a prosecution for the violation thereof.

20. Municipal Corporations ⚷640, 642(1)

In prosecution of defendant for violation of ordinance prohibiting obstruction of sidewalk, with stated exceptions, unless a permit be procured from the city council, exclusion of defendant's evidence of an unconstitutional application of the ordinance was reversible error.

21. Municipal Corporations ⚷642(1)

Where issue of discrimination in the administration of ordinance relative to licensing of obstructions on sidewalk was ruled out by trial court, error in the exclusion of evidence relative thereto could be claimed on appeal, even though facts shown by the proffered evidence were not before the reviewing court.

22. Municipal Corporations ⚷680(3)

Although a city was under no duty to permit the use of tables on its sidewalks as an adjunct to the public forum if the privilege had been granted to some, it could not be denied to another under similar circumstances merely because the city officials disagreed with the views to be expounded by such individual. U.S.C.A. Const. Amends. 1, 14.

Lawrence Speiser, Staff Counsel, American Civil Liberties Union, San Francisco, for appellant.

J. F. Coakley, Dist. Atty. of Alameda County, Roy G. Pucci, Deputy Dist. Atty. of Alameda County, Oakland, Fred C. Hutchinson, City Atty., Robert T. Anderson, Asst. City Atty., Berkeley, for respondent.

WAGLER, Presiding Judge.

Defendant and appellant, Reuel S. Amdur, was convicted of a violation of Section 12.1 of Ordinance No. 3262–N.S. of the City of Berkeley, in that said defendant on or about the sixth day of February, 1953, "unlawfully placed and caused to be placed on a sidewalk a table which obstructed, restricted, and prevented the use of a portion of said sidewalk".

On this appeal appellant asserts (1) that the evidence is insufficient to sustain the judgment; (2) that the ordinance is unconstitutional as written; (3) that the ordinance is unconstitutional as applied; and (4) that the rejection of certain proffered evidence was prejudicial error. Appellant raised the question of constitutionality in the Municipal Court at the outset of the trial by motion to dismiss, and after his conviction by motion in arrest of judgment.

The ordinance in question provides that "It shall be unlawful for any person to place or cause to be placed anywhere upon any sidewalk or roadway, anything which shall obstruct, restrict or prevent the use of any portion of such sidewalk or roadway; provided that this section shall not apply to the article or things listed in Section 12.1–a to and including 12.1–*o*".[1] Here

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[1] The entire section in question reads as follows:

"Section 12.1. Obstructions on Streets and Sidewalks.

"It shall be unlawful for any person to place or cause to be placed anywhere upon any sidewalk or roadway, anything which shall obstruct, restrict or prevent the use of any portion of such sidewalk or roadway; provided that this section shall not apply to the article or things listed in Sections 12.1–a to and including 12.1–*o*.

"Section 12.1–a. Goods in Transit.

"Goods, wares, merchandise or containers may be allowed on the outer ⅓ of the sidewalk for not to exceed one hour while in the actual course of receipt, delivery or removal.

"Section 12.1–b. Construction Materials and Barricades.

"Materials used in the construction or repair of any building or structure, together with the necessary pedestrian walkways, barricades and warning signs, when permission has been obtained from the proper City departments.

"Section 12.1–c. Trees and Shrubs.

"Trees, shrubs and flowers with the necessary barricades when planted or maintained either by the City or by private parties under rules and regulations of the Park Department or authority of the Council expressed by resolution or ordinance.

"Section 12.1–d. Poles, Hydrants, Signs, etc.

"Poles, fire and police boxes, lamp posts, parking, street, directional or warning signs, parking meters, drinking fountains, hydrants, flag poles or standards, decorations for public events, sidewalk clocks, barber poles, refuse cans, book return receptacles, barriers and any other similar installation; provided, however, that any such installation belongs to the City of Berkeley or is authorized by ordinance or resolution of the Council.

"Section 12.1–e. Bicycle Racks.

"Bicycle racks of a type and at locations approved by and under such conditions as may be imposed by the Police Department.

"Section 12.1–f. Gasoline Pumps.

"Gasoline pumps that were installed in the sidewalk area prior to July 1, 1932, and were in use on the 1st day of May 1952.

"Section 12.1–g. Benches.

"Benches which are placed on the sidewalk area for the convenience of persons waiting for public transportation, provided such benches have no advertising on them other than the name of the transportation company and are placed in such locations that they do not interfere with the normal use of the sidewalks by pedestrians.

"Section 12.1–h. Mail Boxes and Armed Forces Recruiting Signs.

"Mail boxes and armed forces recruiting signs that are placed in such locations that they do not interfere with the normal use of the sidewalk by pedestrians.

"Section 12.1–i. Taxicab Telephones.

"Taxicab telephones of a type and at locations approved by and under such conditions as may be imposed by the Police Department, and in accordance with the provisions of the Taxicab Ordinance of this City.

"Section 12.1–j. Newspaper Racks and Newspapers.

"Newspapers and newspaper racks, of a type and at locations approved by and under such conditions as may be imposed by the Police Department.

"Section 12.1–k. Periodicals and Periodical Racks.

"Periodicals and periodical racks which were regularly placed or maintained on the sidewalk area during the three (3) months prior to April 1, 1949, to the extent and at the locations used during such time; provided, however, that such periodicals or periodical racks shall not extend onto the sidewalk area more than twelve (12) inches from the property line. If the placing or maintaining of periodicals or periodical racks is discontinued at any permitted location for a continuous period of thirty (30) days from and after April 1, 1949, periodicals or periodical racks shall not be placed or follows fifteen exceptions covering: (a) Goods in Transit; (b) Construction Materials and Barricades; (c) Trees and Shrubs; (d) Poles, Hydrants, Signs, etc.; (e) Bicycle Racks; (f) Gasoline Pumps; (g) Benches; (h) Mail Boxes and Armed Forces Recruiting Signs; (i) Taxicab Telephones; (j) Newspaper Racks and Newspapers; (k) Periodicals and Periodical Racks; (*l*) Vending Machines; (m) Milk Cases and Boxes; (n) Tables for Registration of Voters; "(*o*) Temporary Uses Authorized by Council. Anything for temporary use at such locations and under such conditions as may be authorized by resolution of the Council."

It is conceded that no rules or regulations have been formulated by anyone for the guidance of those administering Section 12.1–*o* of the ordinance.

On January 30 appellant filed with the City Clerk of the City of Berkeley a written request reading as follows:

> "January 30, 1953.
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> "To the Berkeley City Council:
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> "I would like to set up a table at Telegraph Avenue and Allston Way (Sather Gate) on February 4 and 6, 1953, between the hours of 10:00 A. M. and 2:00 P. M. for the purpose of distributing literature pointing out the basically evil nature of the State as demonstrated in the death sentence meted out to the Rosenbergs, and for the purpose of collecting signatures on a petition opposing murder, whether it be in the name of the State or in the name of the murderer.
>
> "If the Rosenberg case is by this time a fait accompli, then I would like to set up a table at the same place and time for the purpose of facilitating distribution of literature denouncing the notorious Smith Act [18 U.S.C.A. § 2385] and the prosecution of the communist party leaders under the Smith Act.
>
> "(s) Reuel S. Amdur
> "1607 Visalia Avenue
> "Berkeley 7, California"

Thereafter, as was the practice, appellant's request was presented to the Chief of Police of the City of Berkeley, who on February 2 issued the following memorandum to John D. Phillips, City Manager:

> "Subject: Request from Reuel S. Amdur, 1607 Visalia Avenue for Permission to Set Up Table at Telegraph and Allston, February 4 and 6, 1953, Between 10:00 A.M. and 2:00 P.M. to Distribute Literature Relative to the Rosenbergs or to Distribute Literature Denouncing the Smith Act.
>
> "This department has no objection to establishment of a table on the sidewalk at the location and under the conditions indicated in the letter signed by Reuel S. Amdur.
>
> "(s) J. D. Holstrom
> "Chief of Police"

Appellant's request and the memorandum from the Chief of Police were presented to the City Council at its regular meeting on February 3, 1953. After discussion, his application was by unanimous vote "referred to the file".

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maintained on the sidewalk area at such locations in the future.

"Section 12.1–*l*.—Vending Machines.

"Vending machines, when they do not extend onto the sidewalk area more than twelve (12) inches from the property line.

"Section 12.1–m. Milk Cases and Boxes.

"Milk cases and boxes when located on an unimproved portion of the sidewalk area at locations approved by and under such conditions as may be imposed by the Police Department.

"Section 12.1–n. Tables for Registration of Voters.

"Tables used for the registration of voters at locations approved by and under such conditions as may be imposed by the Police Department.

"Section 12.1–*o*. Temporary Uses Authorized by Council.

"Anything for temporary use at such locations and under such conditions as may be authorized by resolution of the Council."

On February 6, 1953, at about 11:35 A.M., appellant was observed passing out leaflets while standing in front of a normal size card table which had been placed on the sidewalk near Sather Gate, the southerly entrance to the University of California. The University was in recess between semesters on the day in question, foot traffic was comparatively light, and the table caused no appreciable obstruction to traffic, although some pedestrians did find it necessary to change their course of travel to "deviate around the card table", and in a few instances there were minor physical collisions between pedestrians as a result of walking around the table.

When asked by a police officer whether he had a permit for the table, defendant replied that he did not. When asked further if he had applied for a permit, he replied, "For all intents and purposes a permit was denied by the City Council when the first application was denied, and a second one was filed".[2] When told that if he did not remove the table he would be arrested, appellant stated, "Go ahead and arrest me. I am a Watsonian anarchist and will stand on my constitutional rights." Appellant was later arrested, tried, convicted and ordered to pay a fine of Twenty-Five Dollars, or in lieu thereof that he "be imprisoned in the Alameda County jail at the rate of one day for each Five Dollars unpaid until said fine is satisfied".

Proof of the above facts which were without essential conflict would, of course, be sufficient to support the judgment of conviction, since the authority of the City of Berkeley to adopt regulations for the promotion of the health, safety and welfare of the people is established by Sections 6 and 11 of Article XI of the Constitution of the State of California, and by Section 49 of the Charter of said city.

[1] At the outset it should be pointed out that the streets and sidewalks of a city are designated primarily for travel and for the transportation of goods to and fro thereon. The public is entitled to the free and unobstructed use of the entire streets and sidewalks for the purposes of travel, subject only to the reasonable and proper control of the municipality. Vanderhurst v. Tholcke, 113 Cal. 147, 45 P. 266; 36 L.R.A. 267; Hill v. City of Oxnard, 46 Cal. App. 624, 189 P. 825; Laura Vincent Co. v. City of Selma, 43 Cal.App.2d 473, 111 P.2d 17; 25 Am.Jur. 566.

[2] The Legislature of the State has declared that the unlawful obstruction of the free passage or use in the customary manner of any public street or highway shall be a public nuisance. Civil Code, §§ 3479, 3480; Penal Code, § 370. This does not mean, however, that it is unlawful for both persons and property to be temporarily at rest upon a public street. Obstructions of a temporary nature, which are incidental to the use for which the street is primarily intended and which do not unduly and unreasonably interfere with the rights of the public, are permissible, 40 C.J.S., Highways, § 218, p. 213, since such temporary appropriation of the street is justified upon the ground of necessity, and a license for it may be implied in the absence of an ordinance expressly conferring the right. 19 Cal.Jur. 112; Fisher v. Los Angeles Pacific Co., 21 Cal.App. 677, 132 P. 767; Searcy v. Noll Welty Lumber Co., 295 Mo. 188, 243 S.W. 318, 23 A.L.R. 816.

[3] Even obstructions which are incidental to the primarily intended use of the street are subject to reasonable regulation by the municipality, since "municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated." Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 150, 84 L.Ed. 155. See also: Cox v. State of New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049; In re Bodkin, 86 Cal.App.2d 208, 194 P.2d 588; Pezold v. Amalgamated Meat, 54 Cal.App.2d 120, 128 P.2d 611.

[4] Any obstruction not falling within the above category or properly authorized

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[2] It appears from the record that appellant had previously on January 23, 1953, applied for a similar permit to set up a table on January 29, 1953, and that said application was denied by the City Council on January 27, 1953, two of the eight Councilmen voting to grant the permit.

by ordinance or otherwise constitutes a public nuisance per se. San Diego v. Southern California Telephone Company, 92 Cal.App. 2d 793, 208 P.2d 27; Irish v. Hahn, 208 Cal. 339, 281 P. 385, 66 A.L.R. 1382; Western States, etc., Co. v. Bayside Lumber Co., 182 Cal. 140, 187 P. 735; Hitch v. Scholle, 180 Cal. 467, 181 P. 657; Strong v. Sullivan, 180 Cal. 331, 181 P. 59, 4 A.L.R. 343; San Francisco v. Buckman, 111 Cal. 25, 43 P. 396, 25 Am.Jur. 566. This is true even though the obstruction does not work a positive inconvenience to anyone. 25 Am. Jur. Sec. 273, page 566. This rule extends to sidewalks which are a part of the street. Ex parte Taylor, 87 Cal. 91, 25 P. 258.

[5] That a table of the type here involved placed upon a public sidewalk constitutes an obstruction within the meaning of the statute and the applicable rules of law there can be no question. There can also be little doubt that such a use of the sidewalk is not a use incidental to the primary use for which the sidewalk is intended, and since appellant concedes that the City Council had not authorized the obstruction, we must conclude that under such circumstances it constituted a public nuisance. In fact, Section 12.2 of the same ordinance which was received in evidence without objection specifically provides that "anything placed or permitted to remain upon any sidewalk or roadway in violation of Section 12.1 of this ordinance, is hereby declared to constitute a nuisance and the Police Department is hereby authorized and empowered to abate such nuisance by removing the same to the custodian of lost property in the Police Department or the Corporation Yard of the City of Berkeley".

Appellant contends that the ordinance in question is unconstitutional on its face because the language is so broad, indefinite, and lacking in standards that it violates both the First and Fourteenth Amendments of the Constitution of the United States and Section 9, Article I, of the Constitution of the State of California. Both street meetings and parades, since they necessarily involve a certain amount of interference with the normal use of streets, asserts the appellant, are encompassed within the broad language of the statute, and the statute therefore places a previous restraint upon freedom of speech guaranteed by the First Amendment.

[6, 7] With this contention we cannot agree. Webster's International Dictionary, second edition, defines "obstruction" as "a *thing* that obstructs or impedes, an obstacle, impediment, or hindrance, as in a street, river or design". The words of a statute are to be interpreted according to their common and ordinary acceptation. Los Angeles County v. Frisbie, 19 Cal.2d 634, 122 P.2d 526; Smith v. Dunn, 68 Cal. 54, 8 P. 625; Civil Code, § 13. Ordinances, like other statutes, must be given a reasonable construction. Healey v. Superior Court, 167 Cal. 22, 138 P. 687; Gage v. Jordon, 23 Cal. 2d 794, 147 P.2d 387; 23 Cal.Jur. 788. An ordinance should be construed so as to harmonize with other statutes adopted by the same legislative body, if possible, Healey v. Superior Court, supra, and to aid the design and intent, of that body, and to effectuate the evident objects and purposes of the law. Los Angeles County v. Frisbie, supra; Harlan v. Industrial Accident Commission, 194 Cal. 352, 228 P. 654.

[8] A presumption of constitutionality protects every legislative act, and since a legislative body is presumed to have had the constitution in mind when passing a statute or ordinance, People v. Superior Court, 10 Cal.2d 288, 73 P.2d 1221, it is the duty of the courts to construe legislative enactments so as to uphold their constitutionality wherever possible, and avoid, if possible, any construction that will render a statute unconstitutional. Bodinson Manufacturing Co. v. California Employment Commission, 17 Cal.2d 321, 109 P.2d 935; Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172.

[9] The ordinance in this case in all of its subdivisions "a" through "n" refers exclusively to inanimate objects. To assert that subdivision "*o*" was intended to or should be construed as requiring persons who wish to exercise the fundamental right of freedom of speech upon a public street or sidewalk to first obtain a permit from the City Council is most unreasonable and in violation of all sound rules of statutory construction. Such construction would

clearly not be in harmony with Berkeley Ordinance No. 2631–N.S. referred to during the trial, which concededly regulates street meetings and parades.

[10] Merely because appellant wished to use a card table as an added convenience in the distribution of this literature does not place such conduct under the protective cloak of the First Amendment. If the validity of regulations designed to keep our streets open and available to all was made to depend upon the motives or desires prompting those who would obstruct them, then the primary purpose for which our streets were intended could be completely frustrated. "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. * * * Where a restriction of the use of highways * * * is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions." Cox v. State of New Hampshire, 312 U.S. 569, 574, 61 S.Ct. 762, 765, 85 L.Ed. 1049, 133 A.L.R. 1396.

[11] Appellant asserts that the ordinance is void upon its face for the further reason it reposes an uncontrolled discretion in the City Council to grant or deny a permit. This argument, however, must stand or fall upon the answer to the question: should the ordinance be construed as applying to First Amendment freedoms? The right to exercise these fundamental freedoms is clearly not subject to a regulation of the type set forth in Section 12.1–*o* of the ordinance in question. See: Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. State (Irvington), 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352; Largent v. State of Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873; Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; Kunz v. People of State of New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280, Id., 340 U.S. 268, 71 S.Ct. 328, 95 L.Ed. 267; In re Porterfield, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675; In re Bell, 19 Cal.2d 488, 122 P.2d 22; Haggerty v. Kings County, 117 Cal.App.2d 470, 256 P.2d 393; People v. Duffy, 79 Cal. App.2d Supp. 875, 179 P.2d 876.

If the ordinance should not be construed as applying to First Amendment freedoms, and we have so decided, we believe the law is equally clear that the ordinance is valid on its face.

While the cases from all jurisdictions dealing with ordinances requiring permits for activities not involving freedom of speech or any cognate right cannot be completely reconciled, 12 A.L.R. 1436; State ex rel. Altop v. City of Billings, 79 Mont. 25, 255 P. 11, 54 A.L.R. 1104; American Baseball Club v. City of Philadelphia, 312 Pa. 311, 167 A. 891, 92 A.L.R. 400, it would appear that the California decisions fall substantially into three factual classifications.

(1) Those which involve the right to engage in an ordinary lawful business or calling—one which has no injurious tendencies and which does not per se invite police regulation.

(2) Those cases which involve the right to engage in a business or calling, which although lawful, because of its tendency to become a nuisance if conducted in a certain locality or in a certain manner, per se requires police regulation in the interest of public morals, safety or the general welfare.

(3) Those cases dealing with mere privileges or activities which may be completely prohibited, or which in the absence of a permit would be prima facie unlawful or constitute a nuisance per se.

These classifications are based upon ultimate questions of fact, and the line of demarcation is not always easily drawn. Under an ever expanding police power, factual situations which at one time or in one locality fall logically within the first group, may just as logically at a later time or in a different locality fall within the second or third classification. Compare: In re Dart, 1916, 172 Cal. 47, 155 P. 63, L.R.A.1916D, 905 and Gospel Army v. City of Los Angeles, 1952, 27 Cal.2d 232, 163 P.2d 704; Los Angeles County v. Hollywood Cemetery Ass'n, 1899, 124 Cal. 344, 57 P. 153 and Odd Fellows' Cemetery Ass'n v. City & County of San Francisco, 1903, 140 Cal. 226, 73 P. 987.

Likewise, a business which at one time may have been subject to discretionary regulation may ultimately take on the complexion of an activity which comes within the protective cloak of the First Amendment. Compare: Mutual Film Corporation v. Industrial Commission of Ohio, 1915, 236 U.S. 230, 35 S.Ct. 387, 59 L.Ed 552, and Joseph Burstyn, Inc. v. Wilson, 1952, 343 U.S. 495, 77 S.Ct. 777, 96 L.Ed. 1098.

The cases falling in the first category follow the rule that licensing ordinances which vest arbitrary discretion in some public official or body, without prescribing some uniform rule of action or standards to be followed, are unconstitutional and void. Application of Dart, supra, Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L.R.A.,N.S., 896; In re Johnston, 137 Cal. 115, 69 P. 973; Sonora v. Curtin, 137 Cal. 583, 70 P. 674; Los Angeles County v. Hollywood Cemetery Ass'n, supra; In re Wisner, 32 Cal.App. 637, 163 P. 868.

The great majority of cases falling factually within the second group involve the construction of ordinances or statutes which in fact do make some attempt, although at times very meager, to set up some rules to serve as a guide to the licensing authority. In some instances the licensing authority has itself formulated rules of procedure. Parker v. Colburn, 196 Cal. 169, 236 P. 921; In re Holmes, 187 Cal. 640, 203 P. 398; Zemansky v. Board of Police Commissioners, 61 Cal.App.2d 450, 143 P.2d 361; In re Jones, 56 Cal.App.2d 658, 133 P.2d 418; In re Hartmann, 25 Cal.App.2d 55, 76 P.2d 709; Cooperative Junk Co. v. Board of Police Com'rs, 38 Cal.App. 676, 177 P. 308; Hood v. Melrose, 24 Cal.App. 355, 141 P. 396; Goytino v. McAleer, 4 Cal.App. 655, 88 P. 991.

However, standards or rules for the guidance of the licensing authority do not appear to be a prerequisite to the validity of such ordinances or statutes, and they are upheld provided they contain no express authority to the licensing body to indulge in favoritism or to make or enforce discriminatory rules. People v. Globe Grain and Mill Co., 211 Cal. 121, 294 P. 3; In re Holmes, supra; City of South Pasadena v. San Gabriel, 134 Cal.App. 403, 25 P.2d 516.

[12] Since the case at bar involves a public nuisance, it falls factually within the third classification. These cases come clearly within the rule that the administration of an ordinance which regulates activities that are mere privileges may be left to the uncontrolled discretion of the licensing authority. In re Flaherty, 105 Cal. 558, 38 P. 981, 27 L.R.A. 529; In re Hartmann, supra. This rule, and the one applied to cases falling in the second classification which is essentially the same, is based upon the presumption that the licensing authority will not abuse its discretion, and upon the practical impossibility of providing in advance for probable exceptional cases. We accordingly find the ordinance constitutional as written.

[13] The fact that the ordinance gives to the City Council an uncontrolled discretion in granting and denying permits does not mean that the council may act arbitrarily or capriciously, or that it may discriminate among applicants, for implicit in the rule of law which upholds ordinances of this character is a binding legal obligation on the part of those administering the ordinance to exercise a reasonable discretion, and a corresponding constitutional obligation to refrain from discrimination. The granting or denying of permits in cases of this character must be based upon considerations related to public health, safety, comfort, morals or the promotion of the general welfare, and the law requires uniform nondiscriminatory and consistent administration. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 39 A.L.R. 1479; Id., 273 U.S. 781, 47 S.Ct. 460, 71 L.Ed. 889; McKay Jewelers Inc. v. Bowron, 19 Cal.2d

595, 122 P.2d 543, 139 A.L.R. 1188; Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486; Graham v. Kingwell, 218 Cal. 658, 24 P.2d 488; People v. Associated Oil Co., 211 Cal. 93, 294 P. 717; 16 C.J.S., Constitutional Law, § 180, p. 549; 11 Cal.Jur.2d 541; Sullivan v. Shaw, D.C., 6 F.Supp. 112.

Appellant claims that the act of the City Council in "referring his application to the file" was equivalent to the denial of a permit. This action, he maintains, was arbitrary and capricious and a violation of his constitutional rights.

At the trial appellant called as witnesses five members of the City Council who were present at the meetings which had considered his applications. Each was requested to and did state the factors considered in acting upon the last application. Each testified that the primary consideration was the fact that it was felt that the applicant was not acting in good faith. This conclusion on the part of the City Council appears to have been based upon a statement alleged to have been made by applicant to an employee in the office of the City Clerk at the time he filed his first application, to the effect that he "hoped that the permit would not be granted, that he wanted to challenge the Council's authority to deny it". A portion of this statement was later by this employee communicated to the City Manager, who in turn passed the information on to the City Council when applicant's second application was under consideration by the Council.

[14] That the statement attributed to appellant was in fact made by him is tacitly conceded since he did not testify at the trial, and it is admitted that after several earlier applications for sidewalk permits in connection with the Rosenberg case had been denied, it was appellant's desire to test the constitutionality of the ordinance and of its application. We find no reasonable basis for considering the motives of an applicant in deciding whether a permit should or should not be granted. The approval of such a standard would constitute an open invitation to discrimination.

In addition to the foregoing testimony, portions of the phonographic recordings of the City Council meetings which considered the application of January 23, as well as the application of January 30, were admitted in evidence. From these recordings the conclusion is inescapable that on both occasions one of the primary considerations governing those members of the council who voted on the first occasion to deny applicant's permit, and on the second to refer it to the file, was the fact that they disagreed with the views which according to his application appellant wished to expound.

However distasteful the political philosophy of the applicant may have been to members of the City Council, no question of a "clear and present danger" being involved, this was not a proper standard to be applied in determining whether the council should grant or deny the permit, except insofar as it may have had a bearing upon the question of public safety or convenience. See: Danskin v. San Diego Unified School District, 28 Cal.2d 536, 171 P.2d 885; Niemotko v. State of Maryland, 340 U.S. 268, 71 S.Ct. 325, 328, 95 L.Ed. 267, 280; Bridges v. State of California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192; Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed 470.

These recordings also show, however, that factors having a direct bearing upon questions of public safety and convenience, such as possibility of riot, obstruction of the street, etc., were considered by at least some members of the City Council before acting upon the application in question.

[15] If we assume that the action of the City Council was arbitrary and capricious and an abuse of discretion, is the wrongful refusal to grant a permit the equivalent of a permit? Is the wrongful refusal of a permit which does not involve an infringement upon rights guaranteed by the constitution available as a defense to a prosecution for acting without a permit? The precise point has never been decided in this state.

"According to the weight of authority, when a license is refused by the licensing officer although the applicant has done all that is necessary to entitle him thereto, he has no right to proceed to do the act for which the license is required. In other words, subject to some exceptions, it is said to be a sound general principle of law that when a permit or license to do an act is required by law, the wrongful refusal to issue such permit or license will not justify the performance of the act, the remedy of the applicant being to compel the issue of the permit or license and not to take the law into his own hands and engage in the action for which the permit or license is required. * * * The unavailability of the wrongful refusal of a license as a defense to a prosecution for acting without a license seems to be the general rule regardless of the type of license refused." Poulos v. State of New Hampshire, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105, 30 A.L.R.2d 1006. See cases collected at 30 A.L.R.2d 1007–1010.

In 53 C.J.S., Licenses, § 68, at page 727, the rule is stated as follows: "The fact that accused had applied for the requisite license, tendered the fee, and had been refused a license constitutes no defense to a criminal prosecution for acting without a license unless the license authorities declined to issue a license on the ground that none was required; and it is likewise no defense to show that an application for a license would have been unavailing."

We consider the following rule quoted in In re Holmes, 187 Cal. 640, 203 P. 398, and recently approved by Justice Traynor in Gospel Army v. City of Los Angeles, 27 Cal.2d 232, 239, 163 P.2d 704, 709, as applying cogently to the case at bar. " 'Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously or for purposes of oppression or mischief.' *If this petitioner had applied for a permit under the requirement of the section of the charter above quoted, and been either whimsically or arbitrarily refused such permit, he might then, as is shown in Gaylord v. City of Pasadena, supra [175 Cal. 433, 166 P. 348], have had recourse to the courts for relief from such unjust and arbitrary action."* (Emphasis ours.) Such relief is always available in this state by use of one or more of the extraordinary writs. This rule represents the sound principle of government by law. We accept it as applicable to this case.

In Poulos v. State of New Hampshire, 345 U.S. 395, 73 S.Ct. 760, 768, 97 L.Ed. 1105, the Supreme Court of the United States held that the requirement that such state judicial procedures be followed was not violative of the Federal Constitution, even where First Amendment freedoms were involved. A majority of the court, speaking through Mr. Justice Reed, there said: "Appellant's contention is that since the Constitution guarantees the free exercise of religion, the Council's unlawful refusal to issue the license is a complete defense to this prosecution. His argument asserts that if he can be punished for violation of the valid ordinance because he exercised his right of free speech, after the wrongful refusal of the license, the protection of the Constitution is illusory. He objects that by the Council's refusal of a license, his right to preach may be postponed until a case, possibly after years, reaches this Court for final adjudication of constitutional rights. Poulos takes the position that he may risk speaking without a license and defeat prosecution by showing the license was arbitrarily withheld.

"It must be admitted that judicial correction of arbitrary refusal by administrators to perform official duties under valid laws is exulcerating and costly. But to allow applicants to proceed without the required permits to run businesses, erect structures, purchase firearms, transport or store explosives or inflammatory products, hold public meetings without prior safety arrangements or take other unauthorized action is apt to cause breaches of the peace or create public dangers. The valid requirements of license are for the good of the applicants and the public. It would be unreal to say that such official failures to act in accordance with state law, redressable by state judicial procedures, are state acts violative of the Federal Constitution."

Since an abuse of discretion on the part of the City Council would constitute only an unlawful application of the ordinance, and since we have concluded that a wrongful application thereof, as distinguished from an unconstitutional application of the ordinance, is not available as a defense, it is not necessary for us to decide whether or not there was a reasonable basis for the action of the City Council in this case.

[16] There is no substance in appellant's argument that he would be required to waive the right to challenge the validity of the ordinance as written in order to pursue a remedy under the extraordinary writs. The cases holding that the constitutionality of a statute or ordinance may be raised by equity injunction and by action for declaratory relief, or both, are legion.[3] These same remedies are available if the statute or ordinance, though valid on its face, is applied in an unconstitutional manner.[4] Fundamental personal rights are not less sacred and not less entitled to injunctive protection than are personal rights. 28 Am.Jur., Sec. 182, 371.

[17] While as a general rule mandamus is not the accepted method for raising the question of the constitutionality of an ordinance or statute, Hadden Inc. v. City of Inglewood, 101 Cal.App.2d 47, 224 P.2d 913, it too may be employed in proper cases. Reynolds v. Barrett, 12 Cal.2d 244, 83 P.2d 29; Bernstein v. Smutz, 83 Cal.App.2d 108, 188 P.2d 48; Bleuel v. City of Oakland, 87 Cal.App. 594, 262 P. 477; Danskin v. San Diego Unified School District, 28 Cal.2d 536, 171 P.2d 885.

[18] Since Code Civ.Proc. § 1094.5 was not intended to apply to the review of quasi-judicial administrative action of the type here involved, (See Tenth Biennial Report, Judicial Council of California) it would appear that where no constitutional question is involved either certiorari or mandamus is an appropriate remedy to test the proper exercise of discretion by a local administrative body in a case of this character. Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P. 349, 142 A.L.R. 1383.

Where legitimate grounds exist to challenge the constitutionality of an ordinance or of its application, there appears to be no valid reason why an aggrieved party in a proper case should not be permitted to bring an equity action to enjoin the enforcement thereof, and in the same proceeding request alternative relief in the event the constitutionality of the ordinance should be upheld. Such procedure would involve prejudice to no one. Once equity has acquired jurisdiction, it may retain it and dispose of the entire controversy, 10 Cal.Jur. 4, 449, even though this involves the determination of purely legal rights. 28 Am.Jur., Sec. 302, 474. Under the procedure herein suggested, in the event of an adverse ruling the appellant would have immediate access to the District Court of Appeal and to the Supreme Court. Under the procedure adopted by appellant, if his conviction should be sustained it would be necessary for him to submit to imprisonment in order to obtain a review of the case by the higher courts.

[19, 20] The fact that an ordinance is unconstitutional as written, In re Deane, 8 Cal.2d 599, 67 P.2d 333; In re Zany, 20 Cal.App. 360, 129 P. 295; In re Dart, 172

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[3] Reclamation District No. 1500 v. Superior Court, 171 Cal. 672, 154 P. 845; Gospel Army v. City of Los Angeles, 27 Cal.2d 232, 163 P.2d 704; Pacific Palisades Ass'n v. City of Huntington, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; Skaggs v. City of Oakland, 6 Cal.2d 222, 57 P.2d 478; Ganley v. Claeys, 2 Cal.2d 266, 40 P.2d 817; Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665; Wheeler v. Herbert, 152 Cal. 224, 92 P. 353; Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884, 109 A.L.R. 895; Skinner v. Coy, 13 Cal.2d 407, 90 P.2d 296; People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3; LaFranchi v. City of Santa Rosa, 8 Cal.2d 331, 65 P.2d 1301, 110 A.L.R. 639; Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028; McKay Jewelers Inc. v. Bowron, 19 Cal.2d 595, 122 P.2d 543, 139 A.L.R. 1188.

[4] Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665; Brock v. Superior Court, 12 Cal.2d 605, 86 P.2d 805; Wade v. City and County of San Francisco, 82 Cal.App.2d 337, 186 P.2d 181; People v. Gordon, 105 Cal.App.2d 711, 234 P.2d 287; Title Guarantee & Trust Co. v. Garrott, 42 Cal.App. 152, 183 P. 470; McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932.

Cal. 47, 155 P. 63, L.R.A.1916D, 905, or that it has been unconstitutionally applied, Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; In re Smith, 143 Cal. 368, 77 P. 180, is always available as a defense to a prosecution for the violation thereof, and it is in this connection that the trial court committed error which necessitates a reversal of the case. At the trial appellant offered in evidence all of the sidewalk table applications considered by the City Council between October 1948 and February 1953. In addition to the two filed by appellant, these totaled forty-two in number. He also offered in evidence the recommendation of the Berkeley Police Department and the official resolution of the City Council in connection with each application, as well as the phonographic recordings of the proceedings of the City Council in connection therewith. All of this evidence was excluded on the ground that it was immaterial.

While this evidence appears to have been available to the trial court, since the record shows that a subpoena duces tecum was served upon the City Manager for the production thereof, it was apparently not marked for identification when rejected. Except for the names of the applicants and the date on which each application was acted upon by the City Council, this evidence has not been included in the record. From the names of the applicants, however, it may be legitimately inferred that the use to be made of the sidewalk table in most cases was as a convenience or adjunct to the public forum.[5]

[21] From the discussion in the record relative to the admissibility of this evidence, it is also clear that it was offered for the express purpose of showing discrimination in the administration of the ordinance. Since this issue was ruled out by the trial court, an error in the exclusion of such evidence may be claimed on appeal, even though the facts shown by the proffered evidence are not before us. Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597; Caminetti v. Pacific Mutual Life Insurance Co., 23 Cal.2d 94, 142 P.2d 741; Phillips v. Powell, 210 Cal. 39, 290 P. 441.

In his opening brief appellant asserts that the documentary evidence showed that all forty-four applications received a favorable recommendation from the Police Department; that of the forty-four applications considered by the City Council thirty-six were granted; that of the eight denied, six were in connection with petitions urging executive clemency for the Rosenbergs. Although the People have undertaken in their brief to correct misstatements of fact contained in appellant's opening brief, they do not deny the foregoing facts as set forth by the appellant.

Appellant asserts further that there is nothing to distinguish the eight cases in which permits were denied from the thirty-six cases in which permits were granted, other than disagreement by the majority of the City Council with the purposes and views of the applicants, and that this conclusion will be substantiated by the phonographic recordings which were excluded from evidence.

These facts, if proved, would constitute evidence that the City Council in the instant case applied the ordinance in a discriminatory manner, hence in an unconstitutional manner, in violation of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution, and of Article I, § 21, of the Constitution of the State of California, which reads as follows: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." See Fowler v. State of Rhode Island, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828; Niemotko v. State of Maryland, 340 U.S. 268, 71 S.Ct. 325, 328, 95 L.Ed. 267, 280; Yick Wo v. Hopkins, 188 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; In re Smith, 143 Cal. 368, 77 P. 180; In re Junqua, 10 Cal.App. 602, 103 P. 159.

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[5] The forty-two applications considered by the City Council during the period mentioned were filed by the following organizations: Eisenhower and/or Nixon Committee—five applications; Stevenson and/or Sparkman Committee—four applications; Berkeley College Chapter National Association for the Advancement of Colored People—four applications; Students for Democratic Action—four applications; Committees to Defend Rosenbergs—four applications; Students' Civil Liberties Union—two applications; Socialist Party, Crusade for Freedom, Students for Wallace, U. S. Red Cross Fund, the San Francisco Chronicle, Guide Dogs for the Blind, The Anvil Club, Disabled Veterans, Inc., Federation for Repeal of Levering Act, Flood and Famine Relief for India, Inter-Faith Council, American Legion Post 402, Youth Committee for Hallinan and Bass, Students Committee for Students Rights and other Campus Groups—one application each.

The latest pronouncement by the United States Supreme Court on this subject is to be found in the case of Fowler v. State of Rhode Island, 1953, supra [345 U.S. 67, 73 S.Ct. 526], and it is determinative of this appeal. The Fowler case involved the application of the following ordinance adopted by the City of Pawtucket: "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park." The constitutionality of the ordinance as written was conceded.

Jehovah's Witnesses, a religious sect, assembled in Slater Park of Pawtucket for a meeting which was conceded to be religious in character. Fowler was invited to and he did attend and address the meeting. Appellant was arrested, tried, and found guilty over objections that the ordinance as so construed and applied violated the First and the Fourteenth Amendments. His conviction was affirmed by the Rhode Island Supreme Court. State v. Fowler, 91 A.2d 27.

On the oral argument before the Supreme Court the Assistant Attorney General conceded that the ordinance as construed and applied did not prevent church services at the park, that Catholics could hold mass in Slater Park and Protestants could conduct their church services there without violating the ordinance. The Supreme Court said: "That broad concession, made in oral argument, is fatal to Rhode Island's case. For it plainly shows that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one. In Niemotko v. State of Maryland, 340 U.S. 268, 272–273, 71 S.Ct. 325, 327–328, 95 L.Ed. 267, 280, we had a case on all fours with this one. There a public park, open to all religious groups, was denied Jehovah's Witnesses because of the dislike which the local officials had of these people and their views. That was a discrimination which we held to be barred by the First and Fourteenth Amendments."

[22] The City of Berkeley was under no duty to permit the use of tables on its sidewalks as an adjunct to the public forum, but if it has granted this privilege to some, it may not deny the same privilege to others under similar circumstances merely because its officials disagree with their views.

The judgment is reversed. A new trial is ordered. On the new trial the court is directed to admit all competent evidence offered on the issue of the unconstitutional application of the ordinance in question.

LEDWICH and HOYT, JJ., concur.

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123 Cal.App.2d Supp. 945

PEOPLE v. McGINNIS.

Cr. A. 2980.

Appellate Department, Superior Court,
Los Angeles County, California.
Nov. 23, 1953.

Defendant was convicted in the Municipal Court of Los Angeles Judicial District, Vernon W. Hunt, J., of driving while intoxicated, and he appealed. The Superior Court, Appellate Department, Bishop, J., held that evidence that defendant had declined to comply with the request of arresting officers that he submit himself to an intoximeter test, was properly admitted.

Judgment affirmed.

1. Criminal Law ⚷351(2)

In prosecution of defendant for driving while intoxicated, evidence that defendant had declined to comply with arresting police officers' request that he submit himself to an intoximeter test was properly admitted, even though defendant at all times denied guilt.

2. Criminal Law ⚷351(1)

Where the conduct of defendant with reference to a crime charged has bearing on his guilt, the jury should be permitted to consider both the conduct of defendant and his words, since a fact relating to the guilt of an accused may be established by circumstantial evidence as well as by direct evidence.

3. Criminal Law ⚷388

Although a person, arrested because it appears that he is intoxicated, may have the right to refuse to subject himself to any of the usual tests, or to the intoximeter test, if such person takes the tests without physical or other coercion frowned upon by due process being employed, the result of that test may be brought before a jury.

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John E. Glover, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and Dan J. Whiteside, Dep. City Atty., Los Angeles, for respondent.

BISHOP, Judge.

The determination of this appeal depends upon the answer to this question: Was it error to admit evidence of the fact that, when arrested on the charge of driving a motor vehicle while under the influence of intoxicating liquor, the defendant declined to comply with the police officers' request that he submit himself to an intoximeter test? We have concluded that it was not error, and that the judgment should be affirmed.

This case falls within the field already containing two well established types of cases: those in which, by statement or by silence in the face of an accusatory statement, the defendant made an admission that serves to establish his guilt, see People v. Simmons, 1946, 28 Cal.2d 699, 712–713, 172 P.2d 18, 25, and cases cited; and those in which by some action he revealed a consciousness of his guilt. Illustrative of the latter type of case we have those in which evidence was received of flight, People v. Anderson, 1922, 57 Cal.App. 721, 727, 208 P. 204; the making of contradictory statements to conceal the true facts, People v. Gentekos, 1931, 118 Cal.App. 177, 182, 4 P.2d 964, 967; the use of a false name. People v. Liss, 1950, 35 Cal.2d 570, 576, 219 P.2d 789, 793. The facts of our case bring it close to the group of cases last cited, for it was not what the defendant said that was significant, nor his failure to say anything, but what he refused to do.

[1, 2] The fact that the defendant at all times denied his guilt does not require the conclusion that the evidence be excluded. If one on trial for any offense had endeavored to conceal his identity after the crime by use of an alias, surely that fact would not be inadmissible in evidence, because as he gave the assumed name he also declared that he was an innocent man. Where actions may speak louder than words, the jury should be permitted to consider both. We do not find in People v. McGee, 1947, 31 Cal.2d 229, 239, 187 P.2d 706, 712, any reason to abandon or modify the conclusion we have expressed.

The jury, of course, might not have been persuaded that it was fear of the result that dictated defendant's refusal, but have believed that he had some other reason for declining to cooperate. This possibility, however, is not a basis for saying that the evidence should not have been received. As stated in People v. Graves, 1934, 137 Cal.App. 1, 10, 29 P.2d 807, 811, 30 P.2d 508: "A study of cases shows a confusion in the minds of some courts between the admissibility of a circumstance in evidence and its weight when admitted. Of course, a circumstance may be so remote as to be of no practical use and should therefore be held inadmissible, but every case must be considered in its own light, and if extreme remoteness is not apparent the circumstance should be admitted and its weight left to the jury." Again, in People v. Roeder, 1940, 41 Cal.App.2d 495, 500, 107 P.2d 92, 94, we find this quotation taken from two earlier cases: "It is well settled, however, that a fact relating to the guilt of an accused may be established by circumstantial as well as by direct evidence; that the right to draw proper inferences from the evidence is a function of the jury, and that as long as its conclusions do not do violence to reason, a reviewing court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Martinez, 20 Cal. App. 343, 128 P. 952. In other words, as frequently said by the courts, circumstantial evidence may be as conclusive in its convincing force as the testimony of witnesses to the overt act. People v. Nagy, 199 Cal. 235, 248 P. 906; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631, and consequently where the circumstances proved reasonably justify the conclusion of the jury expressed in its verdict, it is beyond the authority of the reviewing court to interfere therewith."

We are not prepared to say that it would do "violence to reason" for the jury to conclude that the defendant refused to take the test because he did not want to run the risk that the test would furnish evidence of the condition in which he knew himself to be. Therefore, we should not, and do not, disapprove the trial court's action in admitting the evidence. Incidentally, we note that as a witness the defendant did not claim that he was unfamiliar with the test when a balloon was used, nor was any fact established that served to make it improper for the jury to weigh his refusal as a fact in the case.

[3] A person, arrested because it appears that he is intoxicated, may have the right to refuse to subject himself to any of the usual tests, or to the intoximeter test, as the jury was instructed, but if he takes the tests, no physical or other coercion frowned upon by due process being employed, the result may be brought before a jury. People v. Haeussler, 1953. 41 Cal.2d 252, 260 P. 2d 8.

The judgment is affirmed.

SHAW, P. J., and PATROSSO, J., concur.

123 Cal.App.2d Supp. 973

McFARLAND v. HEADY.

No. 18.

Appellate Department, Superior Court,
Fresno County, California.
Feb. 24, 1954.

Action by real estate broker to recover a fee for services. Judgment for plaintiff in the Municipal Court for the Fresno Judicial District, Frederick E. Butler, Acting Municipal Court Judge and the defendant appealed. The Superior Court for the County of Fresno, Appellate Department, Conley, J., held that where exchange of properties was conditioned on the performance of the condition which was never fulfilled, the broker was not entitled to recover commissions.

Judgment reversed with instructions.

Brokers 🔑49(2)

Where principals agreed to an exchange of properties only if a lease for a motel with certain terms should be granted by the owner of the land on which motel was located, and the owner refused to grant the lease, no effective contract for the exchange of property ever came into being and the broker was not entitled to commissions, notwithstanding he devoted considerable time to completing the transaction.

Frank Marvin and Harold V. Thompson, Fresno, for appellant.

Stutsman, Hackett & Nagel, Fresno, for respondent.

CONLEY, Judge.

The defendant appeals from a judgment for $2,500 awarded the plaintiff real estate broker for alleged services rendered by him in procuring a contract for the exchange of Fresno County property consisting of a motel.

The exchange was never, in fact, consummated because a condition understood, and stipulated to, by all of the interested parties was never fulfilled. The exchange agreement failed solely because a third party, who owned the land upon which the motel was located, refused to execute a new lease to the proposed purchaser upon satisfactory terms, this having been made a condition for the performance of the agreement of exchange. The fundamental question of law raised by appellant which is determinative of this case is, therefore, this: Is a broker entitled to a commission for the sale or exchange of real property if he procures a conditional purchaser ready, able and willing to buy only in the event of the happening of a condition which never occurs? As the answer to this question is clearly "no" under California law, and the case must be decided accordingly, it will be unnecessary to consider other points raised on the appeal.

On May 16, 1952, the defendant, LeRoy F. Heady, and the McFarland Agency, by Frank C. Rich, executed a California Real Estate Association Standard Form Authorization to Sell; LeRoy F. Heady constituted the McFarland Agency as his agent "exclusively and irrevocably" for a period of 15 days "commencing May 16, 1952 and ending May 31, 1952" to sell the "Bragg Motel on Highway 99 south of City of Fresno, immediately south of the overpass, consisting of 18 rental units, together with all furnishings and equipment and supplies pertaining to the motel". It was agreed by the parties that disposal of the Bragg Motel would depend upon the negotiation of a lease with the owner of the land upon which the motel stood:

> "It is understood that all improvements are chattels on a lease of the land upon which same are constructed, and payments on said lease is $70.00 per month. Upon sale of motel a new lease will be drawn with the owner of the land for 20 years, renewable, and at the same monthly rental of $70.00 per month. Lease carries a verbal option to purchase upon owners death, who is about 84 years old."

The agent is granted "the exclusive and irrevocable right to sell the same within said time for Sixty-Five Thousand and No/100 ($65,000.00) and to accept a deposit thereon". The contract continues by stating that the seller will accept $20,000 in cash and give "terms in reason on balance". Seller agrees to pay the broker 5% of the sale price "herein set forth whether said property be sold by said agent or by me or by another agent or through some other source" within the time specified. And the agreement further provides that should a sale be made within 60 days after the termination of the authorization, to parties with whom the agent negotiated during the term, and said agent should notify the seller personally or by mail, in writing, of such negotiation within 5 days after the termination, the commission would be payable.

The plaintiff broker, through his employee, Frank C. Rich, succeeded in inducing two Santa Cruz people (F. J. Schaefer and his wife, Muriel) to agree conditionally to an exchange of property owned by them for the Bragg Motel. The Schaefers signed two instruments on June 3rd, 1952; one is called "Provisional Acceptance of F. J. Schaefer and Wife Offer to Exchange Santa Cruz Property for Bragg Motel at Fresno"; the second is denominated an Exchange Agreement. These two documents, constituting a conditional acceptance by the Schaefers of the Heady offer, must be read together, as they were executed at the same time by the Schaefers, deal with the same factors and complement each other; the two Exhibits constituting the conditional acceptance were prepared by, or under the direct supervision of, Mr. Rich, the employee of plaintiff herein. The Exchange Agreement contains the following provision:

> "It is understood that all improvements" (the Bragg Motel) "are chattels on a land lease, and payments on said

> lease are $70.00 per month, said lease to be negotiated with land owner for 20 years from date and renewable at the same present rate."

It will be noted that this clause is identical in meaning with the language already quoted from the original broker's contract.

When these writings are reasonably construed in the light of the entire record, the conclusion is inescapable that the Schaefers and Heady, as well as McFarland and his employee Rich, fully understood at all times that the procurement of a new lease from the land owner was an essential condition to the effectuation of the exchange. This fact is further established by the two sets of escrow instructions prepared by the respective parties. (Defendant's Exhibits "A" and "B"). Under date of June 23rd, 1952, Mr. Rich, for the McFarland Agency, wrote the Schaefers an account of his attempt to secure a lease from Mr. Frolich, the land owner; the land owner, he said, was willing to give a 20 year lease at a rental of $1,000 per year, payable 6 months in advance, and he would also consent to insert a "first refusal" clause in the lease; the letter concludes with the admonition "we urge you to use your best judgment in the matter and let us hear from you". (Defendant's Exhibit "D"). The Schaefers refused to execute the proposed new lease at this substantial advance in rental. (Defendant's Exhibit "C"). The record establishes that the exchange of the real property involved was not effected because the condition contained in the Exchange Agreement was never fulfilled. There is no contention that Mr. Heady or the Schaefers acted in bad faith or fraudulently or capriciously, or that either of them changed his mind or repudiated the conditional contract reached between them.

[1] The situation is simply one in which the principals agreed to effect an exchange of properties, only if a lease, with certain terms, should be granted by the owner of the land on which the motel was located; the procurement of the lease proved impossible and, as the condition was not complied with, no effective contract for the exchange of the property ever came into being. The plaintiff undoubtedly devoted substantial time and money in his attempt to complete the transaction, and he did all that he could to close the deal successfully. But, as the contract for the exchange was conditional and the condition did not occur, the broker is not entitled to any pay.

In Colton v. O'Brien, 217 Cal. 551, 20 P.2d 43, 44, the plaintiff had recovered judgment for a broker's commission based on a conditional contract for the exchange of real property; the defendant had employed the plaintiff to exchange her equity in certain real estate in Portland, Oregon, valued at $125,000, for property of a like value. The complaint alleged that the plaintiff secured a written offer from one, Gumplo, to exchange Los Angeles property owned by him for the Portland land, upon condition that a loan of $35,000 could be secured by him on the Oregon property. The loan could not be procured under the terms required by Gumplo, and the Supreme Court, holding that no commission had been earned, reversed the judgment. In the opinion it is said:

> "The procurement of the loan was a condition precedent to the exchange. As the exchange was never made, appellant's acceptance of the conditional offer was never fulfilled, and plaintiff was not, therefore, entitled to his commission.
>
> "A broker must bring about a completed transaction in accordance with his undertaking. He is never entitled to a commission for unsuccessful efforts. His commission comes only with success. Success is the very object of the contract. Unsuccessful efforts are of no benefit to the owner, and afford no ground of action."

In the companion case of Colton v. Gumplo, 217 Cal. 554, 20 P.2d 44, 45, the Supreme Court makes the same holding, saying in the opinion:

> "The procurement of the character of loan required was a condition precedent to the exchange. A broker is never entitled to a commission for unsuccessful efforts. Here plaintiff is attempting by these actions to recover

> $7,000 for services he never performed and which were of no benefit whatsoever to the parties."

A similar conclusion is reached by the Supreme Court with respect to a condition subsequent in the case of Ball v. California Conserving Co., 189 Cal. 326, 207 P. 1011, 1012. There the plaintiff sued for broker's commissions for negotiating sales of tomato paste, evidenced by a contract containing the following provision: "Subject this year's delivery meeting buyer's approval." The buyer did not approve the paste upon inspection, and the contract was cancelled; whereupon the broker sued for his commission and recovered judgment in the court below. In reversing the judgment, the Supreme Court says:

> "Appellant herein contends that, as to the Russo & Co. sale, the goods offered by the seller did not meet with the buyer's approval, and hence that, the condition in the contract of sale in that respect not having been fulfilled, and the contract for that reason having been canceled, the plaintiff was not entitled to recover any commissions upon such sale.
>
> "We see no answer to this contention. The memorandum of sale upon which the plaintiff relies for a recovery contains the express provision that the goods must meet the buyer's approval. This provision renders it an executory contract of sale upon a condition subsequent, without the fulfillment of which there could have been no completed sale under said contract. The right of the broker to recover commissions must be held to have depended upon a completed sale; and, this not having been consummated, it follows that the right of the plaintiff to recover his commissions under the contract with Russo & Co. must fail."

Again in McAdoo v. Moore, 70 Cal.App. 408, 233 P. 391, a judgment in favor of the assignee of food brokers for their commission was reversed on the ground that the contract negotiated by the brokers provided as a special condition that the product sold was "subject to approval of sample now in transit". The produce was not accepted because the sample was not satisfactory, but the trial court refused to admit such evidence, taking the position that the commission was earned by the negotiation of the written contract of sale, regardless of whether or not the condition set forth in the agreement was fulfilled. In dealing with the situation this presented, the Supreme Court says:

> "While it is true, generally speaking, that a broker earns his commission when he produces a purchaser ready, able, and willing to purchase according to the terms upon which he was employed to sell, a different legal situation arises where a broker is employed to negotiate a sale, as in the instant case, and negotiates a contract of conditional sale. He then is bound to show that the condition has occurred which converts the conditional sale into an actual sale—a binding contract between the parties. The contract before us is, in effect, as characterized by appellant, nothing more than an offer. This is not a case where samples were presented to the purchaser which were acceptable to him, and the goods warranted to be equal to sample. In such a case, the purchaser would have no choice but to accept the goods if they conformed to the sample. But here we have a case where the goods were sold *subject to approval of a sample* to arrive weeks later. When the sample arrived it was not satisfactory and was not approved. The purchaser was not bound to take the goods, and there was no valid, enforceable contract of sale and purchase between the parties." (Italics are the Court's.)

In Leipsic v. Taggart, 101 Cal.App. 726, 282 P. 400, 401, the plaintiff broker brought suit against the defendant for a commission, contending that he had produced a buyer ready, able and willing to purchase a mortgage which defendant had offered to sell. The letter from the defendant to the plaintiff, authorizing the sale of the mortgage, contained the following provision:

> "At the present time I have borrowed at my bank against this mortgage and the sale to you is predicated on their

> allowing me to take the loan up immediately."

The evidence showed that the bank had refused to allow the defendant to take up the loan, and the judgment of the trial court in favor of the defendant was affirmed.

See also: Barrios v. Foley, 83 Cal.App. 105, 110, 256 P. 573.

The judgment in favor of the plaintiff must, therefore, be reversed; and it would constitute a needless expense to both sides to require the parties to relitigate the action which, under the law and the fact, could have but one result—a judgment in favor of the defendant.

It Is, Therefore, Ordered that the judgment of the trial court be, and it hereby is, reversed, with instructions to the Municipal Court, upon the going down of the remittitur, to enter a judgment that plaintiff take nothing by his action, and that defendant have judgment for his costs.

SHEPARD, P. J., and KELLAS, J., concur.

ZUCKERMAN et al
v.
UNDERWRITERS AT LLOYD'S, LONDON.
L. A. 22668.

Supreme Court of California.
In Bank.
March 12, 1954.
Rehearing Denied April 7, 1954.

Beneficiaries brought action against insurer on accident policies to recover for alleged accidental death of insured, on ground that death was caused by bronchopneumonia resulting from exposure to elements and physical exhaustion, and insurer denied liability, on ground that death was due to pre-existing heart condition and use of alcohol and barbiturates. The Superior Court of Los Angeles County, Robert H. Scott, J., entered judgment adverse to beneficiaries, and they appealed. The Supreme Court, Edmonds, J., held that instructions which placed burden on beneficiaries to establish that death resulted from accidental bodily injury as defined by policies, and was caused by accident, and not by intentional self-injury, disease, or natural causes were not erroneous.

Judgment affirmed.

Carter, J., dissented.

Prior opinion 250 P.2d 653.

1. Trial 🔑295(8)

In action by beneficiaries on accident policies to recover for alleged accidental death of insured, on ground that death was caused by bronchopneumonia resulting from exposure to elements and physical exhaustion, wherein insurer denied liability, on ground that death was due to pre-existing heart condition and to use of alcohol and barbiturates, instruction that beneficiaries had burden of proving that insured's death was not directly or indirectly caused or contributed to by disease or natural causes was not reversibly erroneous when considered with other instructions given.

2. Appeal and Error 🔑882(12)

Appellants were in no position to criticize instruction which had been presented by appellee, and which was substantially similar to instruction requested by appellants.

3. Appeal and Error 🔑882(12)

A party cannot complain of error in instruction given at request of his adversary, when instruction requested by him also contains same error.

4. Trial 🔑295(5)

In action by beneficiaries on accident policies to recover for alleged accidental death of insured, instruction that proximate cause of death is that cause which, in natural and continuous sequence, unbroken by efficient intervening cause, produces death, and without which result would not have occurred, and that if jury found that insured's death would have occurred in any event at or about time it did occur, as result of intentional self-injury, disease or natural causes from which he was suffering continuously before and after accident, verdict was required to be for insurer, was not erroneous when considered with other instructions.

5. Trial 🔑260(1)

Where requested instruction merely restated a rule of law in slightly different language than instruction given, refusal to give requested instruction was not error.

6. Trial 🔑260(1)

Instructions which are cumulative or merely amplifications of other instructions need not be given.

7. Insurance 🔑646(6)

Ordinarily, burden is on insurer to prove a true excepted cause or excluded risk in order to defeat liability on that ground.

8. Insurance 🔑454

Insurer, under accident policy, is not liable for death by mere disease, even in absence of usual clause expressly excluding disease from among risks assumed.

9. Trial 🔑234(7)

In action by beneficiaries on accident policies to recover for alleged accidental death of insured, on ground that death was caused by bronchopneumonia resulting from exposure to elements and physical exhaustion, wherein insurer denied liability, on ground that death was due to pre-existing heart condition and to use of alcohol and barbiturates, instructions which placed burden on beneficiaries to establish that death resulted from accidental bodily injury as defined by policies, and was caused by accident, and not by intentional self-injury, disease, or natural causes, were not erroneous.

10. Insurance ⚷640(3), 645(2)

In action by beneficiaries on accident policies to recover for alleged accidental death of insured, denial by insurer that death was occasioned by bodily injury within meaning of policy was a sufficient plea, and additional defense that death was result of intentional self-injury or disease did not shift burden of proof to insurer.

11. Trial ⚷191(3)

In action by beneficiaries on accident policies to recover for alleged accidental death of insured, instruction that if jury should find that death of insured would have occurred in any event at or about time it did occur, as result of intentional self-injury, disease, or natural causes from which he was suffering continuously before and after alleged accident, then verdict must be for insurer, was not erroneous on ground that it erroneously assumed as an established fact that insured continuously before and after accident was suffering from self-injury, disease, or natural condition.

12. Trial ⚷219

In action by beneficiaries on accident policies, which did not use terms "accidental death" and "death by accidental means," refusal of court to instruct on difference between "accidental death" and "death by accidental means" was not error.

13. Appeal and Error ⚷1067

In action by beneficiaries on accident policies to recover for alleged accidental death of insured, refusal to give an instruction defining "bodily injury" was not prejudicial error, where policies, which defined "bodily injury which shall occasion death," were before jury.

14. Appeal and Error ⚷930(2)

Supreme Court was required to assume on appeal that jury understood instructions and correctly applied them to evidence.

15. Appeal and Error ⚷1062(1)

Where one of the beneficiaries of accident policies did not know that he was named beneficiary in policies until about time when notice was given, on his behalf, to insurer concerning alleged accidental death of insured, there could be little doubt that jury, in action on accident policies to recover for alleged accidental death of insured, found that such beneficiary gave immediate notice as required by policies, and alleged error in permitting issue of notice to go to jury was not prejudicial error as to such beneficiary.

16. Appeal and Error ⚷1062(1)

Where one of the beneficiaries of accident policies did not know that he was a beneficiary under one of the policies until at least one week after insured was cremated, he was not prejudiced by submission to jury, in action by beneficiaries on accident policies to recover for alleged accidental death of insured, of issue dealing with provision in policies that insurer was not liable unless insurer should be allowed, in event of death, to make necessary postmortem examination of body of insured.

17. Appeal and Error ⚷1062(1)

Where implied finding of jury, in action by beneficiaries on accident policies to recover for alleged accidental death of insured, was that death of insured did not result from a bodily injury within meaning of policies, so that there could be no recovery under policies, beneficiaries were not prejudiced because questions of notice to insurer of death of insured and autopsy rights of insurer were permitted to go to jury.

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Francis J. Gabel and Henry F. Walker, Los Angeles, for appellants.

Adams, Duque & Hazeltine, Los Angeles, Waller Taylor, II, Pasadena, for respondent.

EDMONDS, Justice.

Upon trial of the action brought by the beneficiaries under two accident insurance policies upon the life of George H. Francis, a jury returned verdicts in favor of the insurer. As grounds for reversal of the judgment denying recovery, it is contended that certain instructions to the jury were prejudicially erroneous.

One of the policies sued upon insured the life of Francis in the amount of $100,000 for the benefit of the law firm of which he was a member. A second policy for $75,000 provided that the insurance should be payable to the law firm and to James H. Francis, his brother.

The answer of the insurer admitted that the policies were in effect at the time of the death of Francis but denied liability thereunder. As separate and affirmative defenses, it alleged that death was caused by (1) disease or natural causes, and (2) intentional self-injury.

The evidence shows that Francis, a resident of Los Angeles, went to Mexico on a fishing trip. As the result of a storm, the boat used by him and several others in the party was unable to return to the mainland and the men spent a cold and uncomfortable night on an island. The next day Francis complained about not feeling well. He kept himself wrapped in blankets and there is considerable evidence that he appeared to have frequent chills. However, Stilbert, one of the men who accompanied Francis, testified that at no time did Francis appear to him to be ill.

The record includes the testimony that Francis did not go to his office on the three days following his return to Los Angeles. However, Fred Paulsen testified that he and Francis were together at the latter's office on one of those days for one or two hours. He said that Francis "appeared to be in good health, so far as I know". Other testimony is that during those three days Francis was suffering from a cold, evidenced by the symptoms of sneezing and coughing. On the third day, Francis consulted a physician and asked him to prescribe for a cold. Pursuant to the physician's advice, Francis obtained aureomycin and sleeping tablets.

Francis then decided that his condition would improve if he visited his brother who lived on the desert. He made arrangements to drive to Victorville and meet a friend who would accompany him the rest of the way to his brother's home. Late on the following afternoon, Francis parked his car in a picnic ground near Victorville. Two days later, he was discovered in the car, dead. The car was facing south and all of the windows were closed. Francis was lying in the back seat in a supine position with his head to the east on a small pillow. His left arm was down off the seat and the right arm was lying across his body. His collar was buttoned and his tie intact, as were all of his clothes. As to his general appearance, the deputy sheriff who investigated testified that "he was lying there in a peaceful manner". The keys to the car were in Francis' side coat pocket.

An autopsy, not requested by any of the parties, was performed by county autopsy surgeon Baird on the following Monday. Two days later the body was cremated. The record does not show at whose order this was done. Some seven to 12 days after the death of Francis, Norman Pittluck, an attorney employed by the law firm, discovered the insurance policies and informed Arthur E. Edmunds, one of the partners, of their terms.

Eleven days after the body of Francis was discovered, Underwriters was notified of the death and claim filed for payment. Underwriters, pursuant to the provisions of the policies, requested permission to perform a post-mortem examination. The insurer was informed on April 25th that the body had been cremated.

The testimony as to the cause of death is conflicting and extremely technical. The certificate of death, signed by Dr. Baird, states:

> "*Disease or condition directly leading to death:*
>
> "(A) *Bronchopneumonia.*
>
> "*Antecedent Causes.* Morbid conditions, if any giving rise to the above cause (A) stating the underlying cause last:
>
> "Due to (B) Edema of Brain. Due to (C) Acute Alcoholism."

Dr. Baird testified that he put "acute alcoholism" on the death certificate because an acquaintance of the deceased informed him that Francis was an alcoholic drinker. According to Dr. Baird, his diagnosis of edema of the brain was based solely on the statement made to him that Francis used intoxicants. Edema of the brain, said Dr. Baird, results either from alcohol or injury "and in this case there was no evidence of injury". His examination was made by "gross" methods, that is, what he could see with his eyes and feel with his hands, in contradistinction to microscopic study.

An electrocardiographic tracing made for Francis about two years before his death showed that he then had a normal heart for a man of his age. Underwriters' medical expert was of the opinion that Francis had suffered a "first degree heart block".

Flossie Francis, the divorced wife of the insured, remained on friendly terms with him until his death. She testified that he was a heavy drinker and an habitual user of sleeping pills. According to her testimony, he did not look well during the last months before his death and complained of pain, especially in his shoulder. Other witnesses described Francis as "a heavy but sociable drinker", and were of the opinion that he did not appear to be well. However, several friends of the deceased told the jury he was in the best of health and rarely drank, never to excess.

The medical expert for the beneficiaries, in response to a hypothetical question, testified that the cause of death was bronchial pneumonia, and that there "is nothing in the history of this case or in the autopsy findings which show that alcohol was a causative factor in any way whatsoever". A physician called by the insurer also was asked a hypothetical question. He said that an accurate diagnosis could not be made without microscopic studies. In his opinion, Francis did not die of bronchopneumonia. "I don't believe this man died of pneumonia, because if you have ever seen a patient die of pneumonia you have seen a patient who gasps for breath * * * it would be very—very unique for a man to be lying [supine] * * * in a car with his tie in place, with the upper button of his shirt unopened, lying calmly with the windows shoved up. I think most people with pneumonia cry for air, they want the window open, they want the tie off, they want no hindrance to respiration." He gave as his opinion that the primary cause of death was a "condition which led to circulatory collapse and edema and congestion of the lung". As his reasons for that opinion he stated, "Primarily it occurs, of course, in acute heart failure * * * [it] is the classical finding of all these many people who die from an overdose of sleeping pills. Many chemical substances, among which is alcohol * * * I could run through a list of many poisons which can do it."

Except for the amounts of the insurance, the policies are identical in form. In part, they provide as follows:

"A. Insuring Clause: If at any time during the currency of this certificate the Assured shall sustain any accidental bodily injury * * * caused by * * * Accident, as hereinafter defined which shall, solely and independently of any other cause within six (6) calendar months from the date of the accident causing such bodily injury, occasion the disablement of the Assured * * * the Underwriters will pay to the Assured, his Executors, Administrators, or Assigns (or in case such bodily injury shall occasion the death of the Assured, to the Beneficiary or Beneficiaries named herein) * * *:

"E. Definitions: It is understood and agreed that:

"2. 'Bodily Injury Which Shall Occasion Death' includes, in addition to the coverage herein provided, death by exposure to the elements or physical exhaustion or drowning resulting from an accident or mechanical or other failure of anything used as a means of conveyance or transportation.

"G. Conditions:

"1. Exclusions: This certificate does not cover death, injury or dismemberment:

"(b) Directly or indirectly caused or contributed to by intentional self injury disease or natural causes, suicide or attempted suicide. * * *

"2. Notice of Loss: Notice in writing must be sent to the Underwriters of any accident to the Assured as soon as reasonably practicable after the occurrence of the accident * * * In the event of death, immediate notice must be sent to the Underwriters. In no case will the Underwriters be liable to make compensation to the Assured or to his representatives unless the medical or other officer of the Underwriters * * * shall be allowed * * * in the event of death to make any postmortem examination of the body of the Assured as the Underwriters are advised necessary for the purpose of ascertaining the * * * true cause of death. * * *"

The beneficiaries attack the judgment against them upon the ground that the trial judge did not properly instruct the jury. The insurer's position is that the rulings upon instructions were correct.

Complaint is made of an instruction given at the request of the insurer by which the jury was told that the plaintiffs had the burden of proving that the death of Francis was not "directly or indirectly caused or contributed to by * * * disease or natural causes."[1] The effect of this instruction, they assert, is to deprive them of the benefit of the rule established by Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689, and particularly as that rule was applied in Happoldt v. Guardian Life Ins. Co., 90 Cal.App.2d 386, 203 P.2d 55.

The Brooks case was an action upon a policy insuring against "the results of bodily injuries * * * caused directly and independently of all other causes by violent and accidental means". The insurer agreed to pay double indemnity if the injuries were received "in consequence of the burning of any building in which the insured shall be at the commencement of the fire". The policy further provided: "This insurance shall not cover suicide or any attempt thereat while sane or insane; * * * nor shall it cover accident, injury, disability, death or any other loss caused wholly or partly, directly or indirectly, by disease or mental infirmity or medical or surgical treatment therefor." The insured, who was chronically ill, died in a fire which started in his bedroom. It was the autopsy surgeon's opinion that death was caused by second and third degree burns. After a verdict in favor of the insurer, a motion for a new trial was granted upon the ground of insufficiency of the evidence. In affirming the order granting a new trial, the court said "that the presence of preexisting disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of death; and that recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause." 27 Cal.2d at pages 309–310, 163 P.2d at page 691. Otherwise stated, the insurer is liable although death is caused partly by a preexisting disease or infirmity and partly by an accident, so long as the accident is the prime or moving cause. Happoldt v. Guardian Life Ins. Co., supra, 90 Cal.App.2d at page 399, 203 P.2d at page 62.

The provisions of the policies here sued upon are substantially the same as those considered in the Brooks case. The appellants assert that the language "directly or indirectly caused or contributed to" is too broad and improperly states the rule as to proximate cause. That phraselogy, Underwriters reply, should not be construed in isolation. The defect, if any, says the insurer, is cured by the concluding sentence directing the jurors to consider the instructions as a whole.

The first two sentences of the instruction unduly stress the significance of any contribution to the death of Francis by preexisting disease or intentional self-injury. To that extent the instruction is inconsistent with the rule on causation as laid down in the Brooks case, and as stated to the jurors in several other instructions.

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[1] "Plaintiffs have the burden of proving by a preponderance of the evidence that the death of George H. Francis was not directly or indirectly caused or contributed to by intentional self-injury, disease or natural causes. Furthermore plaintiffs may not recover if the evidence affirmatively shows that intentional self-injury, disease or natural causes caused or contributed to the death of the insured directly or indirectly. In determining what is meant by the language 'caused or contributed to' and 'directly or indirectly' you will consider all of the instructions and as a whole."

In the last sentence of the instruction, the jurors were told that they were to determine the meaning of "caused or contributed to" and "directly or indirectly" from "all of the instructions and as a whole". In other instructions, they were told explicitly that "recovery may be had even though a diseased or infirm condition appears to actually contribute to the cause of death, if the happening, within the coverage of the insurance, sets in progress the chain of events leading directly to death, or if it is the prime or moving cause." [2] By these instructions, which exactly stated the rule of the Brooks case, the jurors thus were informed of the technical legal meaning of the words used in the policy which state the conditions of the insurer's liability. It must be assumed that the jurors followed the court's direction and applied the law properly.

[1] In this connection it is important to note that the evidence presented by Underwriters was not offered in support of the theory that the death of Francis was occasioned in part by accident and in part by a preexisting disease or intentional self-injury. The insurer argued to the jury that death was due to "an overindulgence in alcohol, combined with a small ingestion or taking of barbiturates, added on to a preexisting heart condition". On the other hand, the beneficiaries relied upon bronchopneumonia as being the sole cause of death. In these circumstances it cannot reasonably be concluded that the jury could have misinterpreted the language of the instruction here attacked.

[2, 3] The second instruction complained of also was given at the insurer's re-

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[2] "If, under the insurance certificates here involved, the assured sustained any accidental bodily injury caused by an accident or suffered exposure or physical exhaustion covered by the certificates as heretofore defined which bodily injury or exposure or physical exhaustion proximately caused to be set in progress disease, infection or other conditions which in natural and continuous sequence operated directly to cause death of the assured, then that death is considered in law to have resulted from said bodily injury as the bodily injury in such a situation is considered to be the proximate cause of the death. Bodily injury, you will recall, includes, under the definition of the certificates, the exposure or physical exhaustion covered by the certificates." (Plaintiffs' instruction No. 36.)

"The presence of pre-existing disease does not relieve the insurer from liability if an accident exposure or exhaustion as heretofore defined is the proximate, prime or moving cause of the insured's death, or if it sets in progress a chain of events leading directly to the death * * *." (Defendant's instruction No. 20.)

"You are instructed that, if a happening occurs which is within the coverage provisions of a policy such as those here involved and if that happening proximately caused a diseased condition or infirmity which results in death of the insured, then such happening may be the proximate cause of said death." (Plaintiffs' instruction No. 35.)

"If you find that a happening occurred which is within the coverage of the policy and that it, operating upon an unhealthy body, caused and put in motion a chain of events which is traced to said happening, then the happening may be the proximate cause of death. In other words, a recovery may be had even though a diseased or infirm condition appears to actually contribute to the cause of death, if the happening within the coverage of the insurance, sets in progress the chain of events leading directly to death, or if it is the prime or moving cause." (Plaintiffs' instruction No. 14.)

"If you find that George H. Francis sustained any accidental bodily injury caused by an accident or if you find that he suffered exposure to the elements resulting from an accident or exposure to the elements resulting from mechanical or other failure of anything used as a means of conveyance or transportation or if you find that he suffered physical exhaustion resulting from an accident or mechanical or other failure of anything used as a means of conveyance or transportation, and if you further find that such bodily injury or such exposure to the elements or such physical exhaustion proximately caused some bodily infirmity or inflammatory process or infection or ailment from which death resulted, then you are instructed that such death did not result directly or indirectly from disease or natural cause." (Plaintiffs' instruction No. 15.)

quest. It reads: "The burden of proof is upon plaintiffs to prove by a preponderance of the evidence that the death of Mr. Francis was occasioned by accidental bodily injury caused by accident or by exposure to the elements or physical exhaustion resulting from an accident or mechanical or other failure of anything used as a means of conveyance or transportation, and that such was the cause of his death solely and independently of any other cause." Exception is taken to "solely and independently of any other cause". The quoted language is said to be similar to and to have the same effect as that in the instruction condemned in Happoldt v. Guardian Life Ins. Co., supra, 90 Cal.App.2d at pages 398–399, 203 P.2d at pages 61–62. However, the beneficiaries are in no position to criticize the instruction presented by Underwriters because the jury was given a substantially similar instruction requested by them.[3] It is well established that a party cannot complain of an error in an instruction given at the request of his adversary when an instruction requested by him also contains the same error. Wells v. Lloyd, 21 Cal.2d 452, 460, 132 P.2d 471; Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 P. 772.

[4] Another instruction, given at the request of Underwriters, reads: "I have instructed you that the proximate cause of death is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the death, and without which the result would not have occurred. If, therefore, you find that the death of Mr. Francis would have occurred in any event at or about the time it did occur, as a result of intentional self-injury, disease or natural causes from which he was suffering continuously before and after the alleged accident, then and in those events your verdict must be in favor of the defendant."

The beneficiaries argue that this instruction is practically the same as one in the Happoldt case which was held to be erroneous. There, however, the instruction was one of three which were condemned as a group in that they were more favorable to the insurer than they should have been. The court concluded that the erroneous group of instructions "directed the jury to the effect that there could be no recovery if the death was caused partly by disease and partly by accidental injury." 90 Cal.App.2d at page 399, 203 P.2d at page 62. Here, read with the other instructions, the challenged one is a proper statement of the principle enunciated in the Brooks case. It merely conversely declares the rule which requires the beneficiaries to prove that an accident was the prime or moving cause of death. If in a given case death would have occurred in any event from some other cause, at or about the time it did occur, clearly that accident was not the prime or moving cause of death.

[5, 6] Complaint is also made of the refusal to give one of the beneficiaries' requested instructions.[4] However, it merely restated the rule of the Brooks case in slightly different language. Instructions which are cumulative or merely amplifications of other instructions, need not be given. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 783, 117 P.2d 850; In re Estate of Clark, 180 Cal. 395, 399, 181 P. 639.

On the question of burden of proof, the beneficiaries maintain that the insurer was required to prove that death resulted from intentional self-injury or disease, inasmuch as they are causes of death excluded by the policies.[5] The position of the insurer was stated to the jury by its instructions placing

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3. "You are instructed that, while it is plaintiffs' burden of proof to show that, solely and independently of any other cause, there was occasioned to the Assured accidental death caused by accident. * * *" (Plaintiffs' instruction No. 38.)

4. "Death of George H. Francis did not result directly or indirectly from disease or natural cause, so as to bar recovery under either policy, if his death was the proximate result of any one or combination of the events, covered by said policies and herein summarized, which event or combination aggravated or awakened a previously existing bodily infirmity or dormant ailment from which death resulted." (Plaintiffs' requested instruction No. 13.)

5. Plaintiffs' requested instructions on this point are as follows: "Each policy contains what are commonly referred to as

the burden upon the beneficiaries to establish (1) that death resulted from an accidental bodily injury as defined by the policies, and caused by accident; and (2) that death was not caused "by intentional self-injury, disease or natural causes".[6]

[7] The burden of proof was upon the beneficiaries, they concede, to establish that the death of Francis occurred as a result of a "bodily injury" within the meaning of that term as defined by the policy. Postler v. Travelers' Ins. Co., 173 Cal. 1, 3, 158 P. 1022; Kellner v. Travelers' Ins. Co., 180 Cal. 326, 330, 181 P. 61; Ogilvie v. Aetna Life Insurance Co., 189 Cal. 406, at page 413, 209 P. 26, 26 A.L.R. 116; Travelers' Ins. Co. v. Wilkes, 5 Cir., 76 F.2d 701, 705. Moreover, it is settled that ordinarily the burden is upon the insurer to prove a true excepted cause or excluded risk in order to defeat liability upon that ground. Mattson v. Maryland Casualty Co., 100 Cal.App. 96, 98, 279 P. 1045; Travelers' Ins. Co. v. Wilkes, supra, 76 F.2d at page 705. The question for decision, therefore, is whether, under the present policies, death occasioned by either intentional self-injury or disease, is death by reason of an excepted cause.

The policies here insured against "accidental bodily injury [including 'bodily injury which shall occasion death' as defined in the policies] caused by accident". "Accident" has been defined as "a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly and without any design of the person injured." Rock v. Travelers' Insurance Co., 172 Cal. 462, 465, 156 P. 1029, 1030, L.R.A.1916E, 1196; Richards v. Travelers' Ins. Co., 89 Cal. 170, 175, 26 P. 762. Basically, these policies are contracts insuring against accident, and it need not be here determined whether they can be characterized as insuring against "accidental death" or only against "injuries effected by accidental means." Rock v. Travelers' Insurance Co., supra, 172 Cal. at page 465, 156 P. at page 1030; and see United States Mutual Accident Association v. Barry, 131 U.S. 100, 121, 9 S.Ct. 755, 33 L.Ed. 60;

exclusionary clauses or exclusions from coverage. Only certain of these are relied upon by defendant as excluding coverage otherwise provided for by said policies. Those so relied upon will be noted in these instructions. One of the exclusions provided for in said policies is: 'Death directly or indirectly caused or contributed to by disease or natural causes.' As to this exclusion, you are instructed as follows:" (Plaintiffs' requested instruction No. 12.) "Death of George H. Francis did not result directly or indirectly from disease or natural cause, so as to bar recovery under either policy, if his death was the proximate result of any one or combination of the events, covered by said policies and herein summarized, which event or combination aggravated or awakened a previously existing bodily infirmity or dormant ailment from which death resulted." (Plaintiffs' requested instruction No. 13.) "Another exclusion provided for in said policies is: 'Death directly or indirectly caused or contributed to by intentional self-injury.' As to this exclusionary provision you are instructed as follows:" (Plaintiffs' conditionally requested instruction No. 16.) "In order to sustain this defense, the burden rests upon defendant Underwriters to prove by a preponderance of the evidence, each required element thereof. Under this exclusionary provision, it is not sufficient to prove merely that there was a self-injury, if any. The proof must further establish by a preponderance that the self-injury, if any, was intentional on the part of the insured and also that it either directly or indirectly caused or contributed to the death of the insured. If the evidence fails to establish each of these required elements by a preponderance, then this exclusionary provision has not been proven but must be determined against defendant and in favor of plaintiffs." (Plaintiffs' conditionally requested instruction No. 17.)

[6] In its entirety, as modified by the trial court, the second instruction states: "Plaintiffs have the burden of proving by a preponderance of the evidence that the death of George H. Francis was not directly or indirectly caused or contributed to by intentional self-injury, disease or natural causes. Furthermore plaintiffs may not recover if the evidence affirmatively shows that intentional self-injury, disease or natural causes caused or contributed to the death of the insured directly or indirectly. In determining what is meant by the language 'caused or contributed to' and 'directly or indirectly' you will consider all of the instructions and as a whole."

Lincoln Nat. Life Ins. Co. v. Erickson, 8 Cir., 42 F.2d 997, 1000.

The beneficiaries contend that Clause E-2 of the policy enlarged the coverage as stated in other provisions of the contract. However, unquestionably the only purpose of that clause is to define the term "any accidental bodily injury caused by accident" to include "death by exposure to the elements or physical exhaustion * * * resulting from an accident or other failure or anything used as a means of conveyance or transportation". And the law governing the insurer's liability was correctly stated to the jury.

With regard to "intentional self-injury", the jury was properly instructed as to burden of proof. It is the antonym of "accidental", and therefore expresses a concept which manifestly is the antithesis of a death occasioned by accident. Death by suicide reasonably may be said to have been caused by "intentional self-injury", Barber v. Industrial Commission, 241 Wis. 462, 464-465, 6 N.W.2d 199, 143 A.L.R. 1222, and in an action upon an accident policy which excluded liability for death by suicide, the court pointed out that the contract did not provide for payment for death but for death by accident. "Suicide, at least when sane, is not accidental death. A plaintiff under this policy has the burden of proving an accidental death, thereby negativing suicide." Travelers' Ins. Co. v. Wilkes, supra, 76 F.2d at page 705; see also, New York Life Ins. Co. v. Gamer, 303 U.S. 161, 171, 58 S.Ct. 500, 82 L.Ed. 726; Griffin v. Prudential Ins. Co., 102 Utah 563, 586, 133 P.2d 333, 144 A.L.R. 1402. By analogy, then in a suit upon an accident policy, by proof of accident proximately causing death, the beneficiary necessarily negatives "intentional self-injury".

Upon that construction of the insuring provisions, Dennis v. Union Mutual Life Ins. Co., 84 Cal. 570, 24 P. 120, and Bebbington v. California Western States Life Ins. Co., 30 Cal.2d 157, 180 P.2d 673, 1 A.L.R.2d 361, are distinguishable. The Dennis case was an action to recover upon the usual life insurance policy containing an exception to liability if death resulted from suicide. Reasoning that the exception was a true condition subsequent, the court placed upon the insurer the burden of proving suicide as the proximate cause of death. Mrs. Bebbington sued upon a life insurance policy with a clause excluding liability in the event the death of the insured occurred as a result of airplane travel other than as a fare paying passenger in a licensed aircraft flying a regularly scheduled passenger flight. Under such circumstances, the liability of the insurer was limited to the reserve of the policy. Neither of those decisions states the proper rule applicable to an accident insurance policy.

Other cases relied upon by the beneficiaries are also distinguishable. Postler v. Travelers' Ins. Co., supra [173 Cal. 1, 158 P. 1023], was an action upon policies insuring "against bodily injuries effected directly and independently of all other causes through external, violent, and accidental means (suicide, whether sane or insane, is not covered)." It was held, without discussion, and citing Dennis v. Union Mutual Life Ins. Co., supra, that "[o]n the issue of suicide the burden of proof rested upon the defendant". However, the court failed to note that the Dennis case was an action upon a life insurance policy, and the rule of law there stated and applied is inapplicable to accident insurance. The burden of establishing suicide, therefore, should not have been put upon the insurer, as the provision as to death from that cause was not a condition subsequent, but merely definitive of the precise risk assumed.

Mah See v. North American Accident Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123, also was an action upon a life insurance policy and did not distinguish correctly between different forms of insurance. Insofar as these decisions are inconsistent with the rule here stated upon the issue of burden of proof, they are overruled. For the same reason, and to the same extent, Housh v. Pacific States Life Ins. Co., 2 Cal.App.2d 14, 37 P.2d 741, is disapproved.

[8] A rule as to whether or not death caused by disease constitutes a true excepted risk cannot be given in general terms or by way of broad principles of law. As

a general proposition, however, "The insurer, under an accident policy, is not liable for death by mere disease, even in the absence of the usual clause expressly excluding disease from among the risks assumed." Vance on Insurance [2d ed. 1930], § 259, p. 880. The rule is clear but varying definitions of "disease" make it difficult to apply.

A medical definition of "disease" is: "In general, any departure from a state of health; an illness or a disease. More specifically a definite morbid process having a characteristic train of symptoms. It may affect the whole body or any of its parts, and its etiology, pathology, and prognosis may be known or unknown." The American Illustrated Medical Dictionary (Dorland), 17th ed. 1937. In Dickerson v. Hartford Accident & Indemnity Co., 56 Ariz. 70, 105 P.2d 517, the court relied principally upon the statement in Webster's Dictionary. In the course of considering an accident policy containing provisions similar to the present ones, "disease" was defined as a condition in which bodily health is seriously attacked, deranged, or impaired, and as an alteration of state of the human body or some of its organs or parts, interrupting or disturbing the performance of the vital functions.

In Connelly v. Hunt Furniture Co., 240 N.Y. 83, 147 N.E. 366, 39 A.L.R. 867, Judge Cardozo succinctly pointed out the elusive character of "disease" as it relates to workmen's compensation statutes. He said: "We attempt no scientifically exact discrimination between accident and disease, or between disease and injury. None perhaps is possible, for the two concepts are not always exclusive, the one of the other, but often overlap." 240 N.Y. at page 84, 147 N.E. at page 367.

Here, the sole theory of the beneficiaries is that there is liability under the language of Clause E-2 of the policies. The insurer has not urged that the beneficiaries' theory, assuming it to be factually true, was not within the scope and intent of the clause. Nor do the beneficiaries assert that the evidence offered by Underwriters which tended to show that Francis was suffering from certain organic conditions, did not constitute "disease". In these circumstances, the jury having been instructed upon burden of proof in very general terms only, without attempting to define disease, there was no error.

[9] For these reasons, under the policies here sued upon, death occasioned by intentional self-injury or disease is not one which occurs by reason of excepted causes. The "exclusionary clause" is the antithesis of the "insuring clause". If Francis died as the result of an accident, death was not occasioned by intentional self-injury, disease or natural causes. Conversely, if intentional self-injury, disease or natural causes caused his death, it did not result from an accident within the meaning of the policy. The instructions to the jury in regard to the burden of proof on these issues were correct.

[10] It is not significant that Underwriters pleaded as affirmative defenses that the death of Francis occurred as a result of either intentional self-injury or disease and natural causes. A denial that death was occasioned by a bodily injury within the meaning of the policy is a sufficient plea. An additional defense that it was the result of intentional self-injury or disease does not shift the burden of proof to the defendant. Kellner v. Travelers' Ins. Co., supra, 180 Cal. at page 330, 181 P. at pages 62, 63; New York Life Ins. Co. v. Gamer, supra, 303 U.S. at page 171, 58 S. Ct. at page 503; Travelers' Ins. Co. v. Wilkes, supra, 76 F.2d at page 705; Whitlatch v. Fidelity & Casualty Co., 149 N.Y. 45, 48, 43 N.E. 405.

[11] The beneficiaries challenge an instruction which reads, in part: "If, therefore, you find that the death of Mr. Francis would have occurred in any event at or about the time it did occur, as a result of intentional self-injury, disease or natural causes from which he was suffering continuously before and after the alleged accident, then and in those events your verdict must be in favor of the defendant." It is urged that this instruction, requested by Underwriters, erroneously assumed as an established fact that Francis continuously before and after the accident was

suffering from some self-injury, disease or natural condition, whereas the evidence thereon was either otherwise or directly conflicting. The criticism ignores the prefatory language, "If, therefore, you find", and the concluding qualification, "then and in those events". See Happoldt v. Guardian Life Ins. Co., supra, 90 Cal.App.2d at pages 397–398, 203 P.2d at pages 60–61.

[12] The beneficiaries also complain of the court's refusal to instruct upon the difference between "accidental death" and "death by accidental means". They argue that the policies covered "accidental death", which is a less limited concept, and thus afforded greater coverage than "death by accidental means". In a proper case that distinction should be made. Ogilvie v. Aetna Life Insurance Co., supra, 189 Cal. at page 411, 209 P. at page 28; Rock v. Travelers' Insurance Co., supra, 172 Cal. at page 465, 156 P. at page 1030; United States Mutual Accident Association v. Barry, supra, 131 U.S. at page 121, 9 S.Ct. at page 762; Lincoln Nat. Life Ins. Co. v. Erickson, supra, 42 F.2d at page 1000. Here, however, the policies do not use either term, and their provisions, including Clause E–2, were before the jury. Nothing more was required.

[13] The beneficiaries also insist that the jury should have been instructed as to the meaning of "bodily injury". It is their position that to leave the term undefined allows the jury to surmise or speculate or determine that it could not include a death where no external injury was had. However, "bodily injury" was defined for the jurors by stating the express language of the policies, and they were told: "'Bodily injury which shall occasion death' includes, in addition to the coverage herein provided, death by exposure to the elements or physical exhaustion or drowning resulting from an accident or mechanical or other failure of anything used as a means of conveyance or transportation." No prejudice resulted from the refusal to instruct as to other meanings of the insuring phrase.

The instruction to the effect that immediate notice of death was required to be given Underwriters is also attacked by the beneficiaries. They claim that there has not been full compliance with section 551 of the Insurance Code. That statute provides: "Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a lesser period shall be valid." It is asserted that this is not a case involving "life, marine, or fire insurance," and inasmuch as it has been stipulated that notice was given within the 20-day limit, Underwriters cannot rely upon the provision of the policies.

In the alternative, the beneficiaries take the position that section 10335 of the Insurance Code governs the time of notice of claim. That section permits the inclusion of "immediate notice in case of accidental death" only in the event the statutory "standard provision relative to time of notice of claim" also is used. The beneficiaries assert that even if it is assumed that the language in the policy need not be identical with that of the statute, the policies on the life of Francis do not substantially comply with the legislative requirement. They invoke the rule that where a prescribed statutory provision is not contained in the policy, the insurer will be bound either by the statutory provision or by the policy provision, whichever is more favorable to the beneficiary. It is contended, also, that Underwriters has waived notice of claim in that objection was not made promptly and specifically upon that ground, as required by section 554 of the Insurance Code. Furthermore, it is argued, in the event that the question of notice properly was left to the jury's determination, the instructions did not instruct adequately as to when notice has been given "immediately".

As for the last point, the jury was told: "A provision that immediate notice be given is satisfied by notice which is prompt and reasonable under the particular circumstances. A failure to give immediate notice is no defense where it was not reasonably possible to give such notice and the notice actually was given as soon as reasonably possible." And again, "Thus the plaintiffs have the burden of proving that notice was given to the Underwriters within a reasonable time according to the circumstances existing in this case."

It is not necessary to pass upon the other contentions pertaining to notice. Even if it be assumed that the issue of notice should not have been left to the jury's determination, there has not been a miscarriage of justice within the meaning of the constitutional provision. Cal.Const. art. VI, § 4½.

On this issue the beneficiaries were treated separately. The jury was instructed: "Plaintiffs Zuckerman and Edmunds as members of the partnership are presumed to have had knowledge of the terms and conditions of the certificates at all times after the certificates were issued and at the time of the death of deceased. They were required to notify defendant immediately as soon as they learned of the death. It is for you to determine when they or either of them or anyone acting in their behalf and with their knowledge learned of the death, and it is for you to determine further whether they notified defendant immediately of the death. As to the plaintiff James Francis it is for you to determine (1) when he learned of the existence of the certificate naming him as beneficiary in the event of the death of his brother and its requirement of immediate notice to defendant, (2) when he learned of the death and (3) whether, as soon as he had knowledge of the requirement of immediate notice and also had knowledge of the death of deceased he gave such immediate notice to defendant by such means and in such a manner as was reasonable and proper under all the circumstances."

[14, 15] It must be assumed that the jury understood the instructions and correctly applied them to the evidence. Nunneley v. Edgar Hotel, 36 Cal.2d 493, 500, 225 P.2d 497; Henderson v. Los Angeles Traction Co., 150 Cal. 689, 697, 89 P. 976. James did not know that he was a named beneficiary in one of the policies until approximately the time when notice was given, March 29th. The notice dated March 29th was given on behalf of the law partnership and James. Under those circumstances, there can be little doubt that the jury found that James gave "immediate notice". The jury, however, found against him as well as against the law partnership. James, therefore, could not have been prejudiced by permitting the issue of notice to go to the jury.

Nor can it be argued that the law partnership, nevertheless, was prejudiced in that regard. There was only one other issue where plaintiffs were treated separately, the question pertaining to Underwriters' right to autopsy. If the jury reasonably might have found that James did not discharge his duties as to that condition, then neither he nor the partnership could possibly have been prejudiced by the submission of the issue of notice to the jury. Unless the jury decided against James on either the issue of notice or the issue of autopsy rights, the case necessarily must have been decided upon another ground. The remaining ground concerns the cause of death as defined by the policies. That is one which is common to all of the beneficiaries and they could not be separately treated.

The beneficiaries also contend that the issue of autopsy rights should not have been submitted to the jury for determination. That position is based upon their interpretation of that part of Clause G-2 of the policies which provides: "In no case will the Underwriters be liable to make compensation to the Assured or to his representatives * * * unless * * * Underwriters * * * shall be allowed * * * in the event of death to make any post-mortem examination of the body of the Assured as [is] necessary. * *" It is argued that "beneficiaries" are not "representatives" of the assured; also, that the language of an insurance policy is to be construed most strongly against the insurer, particularly where a forfeiture provision is involved. Another claim is that Underwriters waived the right to autopsy in that it did not make a prompt request. It is quite improbable that the jury found against James Francis on the ground of noncompliance with the autopsy provision. One instruction read: "Plaintiff James

Francis as a brother of deceased could have consented to such a post mortem by defendant. Neither James Francis nor the other beneficiaries in this case, however, could by his own order have prevented the cremation of the body of deceased if such cremation had been ordered by some person legally authorized so to do. When a beneficiary knew of the terms of the certificates and learned of the death of deceased it was his duty to do such things as were reasonable and proper under all the circumstances to afford defendant the opportunity to make its own post mortem examination."

[16, 17] The uncontradicted testimony of James Francis conclusively proves, for the purpose of determining whether or not asserted error was prejudicial, that he did not order cremation of the body. He did not know that he was a beneficiary under one of the policies until at least one week after the cremation. In these circumstances, he was not prejudiced by the submission of that issue to the jury. Also, as the jury most probably did not find against James Francis on the issue of notice, the implied finding of the jury is that the death of the insured did not result from a "bodily injury" within the meaning of the policies. That implied finding effectively prevents the law partners of Francis from claiming prejudicial error as to them in permitting the questions of notice and autopsy rights to go to the jury.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I agree with the beneficiaries that Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689, 691, decided by a unanimous court, is controlling here. The attempt on the part of a majority of this Court to distinguish it without overruling it, in my opinion, but serves to point out the correctness of that decision as applied to the facts presented here. We said there that "[on] the other hand there is authority for what in our opinion is the correct rule, that the presence of preexisting disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of death; and that recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause. Scanlan v. Metropolitan Life Ins. Co., 7 Cir., 1937, 93 F.2d 942, 946; Kelly v. Prudential Ins. Co. of America, 1939, 334 Pa. 143, 6 A.2d 55, 59; 1 Appleman, Insurance Law & Practice (1941) § 403, pp. 497, 498; 6 Couch on Insurance (1930), § 1249, p. 4569; cf. Hanna v. Interstate Business Men's Accident Assn, 41 Cal.App. 308, 310, 182 P. 771." It was also said there that "[a]lthough it appears that the insured was suffering from an incurable cancer and was under the influence of narcotics given to relieve pain, and that by reason of his weakened and infirm condition he may have been less able than a normal person to withstand the effect of the injuries, there is evidence from which the court could conclude that the proximate cause of his death was burns received in a fire of accidental origin."

An analysis of the facts involved here in the light of the rule of the Brooks case shows that the policy provided, under the heading "Definitions," that it was understood and agreed that "bodily injury which shall occasion death" included, "*in addition to the coverage herein provided*, death by exposure to the elements or physical exhaustion or drowning resulting from an accident or mechanical or other failure of anything used as a means of conveyance or transportation." (Emphasis added.) Here, the insured suffered from exposure to the elements by reason of the failure of his boat to return to the mainland. The following statement from the majority opinion relative to the medical testimony in this case shows that it was based on the worst kind of hearsay evidence: "Dr. Baird testified that he put 'acute alcoholism' on the death certificate because an acquaintance of the deceased informed him that Francis was an alcoholic drinker. According to Dr. Baird, his diagnosis of edema of the brain was based solely on the statement made to him that Francis used intoxicants. Edema of the brain, said Dr. Baird, results either from alcohol or injury 'and in this case there was no evidence of injury'. His examination was made by 'gross' methods, that is, what he could see with his eyes and feel with his hands, in contradistinction to microscopic study." It should be noted that *under the provisions of the policy* there needed to be no evidence of injury as such. There would be no evidence of *injury* so far as physical exhaustion was concerned, or in all probability so far as exposure to the elements was concerned. The beneficiaries established the facts concerning the ill-fated fishing trip. In all other respects the evidence was highly conflicting. Some witnesses testified that the insured was a heavy drinker; others that he never drank to excess; still others testified that he rarely drank. The evidence was also in direct conflict as to whether the insured had been ill prior to the fishing trip. The medical testimony was uncertain and conflicting and was, for the most part, based upon insufficient evidence and hearsay. An example is the medical evidence relating to the cause of death: the expert for the beneficiaries testified that the insured died of bronchial pneumonia; the expert for the insurer testified that he "didn't believe" the insured died of pneumonia, and that it was his opinion that the primary cause of death was a "condition which led to circulatory collapse and edema and congestion of the lung" which occurred "primarily" in acute heart failure. Other evidence showed that an electrocardiagram made for the insured two years before his death established that Francis had a normal heart for a man his age.

The evidence showed that the insured, after suffering the mishap, had chills, complained of not feeling well to the extent of contacting his doctor, taking the prescribed drugs, and making plans to go to the desert to recuperate. There is nothing to show that any previous physical condition substantially or materially contributed to the death of the insured. The majority admits that the policy sued on here is substantially the same as in the Brooks case and that the insurer may be held liable although death is caused partly by a pre-existing disease or infirmity and partly by accident so long as the accident is the prime or moving cause. In view of the rule of the Brooks case and the facts presented here, one of the instructions complained of was a misstatement of the law and highly prejudicial to the beneficiaries. That instruction told the jury, "Furthermore plaintiffs may not recover if the evidence affirmatively shows that intentional self-injury, disease or natural causes caused or contributed to the death of the insured directly or indirectly." In the majority opinion it is said, "The first two sentences of the instruction unduly stress the significance of any contribution to the death of Francis by preexisting disease or intentional self-injury. To that extent the instruction is inconsistent with the rule on causation as laid down in the Brooks case, and as stated to the jurors in several other instructions." (Emphasis added.) As I have heretofore pointed out, the Brooks case qualifies the provision by holding that the insurer is not relieved from liability if a pre-existing disease or infirmity "appears to actually contribute to cause the death *if* the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause." (Emphasis added.) The majority explain away the inconsistencies by the argument that other instructions followed the rule of the Brooks case. For every instruction stating the rule of the Brooks case, there is another instruction which is inconsistent with it. For example, the jury was directed to deny recovery if the death was caused partially by disease and partially by accident. Still another instruction informed the jury that plaintiffs must prove, by a preponderance of the evidence, that the insured met his death by accident or exposure and that the death occurred "*solely and independently*" (italics added) of any other cause.

The most flagrantly prejudicial, and erroneous, instruction was that which placed upon the beneficiaries the burden of proving that the insured's death was not caused by intentional self-injury, disease or natural causes. The majority concedes that "ordinarily the burden is upon the insurer to prove a true excepted cause or excluded risk in order to defeat liability upon that ground." In order to avoid the effect of this concession, it is held that these exceptions were not exceptions at all. The insurer pleaded, in its answer, as *separate and affirmative defenses*, that death was caused by disease or by natural causes; as an amendment to the answer, another *affirmative* defense was added—that death was caused by intentional self-injury. It had been held prior to the Brooks case that the *absence* of disease was a part of the plaintiff's case; and, prior to the present case, it had also been held that death by intentional self-injury, or suicide, was part of the insurer's case and that the burden of proof was upon the insurer. In order to hold that the burden of proving that the death was not caused by intentional self-injury was on the plaintiffs the majority says "[b]y analogy then, in a suit upon an accident policy, by proof of accident proximately causing death, the beneficiary necessarily negatives 'intentional self-injury'" and relies upon Barber v. Industrial Commission, 241 Wis. 462, 464–465, 6 N.W.2d 199, 143 A.L.R. 1222; Travelers' Ins. Co. v. Wilkes, 5 Cir., 76 F.2d 701; New York Life Ins. Co. v. Gamer, 303 U.S. 161, 58 S.Ct. 500, 82 L.Ed. 726; Griffin v. Prudential Ins. Co., 102 Utah 563, 133 P.2d 333, 144 A.L.R. 1402.

The majority say "[I]t is not significant that Underwriters pleaded as affirmative defenses that the death of Francis occurred as a result of either intentional self-injury or disease and natural causes. A denial that death was occasioned by a bodily injury within the meaning of the policy is a sufficient plea. An additional defense that it was the result of intentional self-injury or disease does not shift the burden of proof to the defendant. [Citations.]" All of this rests upon the reasoning that intentional self-injury is the antonym of accidental and therefore expresses a concept which manifestly is the antithesis of a death occasioned by accident. "The rule supported by the overwhelming weight of authority, in cases involving accident policies *or other policies with accident* features containing express conditions or exceptions excluding or limiting the coverage of the policy as to an injury or death which would otherwise be within such coverage, is that the burden of proving that the insured's injury or death was within such conditions or exceptions is on the insurer, and that the plaintiff is not under any burden of negativing application of such exception or conditions." (Emphasis added.) 142 A.L.R. 746. Where the instructions erroneously place the burden of proof upon the wrong party, the error is prejudicial, Anderson v. Mothershead, 19 Cal.App.2d 97, 64 P.2d 995; Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Howard v. Worthington, 50 CalApp. 556, 195 P. 709; Ferguson v. Nakahara, 43 Cal.App.2d 435, 110 P.2d 1091; Ross v. Baldwin, 44 Cal.App.2d 433, 112 P.2d 666; Scott v. Renz, 67 Cal.App.2d 428, 154 P.2d 738.

Two California cases, Dennis v. Union Mutual Life Ins. Co., 84 Cal. 570, 24 P. 120, and Bebbington v. California Western States Life Ins. Co., 30 Cal.2d 157, 180 P.2d 673, 1 A.L.R.2d 361, are distinguished because they involved *life* insurance policies which contained exceptions if death resulted from suicide. Postler v. Travelers Ins. Co., 173 Cal. 1, 158 P. 1022, relied upon the Dennis case without noting that the Dennis case involved a *life* insurance policy; Mah See v. North American Accident Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123, was an action upon a life insurance policy as was Housh v. Pacific States Life Ins. Co., 2 Cal.App.2d 14, 37 P.2d 741. As nearly as can be ascertained from the majority opinion, so far as the burden of proof is concerned, the following cases are *overruled:* Mah See v. North American Accident Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; Dennis v. Union Mutual Life Ins. Co., 84 Cal. 570, 24 P. 120; Bebbington v. California Western States Life Ins. Co., 30 Cal.2d 157, 180 P.2d 673, 1 A.L.R.2d 361; Postler v. Travelers Ins. Co., 173 Cal. 1, 158 P. 1022. Housh v. Pacific States Life Ins. Co., 2 Cal.App.2d 14, 37 P.2d 741, is disapproved. *Apparently*, the rule is now to be that the burden of proof is to be on plaintiff to prove that an exception to the policy did not occur to cause the death in an accident policy and upon the defendant where a life insurance policy is concerned. I say, "apparently," because it is not clear whether the burden is to be the same so far as both types of policy are concerned.

It is interesting to note that the majority opinion will have the effect of overruling sub silentio many other California cases. It is also interesting to note that of the cases relied upon for the proposition that the burden of proof was not upon the defendant, only one is a California case, Kellner v. Travelers' Ins. Co., 180 Cal. 326, 181 P. 61. The other cases relied upon for that proposition are New York Life Ins. Co. v. Gamer, 303 U.S. 161, 58 S.Ct. 500, 82 L.Ed. 726 (a life insurance policy case arising in Montana and involving the question of accidental, or suicidal, death); Travelers' Ins. Co. v. Wilkes, 5 Cir., 76 F. 2d 701 (a case arising in Florida and involving a life insurance policy and the question of accidental, or suicidal, death); and a New York case—Whitlatch v. Fidelity & Casualty Co., 149 N.Y. 45, 48, 43 N.E. 405. Other cases relied on are from Utah, Arizona and Wisconsin.

In view of the medical testimony that there was no evidence of "injury," I agree with the beneficiaries that the meaning of bodily injury under the policy should have been given to the jury. It is my opinion that the instructions given were conflicting and confusing and weighted in favor of the insurer. The evidence was in direct conflict. The insured was dead; there were no signs of outward "injury." According to the medical testimony the insurer's medical expert testified that the insured could not have died of pneumonia because the clothing was not disarranged. As I have pointed out, physical exhaustion would leave no outward signs, nor, in all probability, would death from exposure to the elements.

I believe that in a case of this type, the instructions should be fairly and concisely given; that when they are as confusing and conflicting as they are in the case at bar, no good purpose may be served by endeavoring to reconcile them in order to reach a result. I feel, too, most strongly that California cases should not be overruled and strained constructions placed upon other cases in order to reach a desired result. As I stated at the beginning of this dissent, it is impossible to distinguish the Brooks case from the one at bar, and any attempt to do so can lead to nothing but confusion.

For these reasons, I would reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

42 Cal.2d 486

STIVERS et al.

v.

DEPARTMENT OF EMPLOYMENT et al.

L. A. 22811.

Supreme Court of California.
In Bank.

March 12, 1954.

Rehearing Denied April 7, 1954.

Action by co-partners, doing business as a fruit packing company, against the State Employment Department and others for the amount of certain unemployment insurance contributions paid by plaintiffs under protest. From a judgment of the Superior Court, Los Angeles County, Roy L. Herndon, J., for defendants, plaintiffs appealed. The Supreme Court, Spence, J., held that plaintiffs' packing-house employees were not engaged in agricultural labor exempt from coverage of the Unemployment Insurance Act, but in commercial activities covered thereby.

Judgment affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion, Cal.App., 255 P.2d 440.

1. Taxation 🔑111.22

The test of whether fruit packing house employees are engaged in "agricultural labor", exempt from coverage of Unemployment Insurance Act, is not principal purpose of enterprise, but whether employees' services are incident to ordinary farming operations as distinguished from commercial operations. Gen.Laws, Act 8780d.

See publication Words and Phrases, for other judicial constructions and definitions of "Agricultural Labor".

2. Taxation 🔑111.22

The provisions of Unemployment Insurance Act for segregation of employee's covered and exempted services on percentage basis and classification of aggregate employment according to how one-half or more of employee's time is spent do not exempt employer conducting single integrated operation having definite commercial aspect, such as fruit packing house, from liability for unemployment insurance contributions in any period during which commercial phase of operation falls below half of total operation. Gen.Laws, Act 8780d, § 7.1.

3. Taxation 🔑111.22

The fact that citrus fruit packing house was operated by partners owning groves on which most of fruit packed was grown did not exempt such partners from liability for unemployment insurance contributions on ground that packing house employees were performing services for landowners and hence engaged in agricultural labor exempt from coverage of Act; commercial nature of packing house enterprise being sufficient to establish partners' liability for such contributions. Gen.Laws, Act 8780d, § 8.5.

4. Social Security and Public Welfare 🔑273

The Unemployment Insurance Act must be liberally construed to effectuate its intended coverage.

5. Taxation 🔑111.22

Employees in citrus fruit packing house owned and operated by partners owning groves on which most of fruit packed was produced were not engaged in "agricultural labor," exempt from coverage of Unemployment Insurance Act, but in commercial activities covered thereby, where 20% of fruit packed came from other producers' groves. Gen.Laws, Act 8780d.

Ivan G. McDaniel and Kenneth N. Dellamater, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw and Vincent P. Lafferty, Deputy Attys. Gen., for respondents.

SPENCE, Justice.

Plaintiffs brought this action to recover certain unemployment insurance contributions assessed and paid under protest pursuant to the Unemployment Insurance Act. (Stats.1935, p. 1226, as amended; 3 Deering's Gen.Laws, Act 8780d.) The assessments were for the period January 1, 1944, through September 30, 1947, and amounted to $5,348.20. Plaintiffs pursued all administrative proceedings prerequisite to the institution of this action. Their claim of refund is predicated upon the contention that their packing-house employees were engaged in exempt "agricultural labor" and not in commercial activities, which latter activities are not exempted by the act. The court sustained defendants' demurrer without leave to amend, and from the ensuing judgment plaintiffs appeal. The record and applicable legal principles affecting the construction of the act support the propriety of the assailed judgment.

It appears from the complaint that four of the Stivers brothers—Morgan A., Glenn, Howard, and Archie[1]—were members of a partnership, which owned, among other properties, 357 acres of citrus groves. Morgan A. Stivers was the managing and operating partner of all properties of the "four-way partnership." A fifth brother, Raymond K. Stivers, owned separately an additional 70 acres of citrus groves. He and the four-way partnership formed a packing-house partnership, known as the Stivers Packing Company. During the tax period involved the packing company owned and operated a packing-house, under the management of Raymond K. Stivers. All the fruit from the Stivers' groves—the combined 427 acres—was packed in this packing-house and constituted 80% of the entire amount of products handled; the remaining 20% of the total fruit packed came from the groves of others. Raymond K. Stivers had a one-third interest in the Stivers Packing Company, and the four-way partnership had a two-thirds interest. All the cost of operating the Stivers' groves was paid by the packing company. These groves were charged with their proportionate expense on the following basis: a credit was allowed for all receipts from the respective fruit sold, against which was made a charge per box for packing, plus an additional charge for the particular operation and maintenance cost, and the balance then accrued in favor of Raymond K. Stivers or the four-way partnership according to the grove accounting. The packing-house partnership did not operate, maintain or manage any "non-Stivers" citrus groves. It is alleged in the complaint that "the primary and sole purpose of said packing-house partnership was to produce, harvest, pick, sell and ship citrus fruits" from the Stivers' groves; but the general allegation that this was the "sole" purpose must fall before the specific, contradictory allegation that "not more than 20% of the total fruit packed" came from the groves of others. The labor here in question involves only the services rendered by the employees of the packing-house partnership working in the packing-house.

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[1] Now deceased, and his son, J. B. Stivers, as executor, joins as a plaintiff.

Plaintiffs' liability for contributions on the wages paid the packing-house employees depends on whether or not such employees may be classified as "agricultural labor." The Unemployment Insurance Act excludes, without definition, "agricultural labor" from the term "employment" within its coverage provisions. The necessary definition for administrative purposes has been supplied by rule of the Department of Employment. Admin.Code, Title 22, § 43,[2] amending rule 7.1 following its interpretation in California Employment Comm. v. Kovacevich, 27 Cal. 2d 546, 551–553, 165 P.2d 917. It thus appears that packing-house labor, in order to be classed as agricultural, must be "services performed * * * in the employ of the owner or tenant of a farm on which the materials in their raw or natural state were produced" and "carried on as an incident to ordinary farming operations as distinguished from * * * commercial operations."

Defendants properly rely upon the rationale of California Employment Comm. v. Butte County Rice Growers Ass'n, 25 Cal. 2d 624, 154 P.2d 892, as determinative of plaintiffs' liability for contributions under the act. That case involved employees of an incorporated farmers' cooperative association operating a warehouse located near a railroad siding for the storage of rice and grain for shipment to market—services performed off the farm following the harvesting of the crops. The association's storage and shipping facilities were available not only to members but also to others upon payment of a nominal application fee, and under the terms of its state warehouse license the cooperative was obligated to serve the public in providing storage accommodations. Under such circumstances the warehouse was held to be a commercial enterprise, helpful to but separate and apart from the farming operations, and the activities of the employees were classified as commercial rather than agricultural within the concept of the act.

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[2] "Agricultural labor exempted from 'employment' by Section 7(a) of the Act includes all services performed:

"a. On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting of any agricultural or horticultural commodity; the raising, feeding, and management of livestock, poultry and bees; which includes among others, the spraying, pruning, fumigating, fertilizing, irrigating and heating which may be necessary and incident thereto.

"b. In the employ of the owner or tenant of a farm on which the materials in their raw or natural state were produced, in connection with the drying, processing, packing, packaging, transporting, and marketing of such materials.

"c. In the employ of the owner or tenant of a farm with respect to ordinary farming operations in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, if substantially all of such services are performed on a farm.

"d. The provisions of subsection (b) and (c) are not applicable with respect to the services referred to unless such services are carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations. Nor are the provisions of said subsections applicable to services performed in commercial canning or commercial freezing."

[1, 2] Plaintiffs seek to avoid the commercial aspect of their packing-house upon the premise that its principal purpose was to facilitate the marketing of the crops from the Stivers' groves. However, the test under the act is not the principal purpose of the enterprise but whether the services performed by its employees were "carried on as an incident to ordinary farming operations as distinguished from * * * commercial operations." Thus significant is the fact that the packing-house served the public to the extent of 20% of its total fruit packing operations, a sizable amount attesting to its commercial character. Plaintiffs argue that this 20% factor is not of controlling importance, since 80% of the fruit handled in the packing-house came from Stivers' groves and such packing services in readying their own farm products for marketing constituted agricultural labor. Accordingly, they cite the act's provision for segregation of the employee's services on a percentage basis and classification of the aggregate employment by reference to how "one-half or more" of the employee's time is spent. (§ 7.1, Stats.1945, pp. 1486, 2230 [3]; Admin.Code, Title 22, § 42(b), effective April 1, 1945.) The employer is required to keep accurate records in segregation of the exempt and non-exempt employment. (Admin.Code, Title 22, § 42(a).[4]) But these provisions appear to have been adopted as a reasonable method of determining whether a specific employee or group of employees, engaged part of the time in exempt work and part of the time in non-exempt work, is in taxable employment and entitled to the coverage provisions of the act. They do not apply in favor of an employer who conducts a single integrated operation having a definite commercial aspect, such as the packing-house in question, so as to exempt such employer from liability for contributions in any period in which the commercial phase of such single integrated operation may fall below 50% of the total operation. A contrary construction would be unreasonable in view of the broad coverage intended by the act in fixing taxable employment. California Employment Stabilization Comm. v. Lewis, 68 Cal.App.2d 552, 554, 157 P.2d 38, and cases there cited. Accordingly, the comparative percentage measure of the packing-house services rendered to the public does not remove the force of that consideration in reflecting the commercial nature of plaintiffs' packing-house enterprise.

[3] Nor does it matter that here plaintiffs' packing-house is a partnership rather than a corporate entity as was the situation in California Employment Comm. v. Butte County Rice Growers Ass'n, supra, 25 Cal. 2d 624, 154 P.2d 892, so that the warehouse activities were not services performed for the owner or tenant of a farm within the concept of "agricultural labor" under the act. To this point plaintiffs maintain that, save in exceptional circumstances, a part-

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[3] "If the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this paragraph the term 'pay period' means a period (of not more than thirty-one consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him."

[4] "Where employees perform services for an employer in both exempt and nonexempt employments, such employer shall maintain accurate records showing the hours worked by and the wages paid to employees in each of said employments. Such segregation must be made with respect to each individual employee rather than on the basis of the employer's operations as a whole and may be made on a percentage or other basis found by the Department to be reasonable."

nership under California law is not regarded as an entity distinct from the individuals composing it. Reed v. Industrial Accident Comm., 10 Cal.2d 191, 192–193, 73 P.2d 1212, 114 A.L.R. 720; Park v. Union Mfg. Co., 45 Cal.App.2d 401, 407, 114 P.2d 373. Accordingly, they claim that since they constituted the packing-house partnership and also owned the Stivers' groves on which the citrus fruit was produced, the packing-house employees were in effect performing services for the owners of the land. In opposition to plaintiffs' argument, defendants cite the act's express definition of an "employing unit" to mean "any individual or type of organization, including any partnership * * * corporation * * *." (§ 8.5; Stats.1937, p. 2053; am. without material changes by Stats.1947, p. 2627.) Such provision, they claim, in effect declares that, for the purposes of the act, a partnership is to be regarded as a separate entity. As a factual consideration indicating the distinct nature of the packing-house partnership, defendants point out the disproportionate ownership interests therein of the member-growers of the Stivers' fruit: the four-way Stivers' partnership owning some five-sixths of the total citrus acreage and two-thirds of the packing-house company; Raymond K. Stivers individually owning one-sixth of the citrus acreage and one-third of the packing-house company. However, it is unnecessary to do more than note here the respective contentions as to the "separate entity" of plaintiffs' partnership, for it is the independent factor of the "commercial nature" of the packing-house enterprise which we deem sufficient to establish plaintiffs' liability for the unemployment contributions in question.

[4, 5] Undoubtedly, services performed in a packing-house operated by and for the farmer-grower of agricultural products may constitute "agricultural labor" under the act provided "such services are carried on as an incident to ordinary farming operations as distinguished from * * * commercial operations." But here the producers of the fruit formed a packing-house partnership which functioned not alone in their behalf in the marketing process. Rather, the packing-house also served the public to the substantial extent of 20% of its total fruit packing services. As so operating for profit on a commercial scale, the packing-house became a single integrated enterprise operating much the same as any business concern, and it should not be treated any differently insofar as bearing its proportionate share of the social responsibilities flowing from the state unemployment insurance law. Consistent with a liberal construction of the act to effectuate its intended coverage, California Employment Comm. v. Butte County Rice Growers Ass'n, supra, 25 Cal.2d 624, 630, 154 P.2d 892, the commercial packing-house labor here involved was not exempt employment. Accordingly, plaintiffs' liability for unemployment contributions as here assessed cannot be avoided on the facts alleged in their complaint.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and TRAYNOR, JJ., concur.

CARTER, Justice (dissenting).

I adopt as my dissenting opinion in this case the able and well reasoned opinion prepared by Presiding Justice Shinn, which was concurred in by Justices Wood and Vallée, when this case was before the District Court of Appeal, Second Appellate District, Division Three. 255 P.2d 440.

"Plaintiffs sued to recover employer's taxes paid under protest under assessments levied under section 45.11(d) of the California Unemployment Insurance Act, Deering's Gen.Laws, Act 8780d. The demurrer of James G. Bryant as Director of Employment and other defendants was sustained without leave to amend and plaintiffs' appeal from the ensuing judgment. The assessments were for the period January 1, 1944, through September 30, 1947, and amounted to $5,348.20. Plaintiffs pursued all necessary administrative proceedings prerequisite to court action.

"The labor for which the assessments were levied was performed in a packing house and the question is whether it was agricultural labor and hence exempt under the Act. It was alleged in the complaint that plaintiffs Morgan A. Stivers, Glenn

Stivers, Howard Stivers and Raymond K. Stivers were, during the period in question, members of a partnership which owns, with numerous other assets, 357 acres of citrus groves. Subsequently, Raymond K. Stivers, died and J. B. Stivers, as executor of his estate, joins with the others as a plaintiff. Raymond K. Stivers owned separately an additional 70 acres of groves. All the property stood in the name of Morgan A. Stivers or of himself and his wife and he had the management of all the properties of the partnership. The same four parties owned a packing house and this was managed by Raymond K. Stivers. Eighty per cent of the products handled in the packing house came from Stivers' groves and not over 20 per cent from the groves of others. The packing house operations were conducted by a partnership consisting of the four owners of the groves, Raymond K. Stivers having a one-third interest in this partnership and the other members a two-thirds interest. All the cost of operating the groves was paid by the packing house partnership. The several groves were charged with this expense, and were credited with all the receipts from products sold, against which was a charge per box for packing, plus an additional charge for the operation and maintenance of the groves owned by Raymond K. Stivers and those owned by the owning partnership. The packing house partnership did not operate, maintain or manage any non-citrus groves; the primary and sole purpose of the packing house partnership was to produce, harvest, pick, sell and ship citrus fruits from the Stivers' groves. It was alleged that two-thirds of the (Stivers) citrus fruits packed were produced in the groves of the owning partners and one-third in the groves owned by Raymond K. Stivers.

"Our discussion will be devoted to the following propositions: If the packing house partnership, as distinguished from its individual members, is to be regarded as a separate entity, and the employing unit of the packing house workers, or if the principal packing house operation was not merely incidental to the farming operation, the labor would not be agricultural labor under the terms of the Act and the regulations of the Department of Employment, whereas, if the packing house partnership was merely an agency of the owners of the groves and the individuals who compose both partnerships were, in reality, the employers, and if the principal packing house operation was merely incidental to the farming operation, all the labor in the packing house would be regarded for unemployment tax purposes as agricultural labor and hence exempt. We are of the opinion that the latter is the case.

"Section 7(a) of the Act provided that the term 'employment' does not include 'agricultural labor.' The Act did not define agricultural labor. During the year 1944 and until January 1, 1945, there was in force Rule 7.1 of the department defining agricultural labor and which read as set out below.[1]

"As of April 1, 1945, without material change, Rule 7.1 became § 43 of Title 22 of the Administrative Code, which was amended June 1, 1945, to read as set out below.[2]

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[1] " 'Agricultural Labor Defined—The term "Agricultural Labor" includes all services performed:

" '(1) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, the raising, feeding, management of livestock, poultry and bees; which includes among others, the spraying, pruning, fumigating, fertilizing, irrigating and heating which may be necessary and incident thereto;

" '(2) By an employee in connection with the drying, processing, packing, packaging, transporting, and marketing of materials which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting, or marketing is carried on as an incident to ordiary farming operations as distinguished from manufacturing or commercial operations.

" 'The services hereinabove set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Nor do such services constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations.' "

"In California Employment Comm. v. Kovacevich, 27 Cal.2d 546, 165 P.2d 917, former Rule 7.1 was interpreted to mean that packing house labor, in order to be classed as agricultural, must be performed by an employee of the owner or tenant of the farm on which the materials are produced, and the services must be carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations. With somewhat different arrangement, § 43 of Title 22 of the Administrative Code imposed the same conditions.

"Inasmuch as 80 percent of the packing services were performed on Stivers' fruit and 20 per cent on other fruit, certain other enactments are to be considered.

"By Stats. 1939, pp. 2850–2853, § 7 of the Unemployment Reserves Act (Stats. 1935, p. 1226) was amended to read as set out below.[3] The same provision is found in § 7.1 of the Act (Stats.1945, pp. 1486 and 2230; Deering's Gen.Laws, § 8780(d). It also appears as § 42(b) of Title 22 of the Administrative Code, effective April 1, 1945, which contains the additional provision set out below.[4]

"We may inquire first whether it appeared from the allegations of the complaint as a matter of law that the packing services were incidental to a commercial operation as distinguished from the farming operation. It was alleged that they were merely incidental to the latter and we think it may not be questioned that the facts pleaded would have justified a finding that this allegation was true. We can conceive of no reason to doubt that the principal purpose of the packing house operation was to facilitate the marketing of the crops from the Stivers' groves.

"Plaintiffs contend that the share of the services amounting to 20 per cent rendered to the public was likewise incidental to the farming operation. We deem it unnecessary to decide this question. Even if it be assumed that the labor performed in packing nonStivers fruit, if considered by itself, would be subject to tax, it should be deemed tax exempt under former § 7 of the Act, which became § 7.1 under the 1945 amendment, for the reason that more than 50 per cent of the entire service was agricultural. It is therefore immaterial whether the 20 percent of services on non-Stivers fruit were agricultural and tax exempt, or nonagricultural and tax subject, inasmuch as the entire service was rendered to the same employer.

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[2] " 'Agricutural labor exempted from "employment" by Section 7(a) of the Act includes all services performed:

" '(a) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting of any agricultural or horticultural commodity; the raising, feeding, and management of livestock, poultry and bees; which includes among others, the spraying, pruning, fumigating, fertilizing, irrigating and heating which may be necessary and incident thereto.

" '(b) In the employ of the owner or tenant of a farm on which the materials in their raw or natural state were produced, in connection with the drying, processing, packing, packaging, transporting, and marketing of such materials.

" '(c) In the employ of the owner or tenant of a farm with respect to ordinary farming operations in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, if substantially all of such services are performed on a farm.

" '(d) The provisions of subsection (b) and (c) are not applicable with respect to the services referred to unless such services are carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations. Nor are the provisions of said subsections applicable to services performed in commercial canning or commercial freezing.' "

[3] "(b) 'If the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this paragraph the term "pay period" means a period (of not more than thirty-one consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him.' "

[4] "(a) 'Where employees perform services for an employer in both exempt and nonexempt employments, such employer shall maintain accurate records showing the hours worked by and the wages paid to employees in each of said employments. Such segregation must be made with respect to each individual employee rather than on the basis of the employer's operations as a whole and may be made on a percentage or other basis found by the Department to be reasonable.' "

"Exemption from tax liability rests upon the further condition that the packing house laborers were working for the owners of the groves. We are satisfied that they were.

"Any type of organization, including a partnership, may become an employing unit (§ 9). So may a partnership be an owner or a tenant. Granting that the packing house partnership was nominally the employing unit with respect to the packing house labor, and recognizing that title to the groves was not vested in the partnership as an entity distinct from its members, we cannot fail to recognize the fact that the groves belonged to the individuals who composed the packing house partnership. This fact establishes that the individuals were in a real sense the employers of the workers.

"Defendants say that the decision in California Employment Comm. v. Butte County, Etc., Ass'n, 25 Cal.2d 624, 154 P.2d 892, 897, 'is viewed to be determinative of the present controversy.' We believe otherwise. The defendant was a cooperative association, incorporated as a nonprofit farmers' organization under civil code sections. It had 48 members, paying $300 each, and 23 applicants for memberships who had paid $10 each. All were entitled to the handling and marketing services. The association conducted a warehouse business in which it was obliged to receive and store products offered to it by the general public without discrimination; it also purchased and sold to its members and applicants, and might also sell to the public, merchandise commonly used in farming operations; it also maintained a public scale for the use of the public. Any profits made in its operation were distributed ratably among the regular members. Applicants for membership received nothing. The association was not the owner, tenant or operator of any farm. The court said: 'Upon this record the conclusion seems inescapable that the defendant association is in essence a commercial enterprise'. It was claimed for the association that it was a mere agency through which the members and applicants processed and marketed their products. The court rejected this claim, stating, (25 Cal. 2d at page 636, 154 P.2d at page 898): 'Such observation is not only squarely at variance with the facts of this case—demonstrating that the defendant association in *all* its services functions as a unit *wholly independent* of the farmers comprising its membership—but is likewise contrary to the elementary legal principle that a corporation is a complete legal entity separate and apart from the individuals who own it.' It was therefore held that the operation of the various enterprises, while helpful, were '"not an incident to ordinary farming operations as distinguished from * * * commercial operations"', and that the labor employed therein was not tax exempt. The features of the operations in that case which the court deemed to be controlling are absent from the present case. The factual features of the present case from which we conclude that the major part of the services here in question was incidental to a farming operation, were absent from the former case. The court in that case did not hold, as respondents contend, that any service rendered to the public would make the running of a packing house a commercial operation. It did hold that the commercial operations of the Rice Growers Association were not incidental to a farming operation.

"Respondents contend that the Stivers partnership was an entity separate from the members thereof, just as the Rice Growers Association was an entity separate from its members. The distinctions are obvious. The principal differences are that the indidivuals who composed the two

Stivers partnerships were the sole owners of the groves and the packing house, operated both the farming and the packing operations through their respective managers, that all the acts of their managers were the acts of the partners, and all the duties and obligations of the partnerships the duties and obligations of the individual members. Certainly it could not be contended that the groves were in an ownership distinct and separate from that of the individual partners.

"A partnership may be regarded as a legal entity for some purposes and not for others. It may in its partnership name become an employer of labor so as to effectively bind its members, but in doing so it acts on their behalf and not as a separate entity. The theory that a workman employed by a partnership is not the employee of each member of the partnership was expressly rejected in Reed v. Industrial Accident Comm., 10 Cal.2d 191, 73 P.2d 1212, 1213, 114 A.L.R. 720. Reed was employed by a partnership, Gordon and Mellott. Mellott became insured before he formed a partnership with Gordon. Reed was denied a compensation award against the insurer on the theory that he was an employee of the partnership, which was not insured. The award was annulled. The court held that Reed was the employee of the individuals who composed the partnership and was therefore insured. We quote from the opinion a passage which we regard as conclusive on the point: 'The underlying fallacy in respondent's argument is the assumption that the partnership is a distinct unit, separate from the members thereof. Occasional suggestions of this "entity" theory of partnership are found in statutes or decisions, but, apart from exceptional situations, a partnership is not considered an entity, but an association of individuals. See First Nat. Trust & Savings Bank v. Industrial Accident Comm., 213 Cal. 322, 331, 2 P.2d 347, 78 A.L.R. 1324; 9 Cal.L. Rev. 119. In consonance with this view, an employee of a partnership is an employee of each of the partners, and no individual partner may escape liability to such employee on the ground that only the partnership and not the individuals composing it can be held. It is immaterial whether the liability of the partners in this situation is joint and several, or joint, for even in the case of joint liability, a several judgment may be had against an individual partner by proper joinder and pleading. See Palle v. Industrial Comm., 79 Utah, 47, 7 P.2d 284, 81 A.L.R. 1222; Merchants' Nat. Bank v. Clark-Parker Co., 215 Cal. 296, 9 P.2d 826, 81 A.L.R. 778. The result is that W. B. Mellott, a partner in the firm of Gordon & Mellott, was an employer of petitioner Reed, and was undoubtedly liable to Reed for workmen's compensation. Since W. B. Mellott procured insurance with respondent company to cover such liability, and paid the required premium therefor, the company must perform its obligation by paying the award.'

"The principle stated is supported by numerous authorities cited by the court and by many others. This entire line of authority is ignored in the brief of the respondents, although it directly supports the contention of the appellants that they, as individuals, were the real employers of the packing house workers. Respondents say that the packing house workers are as much in need of unemployment insurance as other workers, and apparently contend that this fact should influence the interpretation of the law by the courts. The same could be said of all agricultural workers and many others whose wages are tax exempt. We have only to apply the law as it is written. The argument of the respondents has an answer in the Kovacevich case (27 Cal.2d at pages 549, 550, 165 P.2d at page 919) where it is said: 'While it is true that such legislation should be liberally construed so as to afford all the relief which the language of the act indicates that the Legislature intended to grant (California Employment Comm. v. Butte County Rice Growers Ass'n, 25 Cal.2d 624, 630, 154 P.2d 892), the interpretation should not exceed the limits of the statutory intent. * * * In view of the express statutory intent to except "agricultural labor," any labor which is essentially agricultural in nature, and which cannot be otherwise regarded by reason of any change in the custom of doing it, should not be included within the operation of the act by administrative or judicial legislation under the guise of liberal interpretation.'

"The requirement that the employer of both exempt and nonexempt labor must keep the account of each employee so as to record the time spent in each type of employment in each pay period (§ 42, Title 22, note 4 above) was met by the allegations of the complaint that such records were kept.

"We hold that upon proof of the facts pleaded by plaintiffs the court could properly find that plaintiffs were the employers of the packing house labor; that not less than 80 per cent of the packing house services were incidental to ordinary farming operations as distinguished from commercial operations, and hence were agricultural, and could properly conclude therefrom that all the wages paid were tax exempt."

For the foregoing reasons I would reverse the judgment and permit the defendants to answer if they be so advised.

SCHAUER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

42 Cal.2d 399

PICKENS et ux. v. JOHNSON et ux.

JOHNSON et ux. v. PICKENS et ux.

Sac. 6378.

Supreme Court of California.

March 1, 1954.

Actions for declaratory relief with respect to rights of parties under lease and conditional sales contract, and action by lessees against lessors for damages for forcible entry and unlawful detainer. The Superior Court, Sacramento County, J. O. Moncur, J., entered judgments from which the lessors appealed. The Supreme Court, Shenk, J., held that evidence warranted finding that there had been an ouster by the lessors of the lessees from the premises, and an exclusion of the lessees from possession and a forcible entry by the lessors contrary to the rights of the lessees under the lease and sales agreement.

Judgments affirmed.

Carter and Schauer, JJ., dissented in part.

See also, 107 Cal.App.2d 778, 238 P.2d 40.

1. Judges 🔑22(2)

Constitutional provision declaring the legislature shall have power to provide for payment of retirement salary to employees of state who shall qualify therefor by service in work of state as provided by law, was and is an enabling provision authorizing legislature to provide a system for retirement of members of the judicial department of the state embraced within the Judges' Retirement Law. Const. art. 4, § 22a; St.1951, p. 3694.

2. Judges 🔑22(11)

The legislature, in exercising its authority under the constitution to establish a system for the retirement of judges, could impose as a condition of retirement that the judges, so long as they received retirement allowances, should continue to be judicial officers of the state, and could make them subject to call for judicial service by assignment, with their permission, by the chairman of the judicial counsel, since the provision for assignment and service of retired judge bore a reasonable relationship to a system of judges' retirement. Const. art. 4, § 22a; St.1951, p. 3694.

3. Judges 🔑7, 13

The assignment of a retired judge for judicial service, with his consent, does not prolong the judge's term of office, but merely vests in him the powers of a judge of the particular court for the term of the assignment, or determined in the discretion of the chairman of the judicial council, and upon the expiration of the period so determined, the judge resumes his prior status as a retired judge. Const. art. 4, § 22a; St.1951, p. 3694.

4. Judges 🔑2

The number of superior court judges in any county is not limited by the constitution, and thus the assignment of a retired judge for service on the superior court is not an unlawful increase in the number of judges of the county to which the retired judge is assigned. Const. art. 6, §§ 6, 9; St.1951, p. 3694, § 6.

5. Judges 🔑22(7)

In view of fact that the compensation to be paid to superior court judges is for the legislature to determine, the assignment of a retired judge for service on the superior court, with compensation to be paid therefor in addition to retirement allowance, is not an increase in compensation in violation of any provision of the constitution. Const. art. 6, § 17; St.1951, p. 3694, § 6.

6. Judges 🔑7

In view of fact that the assignment of a retired judge for service on the superior court does not extend his term of office, but merely vests in him the powers of a judge of the superior court during the period specified in the assignment, such assignment is not an unlawful extension of his term of office beyond the six year term provided by the constitution. Const. art. 6, §§ 8, 17; St.1951, p. 3694, § 6.

7. Judges 🔑13

A retired judge assigned for service on the superior court by the chairman of the judicial council with the judge's consent, thereby voluntarily assumes the status of a regular judge and is necessarily governed by those conditions that attach to the status and activities of an incumbent judge but he is not so governed when the term of the assignment terminates and he reverts to his former status as a retired judge. Const. art. 6, § 9; St.1951, p. 3694, § 6.

8. Courts 🔑42(1)

Constitutional provision pertaining to the establishment of a court through the medium of a pro tempore judge, selected from the membership of the bar by stipulation of counsel to try particular case, is not in conflict with provision of Judges' Retirement Act permitting the assignment of a retired judge for service in the superior court, but not requiring a stipulation of counsel prerequisite to the assignment, since the judge so assigned is not a judge pro tempore as contemplated by the constitutional provision. Const. art. 6, § 5; St. 1951, p. 3694, § 6.

9. Constitutional Law 🔑48

The Supreme Court would not assume, as basis for declaring invalid provision of Judges' Retirement Act relative to assignment of retired judges for judicial service, that the power of assignment would be improvidently exercised. Const. art. 6, §§ 5, 6; St.1951, p. 3694, § 6.

10. Constitutional Law 🔑70(3)

Whether, as a matter of policy, the system of assignment of retired judges, authorized by the Judges' Retirement Act, should be put into effect, was for determination by the people through the constitution and amendments thereof, or by the legislature, and it was not a matter subject to judicial control, when the public policy had been plainly declared by both constitutional provision and legislative authority. St. 1951, p. 3694.

11. Judges 🔑6

Judgment 🔑8

A retired judge, assigned for service in the superior court, pursuant to authorization of Judges' Retirement Act, acted as a judge de jure, or at least de facto, and judgments rendered by him while so acting could not be successfully attacked on ground of his lack of capacity to act. St. 1951, p. 3694.

12. Appeal and Error 🔑1011(1)

Finding of trial court in forcible entry and detainer action, on issue as to whether lessees had abandoned leased premises, thereby giving lessors right of re-entry, when based upon conflicting evidence, would not be disturbed by reviewing court.

13. Landlord and Tenant 🔑18(3)

In action of forcible entry by lessees of premises against lessors, evidence, including perusal of the lease agreement, did not warrant finding that premises, utilized for the operation of a liquor business, were part of a joint enterprise between the lessors and lessees, but compelled conclusion that a landlord-tenant relationship existed.

14. Landlord and Tenant ⇐291(13)

In action by lessees against lessors for damages for forcible entry and unlawful detainer of the premises, evidence warranted finding of an ouster by the lessors of the lessees from the premises, and an exclusion of the lessees from possession and a forcible entry by the lessors, all contrary to the rights of the lessees under the lease agreement between the parties.

15. Landlord and Tenant ⇐291(14)

Evidence in forcible entry and detainer action relative to premises operated as a liquor business, showing net income of over $7,000 for the twelve month period prior to the unlawful entry, and alleged value of the liquor license of approximately $10,000, sustained award of damages of $19,900 consisting of $4,500 for the liquor license and $15,400 for the loss of possession of the premises, according to value of the use at the rate of $400 per month.

◆

F. H. Bowers, Roseville, and Thomas F. Sargent, Auburn, for appellants.

McAllister & Johnson and Walter C. Frame, Sacramento, for respondents.

SHENK, Justice.

This is an appeal from judgments in favor of the Johnsons, husband and wife, for $4,500 and $15,400, respectively, in actions consolidated for trial and on appeal.

The Pickens, husband and wife, commenced an action in Sacramento County, for declaratory relief involving their rights under a lease from the Pickens to the Johnsons of premises owned by the Pickens. Their rights under a contract of conditional sale of the business and equipment on the premises leased by the Pickens from the Johnsons were also involved. The Johnsons brought an action in the same court against the Pickens for damages for the forcible entry and unlawful detainer of the premises. The actions were consolidated for trial and tried without a jury.

Before approaching the merits of the appeal a preliminary constitutional question raised by the Pickens must be disposed of. The cases were tried before the Honorable J. O. Moncur who was elected in 1944 as judge of the superior court of Plumas County for the full term of six years. He discharged the duties of that office until the last day of his term (Jan. 8, 1951) when he retired pursuant to the provisions of the Judges' Retirement Act, Stats.1937, p. 2204. At the time this consolidated action was tried Judge Moncur was sitting in the superior court of Sacramento County pursuant to an assignment to that task by the chairman of the judicial council as provided in section 6 of the act as amended in 1951. Stats.1951, p. 3694. At the time of the assignment that section provided, and still provides, in its pertinent parts as follows:

"Sec. 6. Justices and judges retired under the provisions of this act, so long as they are entitled by its provisions to receive a retirement allowance, shall be judicial officers of the State, but shall not exercise any of the powers of a justice or judge except while under assignment to a court as hereinafter provided. Any such retired justice or judge may, with his own consent, be assigned by the Chairman of the Judicial Council to sit in a court of like jurisdiction as, or higher jurisdiction than, that court from which he was retired; and while so assigned shall have all the powers of a justice or judge thereof. If assigned to sit in a court, he shall be paid while sitting therein in addition to his retirement allowance the difference, if any, between his retirement allowance and the compensation of a judge of the court to which he is assigned."

It is the contention of the Pickens that the foregoing section of the Judges' Retirement Act is unconstitutional and that any judgment rendered by Judge Moncur while under assignment is void.

As authority for the adoption of the Judges' Retirement Act and particularly section 6 as amended in 1951, reliance is placed on section 22a of article IV of the constitution adopted in 1930. The pertinent parts of that section are as follows: "The Legislature shall have power to provide for the payment of retirement salaries to employees of the State who shall qualify therefor by service in the work of the State as provided by law. The Legislature shall have power to fix and from time to time change the requirements and conditions for retirement which shall include a minimum period of service, a minimum attained age and minimum contribution of funds by such employees and such other conditions as the Legislature may prescribe * * *."

Under the authority of the foregoing constitutional section the legislature in 1931 enacted the statute establishing a system for the retirement of the employees of the state, Stats. 1931, p. 1442, and it has been in continuous operation since that time.

In 1948 the question was presented to this court whether section 22a of article IV of the constitution conferred upon the legislature the power to provide a retirement system for its own members. It was held in the case of Knight v. Board of Administration of the State Employees' Retirement System, 32 Cal.2d 400, 196 P.2d 547, 5 A.L.R.2d 410, that section 22a was an enabling act; that the term "employees" included officers of the state; that members of the legislature were officers of the state, and that under the section the legislature was authorized to establish a retirement system for its members as provided for in the Legislators' Retirement Law of 1947. Govt.Code, § 9350 et seq.; Stats.1947, p. 2058. The validity of that statute was upheld by unanimous decision of this court.

[1] There can be no doubt that section 22a as construed in the Knight case was and is an enabling provision of the constitution authorizing the legislature to provide a system for the retirement of the members of the judicial department of the state embraced within the Judges' Retirement Law. In fact there is here no contention to the contrary. That act, as stated, was adopted in 1937. Section 6 was then in its present form with the exception of a provision added by amendment in 1951. The section was first amended in 1941, Stats.1941, p. 2938, to provide that there must be a stipulation in the case by all counsel that the retired judge could act. In 1951 the section was again amended by unanimous vote of both houses of the legislature. Assembly Daily Journal, May 18, 1951, p. 4501; Senate Daily Journal, June 16, 1951, p. 3462. By that amendment the requirement of a stipulation of counsel was eliminated and a provision added for compensation to the retired judge while under assignment based on the difference between his retirement allowance and the compensation of a judge of the court to which he is assigned. Stats. 1951, p. 3694.

For a period of fifteen years and over, and until the judgment in this case in August, 1952, the system of assignment of retired judges to try cases in the superior court has been in operation without objection.

Thus, at all times since the enactment of the Judges' Retirement Act in 1937 section 6 thereof has contained the provision that a retired judge should be a judicial officer of the state and also the provision granting to the legislature power "from time to time" to "change the requirements and conditions for retirement". This the legislature has done in the two instances mentioned and the question is whether the conditions in the original enactment and those subsequently incorporated in it were within the power of the legislature to enact. If it be concluded that they bear a reasonable relation to a system of retirement of judges and do not offend any provision of the constitution they should be upheld. It is our conclusion that they are valid from both standpoints.

This type of legislation, both constitutional and statutory, is not new in this state. The Public Utilities Commission has been established under a constitutional enabling act with full power conferred on the legislature to enact legislation even contrary to any other provisions of the constitution, provided it be cognate and germane to the regulation and control of Public Utilities. Const. § 22, Art. XII; Pacific Telephone, etc. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652. Likewise the Industrial Accident Commission has been set up under an enabling act whereby the legislature is expressly vested with plenary power "unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation * * *." Const. § 21, Art. XX; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491.

Under the foregoing enabling acts the legislature has enacted laws which, as interpreted by the courts, are controlling, as to the subjects properly legislated upon, over other general provisions of the constitution and general laws.

[2] So here the constitution has in general terms conferred upon the legislature the power to establish a system for the retirement of judges. The legislature has done so and has imposed as a condition of retirement that retired judges, so long as they receive retirement allowances, shall continue to be judicial officers of the state and with their permission shall be subject to call for judicial service by assignment for that purpose by the chairman of the Judicial Council.

It would seem to be beyond question that the provision for the assignment and service of a retired judge in accordance with the statute bears a reasonable relationship to a system of judges' retirement. It is inherently connected with the problems of the administration of justice under which the state, in consideration for the retirement allowance, may invoke the assistance of the retired personnel of the judicial department in emergencies found to exist by the chairman of the Judicial Council. Nothing foreign to that purpose could have been in contemplation by the legislature.

It is recognized that the constitutional grant of power to the legislature to establish the two commissions above referred to is much more comprehensive than that contained in section 22a of article IV, and it is taken for granted that any legislation adopted under the authority of that section must not be inconsistent with other provisions of the constitution.

There is no provision of the constitution which would prohibit the legislature from providing, as it has in section 6, that so long as he receives a retirement allowance a retired judge shall be a judicial officer of the state. Section 1 of article VI which provides that the judicial power of the state shall be vested in the senate, sitting as a court of impeachment, and in the several courts, including the superior court, deals with the question of the official entities in which the judicial power of the state shall be vested and not with the personnel of those institutions. And it must be assumed that an assigned retired superior court judge is possessed of all of the qualifications otherwise required for service on that court, including the requirement of section 23 of article VI of the constitution that he shall have been admitted to practice in this state for at least five years before becoming a superior court judge.

[3] With that assumption it is observed that here we are dealing with the status of a superior court judge who has retired pursuant to the provisions of the statute. In order to retire he must, while in office, file his notice of retirement with the Secretary of State as provided by section 1 of the act. Stats.1937, p. 2204. While in retirement he has the privilege of maintaining his membership in the State Bar of California. As such he is entitled to all of the privileges and immunities and is subject to the duties and obligations of an attorney at law so long as he maintains his membership in the State Bar organization. His term of office as a judge has expired, or been terminated prior thereto by his voluntary act, and the office is vacant. He may go and come in all respects as any attorney and counselor at law but he has no power as a judicial officer until the happening of a contingency, namely, his assignment and voluntary acceptance thereof as a judge of the superior court in and for a designated county by the chairman of the Judicial Council. That assignment does not prolong his term of office. It merely has the effect of vesting in him the powers of a judge of the superior court during the period specified in the assignment, as is ordinarily done in the case of an assignment by the chairman of the Judicial Council of an incumbent superior court judge from one county to another under the authority of section 1a of article VI of the constitution. It must be taken for

granted that under the proper exercise of the power of assignment a retired judge will not be continued in service indefinitely. The term of assignment is necessarily within the wise discretion of the chairman of the Judicial Council. Upon the expiration of the period of his assignment the judge resumes his prior status as a retired judge. If he desires to exercise the privileges of an attorney during his retirement and while unassigned, he would, of course, be subject to the provisions of the State Bar Act, including the requirement of the payment of dues.

[4] It is also observed that section 6 of the Judges' Retirement Act does not offend any provision of the constitution on the ground that an assignment thereunder is an unlawful increase in the number of judges of the county to which the retired judge is assigned. The constitution does not limit the number of superior court judges in any county. The legislature has full control of the number (two-thirds in both houses voting in favor thereof, § 9, Art. VI) and section 6 of the retirement act is legislative authority for additional sessions of court for the particular county to which the assignment is made, §§ 6 and 9, Art. VI.

[5] Again, the increase in compensation provided for in section 6 of the act to be paid to retired judges while under assignment is not inconsistent with any provision of the constitution. The compensation to be paid to superior court judges is for the legislature to determine under section 17 of article VI of the Constitution.

[6] Section 8 of article VI, providing that the term of office of a superior court judge shall be six years, and cases such as Martello v. Superior Court, 202 Cal. 400, 261 P. 476, holding that a judicial officer may not perform a valid judicial act after his term has expired, do not set at nought the obvious purpose of the assignment provisions of the Judges' Retirement Act. In no proper sense is the term of a judge extended by his retirement or by his assignment. Upon his retirement he can no longer of his own volition assume to act as a judge whether he retires at the end of his term, as in this case, or in his mid-term. It is only upon his assignment in accordance with a statute as authorized by the constitution that he has any judicial power whatsoever, and since it is correct to say that the assignment has a reasonable relationship to the system of retirement with no rights in the retired judge to act except under the assignment there has been no unlawful extension of his term of office.

[7] The fact that under section 6 of the act the retired judge while receiving retirement allowance is declared to be a judicial officer of the state (but without any power as such except while under assignment) should be considered as nothing more than making him eligible for assignment. It would be unreasonable to conclude that while not under assignment he would be subject to the conditions that attach to the status and activities of an incumbent judge. When assigned he voluntarily assumes the status of a regular judge and would necessarily be governed by those conditions. For example, when under assignment he could not practice law, Const. art. VI, § 18, and could not be absent from the state longer than 60 days, Const. art. VI, § 9. Others could be noted. While not under assignment there is no good reason to say that he would be subject to the provisions of the constitution and law of the state made specially applicable to regular incumbent judges.

As hereinbefore indicated there was no provision in the original Judges' Retirement Act of 1937 requiring a stipulation of counsel that the assigned retired judge might act. Stats.1937, p. 2206. In 1941 section 6 of the act was amended to provide that, "Any such retired justice or judge may, with his own consent, and upon stipulation of all the counsel in the case or cases to which he is assigned to sit, be assigned by the chairman of the judicial council to sit in any court; and while so assigned shall have all the powers of a justice or judge thereof." Stats.1941, p. 2938. In 1951 this section was again amended by eliminating the requirement of a stipulation of counsel before the order of assignment could be made. Stats.1951, p. 3694.

It is again emphasized that we are here dealing with the assignment of a retired judge of the superior court to sit in a superior court. Such being the case it is urged that, notwithstanding the amendment of section 6 in 1951, dispensing with the requirement of a stipulation of counsel, nevertheless such a stipulation as to the assignment of a superior court judge is required under the provisions of section 5 of article VI of the constitution as amended in 1928. The amendment added in that year is as follows: "Upon stipulation of the parties litigant or their attorneys of record a cause in the superior court or in a municipal court may be tried by a judge pro tempore who must be a member of the bar sworn to try the cause, and who shall be empowered to act in such capacity in the cause tried before him until the final determination thereof. The selection of such judge pro tempore shall be subject to the approval and order of the court in which said cause is pending and shall also be subject to such regulations and orders as may be prescribed by the Judicial Council."

It is argued that since section 22 of article I of the constitution provides that: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise", there is no power in the legislature to provide for the assignment of a retired superior court judge to act as a judge of such a court except by stipulation of counsel, accompanied by an order of the superior court approving the selection.

[8] A sufficient answer to this argument is that the constitution and the statute do not encompass the same subject matter and that there is no conflict between them. Section 5 of article VI of the constitution, by its own terms, has to do only with the establishment of a court through the medium of a *pro tempore* judge, selected from the membership of the bar by stipulation of counsel to try a particular case, and whose selection must be approved by the superior court. The chairman of the Judicial Council has nothing to do with setting up such a court. On the other hand section 6 of the Judges' Retirement Act operates to establish a court through the medium of a judicial officer of the state and his assignment thereto by the chairman of the Judicial Council. Where duly assigned under that section such officer obviously is not a judge *pro tempore* selected by stipulation of counsel to try a particular case as contemplated by section 5 of article VI of the constitution. The latter section operates independently of the retirement act. Neither controls the other. When a retired judge is duly assigned under the retirement act he is a regular judge of the superior court whose status as such is created by the legislature pursuant to constitutional authority. Section 5 of article VI is therefore not controlling. It necessarily follows that under the retirement statute no stipulation of counsel is required as a prerequisite to the assignment of a retired superior court judge to preside as a judge of the superior court in any county in the state.

[9] It may not be assumed that the power of assignment conferred by section 6 of the statute will be improvidently exercised. If perchance it should be the legislature has complete authority to deal with the subject by appropriate legislation even to the extent of withdrawing the power altogether.

By section 1a of article VI, subd. 6, of the constitution the duty is enjoined upon the chairman of the Judicial Council to seek to expedite the judicial business of the state, to equalize the work of the judges, and to provide for the assignment of incumbent judges from one county to another under certain conditions. None of the conditions specified in that section would prohibit the assignment here under consideration.

[10] Whether as a matter of policy the system of assignment of retired judges should be put into effect is for the people of the state to determine through the constitution or by the legislature. That policy has been declared by both, by the constitution by reasonable implication and by the legislature in the unmistakable and definite terms of section 6 of the retirement act. The public policy so reflected is of considerable public concern. It is not a

matter which is subject to judicial control where it has been plainly declared by legislative authority. A plan for the continued service of federal judges has been in effect for many years. 28 U.S.C.A. § 294 (formerly § 375a); Booth v. United States, 291 U.S. 339, 54 S.Ct. 379, 78 L.Ed. 836; United States v. Moore, 2 Cir., 101 F.2d 56, certiorari denied, 306 U.S. 664, 59 S. Ct. 788, 83 L.Ed. 1060. The purpose of such a plan would seem to be to make available to the judicial department the experience, aptitude and capabilities of retired judges who, with their consent, may be called upon for assistance in the administration of justice. Such a plan is highly desirable not only in particular cases but also when congestion in judicial business in a particular locality has become critical, and oftentimes intolerable.

The chairman of the Judicial Council is the logical constitutional officer in whom to vest the power of assignment. It is one of his functions to marshal the judicial manpower of the statute by assignment and transfer of judges to facilitate the dispatch of judicial business. No other person is in better or as good a position as he to determine the desirability and need for such assistance.

[11] From the foregoing it is concluded that while the trial judge in these cases was acting under the assignment he was acting as a judge *de jure*. There is no question but that if he were not, the status of a judge *de facto* attached to his action. The office to which he was assigned was a *de jure* office. By acting under regular assignment under a statute authorizing it he was acting under color of authority as provided by law. His conduct in trying the cases and rendering judgment therein cannot here be questioned. People v. Kempley, 205 Cal. 441, 271 P. 478, and cases there cited. But the fact that those judgments may not be attacked for disqualification of the trial judge because he acted at least as a judge *de facto* is not enough. The question whether he acted as a *de jure* judge is essential to the proper disposition of this case, especially for the proper functioning of the retirement system and the regularity of the action of assigned judges thereunder.

Since it is determined that the judgments herein may not be assailed on the ground that the trial judge was without power to act under the assignment, we turn to the merits of the appeal. From the record it appears that the Pickens were the owners of a business (including an on-sale liquor license) and equipment and the property on which it was located. In 1948, the parties made a conditional contract of sale in which the Pickens were the sellers of the business and personal property used therewith for the sum of $10,000 to be paid in stated installments, and of which $5,000 was paid. At the same time, the Pickens leased by written lease the real property on which the business was located for a five-year term commencing January 5, 1948, at a monthly rental of $225, the first and the last month of which were paid in advance. The Johnsons took possession of the property under the agreements and they retained possession until September 20, 1949.

In the course of operating the business, the Johnsons incurred obligations to third persons for which an action was commenced against them in the municipal court. An attachment was issued in that action against "goods, wares and merchandise" of the Johnsons located on the leased property. On September 14, 1949, the marshal levied the attachment on such "goods, wares and merchandise" by posting notice on the premises where located and padlocking the doors of the building. Hunter, an employee of the Johnsons, was then in charge of the business. He operated the bar at the business on September 15th under the marshal's direction. He left the premises on September 19th and when he returned on the 20th, the marshal's padlocks had been replaced by other padlocks, and the Pickens were in possession, having entered on that day, removing the marshal's padlocks. At that time, all sums payable under the lease and agreement had been paid by the Johnsons according to the instruments. The rent had been paid to and including October 10, 1949, and on that date the Johnsons' tender of the rent for the ensuing month was refused by the Pickens. Other factors show that the Pickens asserted and held possession of the premises to the exclusion of the Johnsons.

In the first of the two consolidated actions, the Pickens', plaintiffs, basic claims were that the Johnsons had violated the lease by suffering the attachment to be levied and incurring the obligations on which the attachment was based in their name and on their credit; that hence the lease was breached and it and the agreement were no longer in effect and they were entitled to regain possession of the premises and business. In the second action, the Johnsons, plaintiffs, claimed damages from the Pickens for ousting and excluding them from possession of the premises and business, asserting no breach of the lease or agreement and resting their claim on those instruments.

The court found that there had been no breach of the lease or agreement; that the merchandise was not bought in the Pickens' name or on their credit; that the levy of the attachment did not breach the lease; that the Pickens ousted and excluded the Johnsons from possession without right; that the Johnsons had not abandoned the premises or their rights under the lease; and that the Pickens were liable in damages to the Johnsons for their conduct.

The actions were previously tried resulting in a judgment for the Pickens, and the Johnsons were ordered to transfer the liquor license to the Pickens. That was done and in the second trial $4,500 of the damages awarded to the Johnsons was the found value of the liquor license. An appeal was taken from the judgment after the first trial, the main grounds being insufficiency of the evidence to support it. The judgment was reversed on that ground and several matters were determined. Pickens v. Johnson, 107 Cal.App.2d 778, 238 P.2d 40. The Pickens based their claim of a violation of the lease on a clause in which the Johnsons, lessees, agreed not to permit any liens to be filed against the premises, asserting the levy of the attachment as a violation, and further invoked a clause of the lease which gave them right of re-entry for breach. The district court of appeal held that there was no breach because the attachment was of merchandise, rather than of premises. It was also determined that under the evidence the Johnsons did not incur the obligations upon which the attachment was based in the Pickens' name or credit and the Johnsons had not abandoned the premises, their lease, or the agreement.

The Pickens assert on this appeal that they were justified in seizing possession of the premises and taking the liquor license from the wall on the premises, or otherwise phrased, the findings of the court to the contrary are not supported by the evidence. They assert that the Johnsons abandoned the premises and that an improper measure of damages was applied.

We have heretofore seen that it was settled by the former appeal, Pickens v. Johnson, supra, 107 Cal.App.2d 778, 238 P.2d 40, that there was no breach of the lease by reason of the levy of the attachment and hence the Pickens had no right to reenter or retain possession of the premises and merchandise on that ground.

[12] The Pickens concede that there is a conflict in the evidence on the question of abandonment of the lease and agreement by the Johnsons and the court in its findings resolved that conflict against them. Thus there is no occasion to discuss the evidence on the subject.

[13] For the first time the Pickens now contend that the business and the premises were a part of a joint enterprise between them and the Johnsons and therefore they had the right to enter and retain possession of the premises and merchandise. They point to evidence that the liquor license was issued in the Johnsons' and their names jointly and that they were parties defendant in the municipal court action and judgment was then given against them as well as the Johnsons. No such proposition was asserted in any of the pleadings or at any other time. Moreover, the lease and agreement squarely refute it. They created a landlord-tenant relation with reference to the premises and the liq-

uor license was one of the things sold by the agreement to the Johnsons. At no time prior to their entry into possession in September did they make any such claim.

[14] The Pickens contend they had a right to enter to obtain the liquor license in order to turn it over to the Board of Equalization as the law required them to do to protect their interest because the failure to operate the business would forfeit the license and that is the reason they entered. Assuming such was the case it would not authorize them to forcibly seize possession of the premises and merchandise and retain them to the exclusion of the Johnsons. There is evidence which negatives that as the purpose of their entry. While there is some conflict, the evidence shows that the Pickens broke the padlocks which had been placed on the door by the marshal and put their own locks on. The Pickens thereupon took possession of the premises. They removed some merchandise therefrom and took down decorations and renovated it. After the attachment was levied on September 14, 1949, the premises were open with a keeper in charge for two days and then padlocked. The Pickens told the Johnsons' bartender who was residing at the premises to remove his personal articles. The Johnsons had made arrangements with a Mrs. Sprouse to borrow the money to discharge the attachment but when she found out the Pickens were in possession she refused to advance it. Mrs. Johnson tendered the rent due under the lease on October 10, 1949, to the Pickens and demanded possession of the premises; both were refused. Similar tenders and demands were made on November 10th. Also, the Pickens refused to permit the Johnsons to remove their personal belongings. The Pickens posted a notice dated September 14, 1949, on the premises declaring that because of the attachment the Johnsons had broken the lease and agreement (which as we have seen was not true) and unless the attachment was released in three days the Johnsons would lose all rights under the lease and agreement. Finally, the Pickens commenced their action on October 28, 1949, in which they declared that the lease and agreement were broken and they took possession of the property on September 20, 1949, and requested the court to declare that the Johnsons had no right to the property. There is, therefore, sufficient evidence to show an ouster by the Pickens of the Johnsons from the premises, an exclusion of the Johnsons from possession and a forcible entry by the Pickens, all contrary to the Johnsons' rights under the lease and agreement.

[15] The damages of $19,900 awarded the Johnsons consisted of $4,500 for the liquor license and $15,400 for the loss of possession of the premises in violation of the lease. It was found that the value of the use of the premises which is the rental value from September 20, 1949, to January 5, 1953, the end of the lease term, was $400 per month. Evidently the court concluded that this ran from October 21, 1949. The rental under the lease was $225 per month but no claim is made that such amount should be deducted from the $400 use value. The Pickens assert that the only evidence of the use value was based on the assumption that the liquor license would be used on the premises and that to permit recovery of such a use value and also the value of the liquor license is to allow two amounts of damages for the same thing.

There is evidence that the net income from the business was over $7,000 for the 12-month period prior to the unlawful entry and there was evidence that the liquor license alone was worth $10,000. It will be recalled that the lease called for a rental of $225 per month and independent of that the price of the equipment including the license in the agreement was $10,000. It is true that the lease and agreement should be read together, and it was contemplated that the license be used on the leased premises, but a separate price was fixed for the use of the premises (the lease) and the sale of the license and equipment under the agreement. Taking into consideration the net profit from the business together with the rental price stated in the lease, the court could have properly concluded, as it did, that the value of the use of the premises was $400 per month.

The judgments are affirmed.

EDMONDS, TRAYNOR, and SPENCE, JJ., and DOOLING, J. pro tem., concur.

DOOLINC, J. pro tem., sat in the place of the CHIEF JUSTICE, who deemed himself disqualified.

CARTER, Justice (concurring and dissenting).

I concur in the judgment on the ground that J. O. Moncur was a de facto judge and that no error was committed; hence the judgment should be affirmed. But I cannot agree with the holding of the majority that a retired justice or judge may be a de jure justice or judge, or that the Judge's Retirement Act Stats.1937, p. 2204, as amended, is constitutional insofar as it purports to authorize a justice or judge whose term of office has expired to act in a judicial capacity without, at least, the consent of the parties.

The fallacy of the majority holding in this respect is apparent. In effect the majority holds that section 22a of article IV of the Constitution which empowers the Legislature to provide for retirement salaries for state employees modifies or repeals all provisions of the Constitution relating to the selection, terms of office and extra-judicial activities of justices or judges. See Calif.Const., art. IV, §§ 18 and 20; art. VI, §§ 3, 8, 9, 10, 10a, 18 and 26. The majority holding also nullifies section 1 of article III of the Constitution providing for the separation of the powers of the state government.

Under the majority holding, the Legislature may, pursuant to section 22a of article IV, extend the term of office of a superior court judge beyond a period of six years fixed by article VI, § 8, of the Constitution and may extend the term of office of a member of the Supreme Court or District Court of Appeal beyond the twelve-year period fixed by article VI, §§ 3 and 4a, of the Constitution. This is obvious because, under this holding a justice or judge whose term of office has expired, is still a justice or judge although he is entitled to practice law in violation of article VI, § 18, of the Constitution. The chairman of the Judicial Council by some magic may assign this practicing lawyer-justice or judge to the position of a de jure justice or judge for such period as such chairman and such lawyer-justice or judge may decide between themselves. If a client should consult such a lawyer-justice or judge while he is under assignment, I presume the latter would say: "While I was a lawyer and entitled to practice law before this assignment, I am now a justice or judge and not entitled to practice law during this assignment, but when I finish this assignment I will again be a lawyer entitled to practice law, and I can then act as your lawyer." While under such assignment and acting as such justice or judge he is not permitted to give legal advice, accept employment or compensation for any service performed as a lawyer. After the assignment is ended, he resumes the practice of law until the next assignment, or he may seek a public office or fill some public position in violation of article IV, § 20, and article VI, § 18, of the Constitution. He may decide to take a journey out of the state but if he is out of the state for a period of longer than sixty days he violates article VI, § 9, of the Constitution. Suppose a retired justice or judge should be elected a district attorney, a city attorney, a member of the Legislature, or some other public office. Obviously under settled principles of constitutional law he would not be eligible for assignment to a de jure judicial position. Would this mean that he would lose his retirement salary as he would not be available to accept an assignment to a judicial position by the chairman of the Judicial Council? We would then have the unique situation that some retired justices or judges would be eligible for assignment and others would not. The assignment by the chairman of the Judicial Council of such a lawyer-justice or judge may be for one day or one year or ten years for service upon any court which such chairman and such retired lawyer-justice or judge may agree upon. All this without popular sanction and in direct violation of constitutional mandates. Just the chairman of the Judicial Council and this lawyer-justice or judge determines when he is a lawyer and when he is a judge and where he will sit when he is a judge. When he is a lawyer he is subject to the provisions of the State Bar Act and must pay his State Bar dues. When he is a justice or judge he is subject to the above cited constitutional provisions with respect to his extra-judicial activities. He may be a lawyer one day and justice or judge the next. As a lawyer he is an advocate—a partisan—a confidential adviser of his clients. As a judge he is required to weigh and consider the evidence and the law and render a fair and impartial decision. As a justice or judge he has no fixed term of office except the period of assignment which may or may not be renewed at the discretion of the chairman of the Judicial Council. In fact he does not know from one day to another whether he is to be a judge or a lawyer. In short, he must have a dual or split personality to qualify for these dual positions overnight.

In describing the type of judge created by section 6 of the Judges' Retirement Act the majority opinion states: "On the other hand section 6 of the Judges' Retirement Act operates to establish a court through the medium of a judicial officer of the state and his assignment thereto by the chairman of the Judicial Council. Where duly assigned under that section such officer obviously is not a judge *pro tempore* selected by stipulation of counsel to try a particular case as contemplated by section 5 of article VI of the constitution. The latter section operates independently of the retirement act. Neither controls the other. When a retired judge is duly assigned under the retirement act he is a regular judge of the superior court whose status as such is created by the legislature pursuant to constitutional authority. Section 5 of article VI is therefore not controlling. It necessarily follows that under the retirement statute no stipulation of counsel is required as a prerequisite to the assignment of a retired superior court judge to preside as a judge of the superior court in any county in the state."

It is obvious from a reading of the foregoing excerpt from the majority opinion that the majority reason from a false premise; that is, the majority assumes that a retired justice or judge whose term of office has expired is "a judicial officer of the state." This assumption is made notwithstanding the previous statement in said opinion as follows: "In no proper sense is the term of a judge extended by his retirement or by his assignment. Upon his retirement he can no longer of his own volition assume to act as a judge whether he retires at the end of his term, as in this case, or in his mid-term. * * * While not under assignment there is no good reason to say that he would be subject to the provisions of the constitution and law of the state made specially applicable to regular incumbent judges." In other words, when not under assignment, the retired justice or judge is returned to the status of a lawyer,—a member of the State Bar, if he pays his dues, and is entitled to practice law. How, may I ask, is his status any different from that of any other lawyer or member of the Bar, and what magic has transformed him from a lawyer or member of the Bar into "a judicial officer of the state"? Finally, can it be said that a person may have the status of both a member of the Bar, entitled to practice law, and that of "a judicial officer of the state", at one and the same time? To so hold is to overrule State Bar of California v. Superior Court, 207 Cal. 323, at page 340, 278 P. 432, at page 439, where it was held by a unanimous court as follows: "The duly elected and qualified judges of the courts of record in this state who were such at the time said act became effective, and who have since become and are such judicial officers, were and are not, under the inhibition of section 22 of article 6 of the state Constitution, entitled to practice law in this state during their and each of their continuance in office, and hence under the express provisions of said State Bar Act have not become, and during said period are not, members of the state bar of California, and hence are not subject to the jurisdiction, control, and processes conferred upon said corporation and the governing board or other officers thereof by the scope and provisions of said act."

The majority opinion also states: "It may not be assumed that the power of assignment conferred by section 6 of the statute will be improvidently exercised. If perchance it should be the legislature has complete authority to deal with the subject by appropriate legislation even to the extent of withdrawing the power altogether."

This pronouncement strikes a lethal blow at section 1, article III, of the Constitution known as the separation of powers mandate. Under the majority holding the Legislature, in violation of this mandate, may say to retired justices or judges whose terms of office have expired: "You must continue to serve as justices or judges whenever and wherever we (the Legislature) direct or you may not serve at all—you may or you may not practice law or hold other positions—in other words, you retired justices and judges are under our control and you must obey our mandates." Obviously, if the Legislature may provide that retired justices or judges may be assigned to a judicial position with their consent, it may also provide that they must serve in such judicial positions without their consent and may provide sanctions for their failure to so serve. This may not set well with even some retired Supreme and appellate court justices who may desire to engage in extra-judicial activities. They may then remember the trite saying with mixed metaphors: "When chickens come home to roost it's a horse of another color."

Another serious result which may flow from the majority holding in this case is that a justice or judge eligible for retirement under the Judges' Retirement Act may be defeated at an election to succeed himself and then retire under the act before his term expires. Under the majority holding here such justice or judge may be assigned by the chairman of the Judicial Council to sit as a justice or judge in any court in which he may be eligible to sit under the act and thus he may continue to function as a justice or judge indefinitely and thereby thwart the will of the electors. I can envision a situation such as this arising in the smaller counties of the state which have only one or two judges and where the defeated retired judge may be so unpopular that he has lost the confidence and respect of a large segment of the population who constitute his constituents. Yet the chairman of the Judicial Council with the consent of such retired judge could foist him onto the people of that county as a judge of the superior court for an indefinite period by the power of assignment which the majority now hold the chairman of the Judicial Council possesses. I believe there can be no refutation of the statement that when the people of this state adopted section 22a of article IV of the Constitution at the general election in 1930 not a single soul who voted for this amendment ever contemplated the far-reaching consequences of their act as now construed by a majority of this court.

The majority refers to section 5, article VI, of the Constitution which authorizes the appointment of a judge *pro tempore* by stipulation of the parties approved by a judge of the superior court. While this provision has been in the Constitution in one form or another since 1879 its use has been very limited. In my twenty-six years of law practice, I never knew of it being used, and in the more than 14 years that I have been a member of this court, I do not recall of a single case coming before this court which had been heard and decided by a judge *pro tempore* selected under this provision of the Constitution. I mention this only to call attention to the fact that it must be the feeling of lawyers and litigants alike that they prefer to have their controversies settled by judges selected in accordance with the constitutional provisions hereinabove cited, and if I am not mistaken the Bar of this state will revolt against the holding of this court which places it within the power of the chairman of the Judicial Council and a retired justice or judge to create the judicial tribunal which has the power to determine the rights of the litigants in controversies which may involve their life, liberty, or property in violation of the constitutional mandates which I have heretofore cited.

Much is said in the majority opinion in regard to the desirability of the legislation contained in section 6 of the Judges' Retirement Act. In this respect the majority opinion states: "The purpose of such a plan would seem to be to make available to the judicial department the experience, aptitude and capabilities of retired judges who, with their consent, may be called upon for assistance in the administration of justice. Such a plan is highly desirable not only in particular cases but also when congestion in judicial business in a particular locality has become critical, and oftentimes intolerable." Assuming, without conceding, the factual correctness of the foregoing statement, I have grave doubt as to its wisdom even though it were possible by any reasonable or logical analysis to extend the provisions of section 22a of article IV of the Constitution to authorize the adoption of such a plan. While it is no doubt true that some retired justices or judges may be well qualified to continue functioning in a judicial capacity, it is likewise true that some are not. We certainly have the right to assume that when a judge voluntarily retires, he desires to be relieved of the duties of his judicial office, as retirement means just that. The Legislature has the power under the Constitution to create a sufficient number of superior court judgeships to enable our superior courts to expeditiously handle all legal matters coming before our courts, and it seems to me much more appropriate for the Legislature to exercise this power than to resort to the hybrid type of legislation contained in section 6 of the Judges' Retirement Act.

In this case there is no question that Moncur, the judge who purported to act as such in these consolidated cases, was not a legal judge. The term of office for which he had been elected had expired. He did not run for office again but on the contrary retired as he was authorized to do under the retirement act. A successor had been chosen for his office, a superior court judge in Plumas County. It is true he was regularly assigned to act as a judge in these cases by the chairman of the Judicial Council but he was not qualified for that position.

There are several constitutional obstacles to his being a de jure judge or to the power of the Legislature under the retirement act or otherwise to authorize such procedure.

The Constitution requires that judges of superior courts *shall be elected* by the voters of the county in which is situated the superior court for which the judge is to be chosen, Cal.Const. art. VI, § 6, but that in case of a vacancy in the office, the Governor shall appoint a person to hold the office until the commencement of the term of a person elected to fill the vacancy which shall be done at the general election next after the first day in January after the vacancy occurs, and his term (six years) shall commence on the first Monday of January after the first day of January next succeeding his election. The term of office is six years. Cal.Const. art. VI, § 8. Under these provisions it has been held that a purported judicial act done by a judge after his term of office has expired has no force or effect. Martello v. Superior Court, 202 Cal. 400, 261 P. 476; Connolly v. Ashworth, 98 Cal. 205, 33 P. 60; Mace v. O'Reilley, 70 Cal. 231, 11 P. 721; Broder v. Conklin, 98 Cal. 360, 33 P. 211; People v. Ruef, 14 Cal.App. 576, 630, 114 P. 48, 54. The Legislature *cannot extend* the term of a judge fixed by the Constitution, People ex rel. Bledsoe v. Campbell, 138 Cal. 11, 16, 70 P. 918; People ex rel. Hargrave v. Markham, 104 Cal. 232, 235, 37 P. 918, *nor confer upon him judicial power after his term has expired,* where the Constitution fixes his term of office and mode of selection. Hallam v. Tillinghast, 19 Wash. 20, 52 P. 329.

From the above constitutional provision and authorities it is clear that Moncur was not a judge when the cases were tried and any judicial act done by him was ineffective. He had been elected a superior judge but his term had expired on the day he retired and he was not re-elected; his successor had previously been elected and was discharging the duties of that office. Moncur did not hold an appointment by the

Governor to fill a vacancy. That is, he was in no different position than a judge who did not run for re-election or did run and was defeated; his term had expired and his successor was occupying the position. Hence if there are no other provisions justifying a different result, section 6 of the Judges' Retirement Act, which authorizes retired judges to serve as judges after retirement, at least without the stipulation of the parties, is invalid.

Moreover, the effect of permitting the Legislature to authorize judges who are not judges (retired judges to act as such [the retirement act]) violates the fundamental premise of our Constitution that the legislative, judicial and executive departments of our state government shall be separate. Cal.Const. art. III, § 1. If the Legislature may at its sole discretion thwart the provisions in the Constitution for the judiciary then there is no longer any true separation of power. Section 6 of the retirement act does just that, because it empowers the chairman of the Judicial Council to create offices of superior court judges where none may exist under the Constitution and in a manner contrary to it.

To overcome the positive constitutional provisions fixing the term of office and mode of selection of superior court judges, the majority opinion proceeds on the theory that the constitutional provisions authorizing the Legislature to establish a retirement system, Cal.Const. art. IV, § 22a, are paramount to the former provisions and that the Legislature may enact measures contrary to them. It stresses the constitutional authority of the chairman of the Judicial Council to assign judges from one area to another, and a retired judge is not a judge until after he has been assigned to serve by the chairman and then only during the assignment.

In reaching that result an analogy is sought to be drawn between the powers granted by the Constitution to the Public Utilities Commission and Industrial Accident Commission.

First, with reference to the assignment authority provision, it is crystal clear that that provision does not purport to repeal the requirement that judges be elected for a fixed term; in case of vacancy and before election the Governor must make an appointment, not the chairman of the Judicial Council. Under the Judicial Council provision it will be noted that "any judge" may be assigned, but in order to derive authority therefrom to assign a retired judge, it would be necessary to conclude that the words mean any person, whether or not he is still a judge in the proper legal sense that he has been elected or appointed under the constitutional provisions above discussed, and his term has not expired. To so construe those words is out of harmony with the rule announced in Fay v. District Court of Appeal, 200 Cal. 522, 536, 254 P. 896, in holding that amendment to the Constitution with reference to judges *pro tempore* did not mean that the entire judicial personnel of a District Court of Appeal could consist of *pro tempore* judges. In Edler v. Hollopeter, 214 Cal. 427, 6 P.2d 245, it was held that under the Judicial Council amendment an inferior court judge could be assigned to a higher court but he must meet the qualifications of the higher judicial position (admission to practice for five years prior to his election). If that is necessary it would follow that he must also satisfy the qualifications for the position of judge, that is, holding office by election or appointment before expiration of his term. And it has been held that the term "judge" does not apply to a person whose term of office has expired. In re Wheelock's Will, 205 App.Div. 654, 200 N.Y.S. 157.

It is unreasonable to believe that the framers of the Judicial Council provision or the people in adopting it, intended that the chairman of the council be given such broad authority by the Constitution that he could select a person for a judicial assignment, who had never been a judge, or who had been one, and was defeated for re-election years before or did not run for re-election. I would hold, therefore, that the Judicial Council provision in the Constitution did not confer authority on the chairman to assign as judges other than those who were duly elected, qualified and acting and whose term has not expired.

In the same connection the majority opinion makes the point that retired judges are judicial officers only when they are under assignment by the chairman of the Judicial Council; that at all other times they are lawyers with no official position. Even if that is true, it furnishes no ground for creating a "temporary" judge who has not been elected as required by the Constitution, and in any event it is contrary to reason and logic. In speaking of retired federal judges, the United States Supreme Court has this to say: "By retiring pursuant to the statute a judge does not relinquish his office. The language is that he may retire from regular active service. The purpose is, however, that he shall continue, so far as his age and his health permit, to perform judicial service, and it is common knowledge that retired judges have, in fact, discharged a large measure of the duties which would be incumbent on them, if still in regular active service. *It is scarcely necessary to say that a retired judge's judicial acts would be illegal unless he who performed them held the office of judge. It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge.* The act does not, and indeed *could not,* endue him with a new office, different from but embracing the duties of the office of judge. He does not surrender his commission, but continues to act under it." Emphasis added; Booth v. United States, 291 U.S. 339, 350, 54 S.Ct. 379, 381, 78 L.Ed. 836.

The constitutional retirement provision does not authorize the use of retired judges in a judicial capacity or sanction legislative authority therefor in the face of the constitutional provision requiring election and fixing terms of office for judges. To hold as does the majority would mean that the retirement provision repealed by implication the requirement of election of judges, a drastic conclusion which could not have been contemplated by the voters in authorizing a retirement system.

Serious consequences may flow from the holding of the majority in this case. Similarly the Legislature could authorize the selection and appointment of a retired but defeated legislator to fill a vacancy in the Legislature or to serve while the incumbent legislator was incapacitated. The same would be true of a retired governor. I cannot believe that the constitutional provision for a retirement system was intended to authorize any such a far-reaching and drastic curtailment of the other provisions in the Constitution, indeed in our whole system of state government. It is no doubt true that the retirement authorization includes the right to exact further service from the retiree as far as he is concerned, but when we consider the right of the people as guaranteed by the Constitution to have their officers, judicial, legislative and executive, elected by them and serve only for a fixed term, it is another matter. Requiring that retired judges perform services after retirement does not carry the right to impose such judges on the people contrary to the election and term of office provisions of the Constitution. The matter may be simply solved by requiring the consent of the parties to the sitting of a retired judge as was done by the retirement act before its amendment in 1951. The pertinent reasoning in this situation is stated in Fay v. District Court of Appeal, supra, 200 Cal. 522, 536, 254 P. 896, 902, where the court held that the amendments to the Constitution providing for *pro tempore* judges to sit on the District Court of Appeal did not mean that the entire judicial personnel of a District Court of Appeal could consist of *pro tempore* judges for: "To so interpret these provisions in said amendments, evidently intended to afford temporary and emergency relief, would be to encourage the violation of a very vital principle of popular government which is none other than that of the right of the people of a commonwealth to have their essential rights, liberties, and interests in respect to person and property heard and determined by courts of last resort, the constituent membership of which is composed of public servants of their own selection. That the people might transfer the direct exercise of this selection to those whom they may have chosen to administer the functions of our representative scheme of government is undoubted, but the text of such transfer, whether embodied in a Constitution or a statute, should be plain and unambiguous." The reasoning of the majority opinion is squarely contrary to the Fay case.

The analogy claimed by the majority between the retirement provision and other provisions in the Constitution which are expressly made paramount to other constitutional requirements, does not exist. The retirement provision not only does not contain such words of supremacy, but in order to reach the majority's result we have to read the retirement provision as if it does have such words, and then take the further step of implying that authorization for a retirement system includes the right of the Legislature to wipe out the constitutional provisions as to election and term of office of both superior judges and justices of the Supreme Court and District Courts of Appeal.

In summary, the Constitution fixes the term of office of justices of the Supreme Court and District Courts of Appeal and superior court judges. The Legislature has no power to extend such terms. Under no reasonable construction can it be said that such power is granted by the provisions of section 22a of article IV of the Constitution. In fact, the antithesis of such construction is indicated. The following conclusions are inescapable: (1) That by accepting retirement the justice or judge has decided to withdraw from the position held by him and cease rendering service of a judicial nature; (2) during retirement the justice or judge is restored to his status as a member of the Bar and entitled to practice law which a justice or judge may not do while acting in the capacity of a judicial officer of the state; (3) that his position as a justice or judge will be filled by a successor in a manner provided for in the Constitution; (4) that he is entitled to his retirement salary as a part of the compensation earned by him for services already rendered and should not be required to render services in the same capacity after retirement; (5) that to do so would be discriminatory and unfair to those who are capable, because those who are incapable of rendering services will receive their retirement salaries without being required to render services after retirement; (6) that the chairman of the Judicial Council has no constitutional power or authority to create judicial positions and select justices or judges to fill them or change the status of a member of the Bar to that of a justice or judge, and the Legislature cannot constitutionally confer such power in view of the constitutional provisions hereinabove cited which expressly provide for the method of selection and term of office of such justices or judges; (7) that the holding of the majority in this case strikes a lethal blow against our republican form of government and is destructive of the democratic processes set up in our Constitution for the selection of judges; (8) and that even if this drastic change in our form of government were dictated by compelling expediency, I could not accept it, because it is contrary to one of the basic concepts of popular government declared in the Constitution of California—that the people by popular vote shall have the right to determine the manner in which their public officers shall be selected and the term of office of such officials.

I hold, therefore, that the provision in the Judges' Retirement Act, supra, authorizing the assignment of retired judges to conduct judicial business without the consent of the parties is unconstitutional.

The Johnsons assert, however, that Moncur was a de facto judge and hence the judgments are valid. The Pickens reply that there cannot be a de facto judge unless there is a de jure court or office of judge; that there was no de jure office or court here and thus Moncur could not be a de facto judge.

It has been stated, and said to be the majority rule, that there cannot be a de facto officer where there is no de jure office or, as to judges, there can be no de facto judge where there is no de jure court. People ex rel. Hoffman v. Hecht, 105 Cal. 621, 629, 38 P. 941, 27 L.R.A. 203, dictum; Oakland Pav. Co. v. Donovan, 19 Cal.App. 488, 494, 126 P. 388, dictum; Malaley v. City of Marysville, 37 Cal.App. 638, 640, 174 P. 367, dictum; Kitts v. Superior Court, 5 Cal.App. 462, 468, 90 P. 977, dictum; People v. Toal, 85 Cal. 333, 338, 24 P. 603; Ex parte Giambonini, 117 Cal. 573, 49 P. 732; Buck v. City of Eureka, 109 Cal. 504, 512, 42 P. 243, 30 L.R.A. 409; see cases from other jurisdictions collected, State ex rel. Tamminen v. City of Eveleth, 189 Minn. 229, 249 N.W. 184, 99 A.L.R. 294. That rule has received sharp criticism mainly for the reason that the public policy underlying the de facto officer doctrine applies with equal force whether or not there is a de jure office. See 2 So.Cal.L.Rev. 236, 243; 9 Ibid. 189, 206; 1 Vanderbilt L.Rev. 651; 46 Mich.L.Rev. 439; 13 Minn.L.Rev. 439; 29 Ibid. 36; 86 U.Pa.L.Rev. 551. The rule has been said to be unsound: "[*F*]*irst,* because an office created or authorized by the legislature should be treated as de jure until declared otherwise by a competent tribunal, since a statute must be received and obeyed by the individual until questioned in, and set aside by, the courts, because every statute is presumed to be constitutional; *second,* because the same reasons behind the rule protecting the acts of a de facto officer in a de jure office equally apply to acts of a de facto officer in a de facto office; *third,* because the attack on the constitutionality of the office should not be made collaterally by private parties but should be brought in an action expressly for the purpose of questioning the validity of acts of an officer under an unconstitutional statute, for to allow individuals who deal with public officers to question their authority in every instance would be productive of uncertainty and of a disordered society; and *fourth,* because, historically, the English rule requiring a de jure office, from which the majority American rule is derived, is not so productive of harsh results, since the acts of English officials are not declared void because the officer was acting under an unconstitutional statute." 9 So.Cal.L.Rev. 189, 206. There are as many authorities to the contrary. See cases collected, 9 So.Cal.L.Rev. 207; State ex rel. Tamminen v. City of Eveleth, 189 Minn. 229, 249 N.W. 184, 99 A.L.R. 294. There are so many so-called exceptions to the rule or qualifications as to what is a de jure office that it cannot be said to have invariable application. Where an office is created by an unconstitutional statute, a person holding office under the statute before it is declared unconstitutional may be a de facto officer. Statement in State v. Carroll, 38 Conn. 449, 9 Am.Rep. 409, approved in People ex rel. Hoffman v. Hecht, supra, 105 Cal. 621, 38 P. 941; Oakland Pav. Co. v. Donovan, supra, 19 Cal.App. 488, 126 P. 388; Reclamation Dist. No. 70 v. Sherman, 11 Cal.App. 399, 105 P. 277; Kitts v. Superior Court, supra, 5 Cal.App. 462, 90 P. 977. If the office has potential existence—has not been established but may be—a person holding it is a *de facto officer.* Buck v. City of Eureka, supra, 109 Cal. 504, 42 P. 243. After a judge's term expires and his successor is selected, the former may be a de facto judge. Merced Bank v. Rosenthal, 99 Cal. 39, 31 P. 849, 33 P. 732.

Even if the de jure office rule is applied, it appears that within the reason of the qualification heretofore noted, there is a de jure office—a court, the superior court, and judges of such court—and it was to act in the capacity of such a judge that Moncur was assigned. The method of naming him was invalid but he was a de facto judge. He had a clear color of title by reason of the express legislative authority for his assignment (Judges' Retirement Act, supra) and was regularly assigned by the person authorized to make it.

SCHAUER, Justice (concurring and dissenting in part).

Insofar as the merits of the controversy are concerned I agree with the discussion in the majority opinion; as to the power of the acting judge, I find in our Constitution no authority for, but much in negation of, the chameleonic status of the retired judge envisioned in such majority opinion.

Accordingly, I concur in the judgment of affirmance solely because by a long line of respectable authority the acts of acting pro tempore Judge Moncur have validity as those of a de facto officer performing the duties of a de jure court.

42 Cal.2d 873

Lawrence L. PICKENS and Elfrieda Pickens, husband and wife, Petitioners, v. SUPERIOR COURT OF STATE OF CALIFORNIA, IN AND FOR SACRAMENTO COUNTY, Respondent.

Sac. 6350.

Supreme Court of California.
In Bank.
March 1, 1954.

F. H. Bowers, Roseville, and Thomas F. Sargent, Auburn, for appellant petitioners.

McAllister & Johnson and Walter C. Frame, Sacramento, for respondent.

PER CURIAM.

This is a mandamus proceeding in which the judgments in consolidated actions reviewed on appeal in Pickens v. Johnson, Cal.Sup., 267 P.2d 801, are attacked on one of the grounds urged on that appeal. Inasmuch as the appeal disposes of that issue, the petition for the writ is denied and the alternative writ discharged. See California Toll Bridge Authority v. Durkee, 40 Cal.2d 341, 253 P.2d 673.

DOOLING, J. pro tem., sat in the place of the CHIEF JUSTICE, who deemed himself disqualified.

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123 Cal.App.2d 807

VERMILLION v. TETERS.

Civ. 19790.

District Court of Appeal, Second District, Division 1, California.
March 15, 1954.

Rehearing Denied April 5, 1954.
Hearing Denied May 6, 1954.

Action on a note. The Superior Court, Los Angeles County, Allen W. Ashburn, J., entered judgment for holder. Maker appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained trial court's conclusion of law that holder was a holder in due course.

Judgment affirmed.

Bills and Notes ⇔525

In action on note, which conformed to all requirements for negotiability, by holder, who paid full value for note and who testified that when he received note he did not know of any agreement that note was not to be used until signed by another, nor that there was no consideration, nor that note was given subject to maker's right to "pick up" within 45 days, evidence sustained trial court's conclusion of law that holder was a holder in due course. Civil Code, §§ 3082, 3133.

Eugene L. Wolver, Los Angeles, for appellant.

Mindlin & Levy, Los Angeles, for respondent.

DRAPEAU, Justice.

On September 17, 1951, defendant Teters executed and delivered to Wes Beeman Productions a promissory note for $3,800, payable November 1, 1951. Concurrently therewith, a preliminary agreement was executed by Wes Beeman Productions, as party of the first part, and John L. Carpenter and defendant Teters, as parties of the second part. This agreement provided that the note and property rights to a certain screenplay should "stand for a maximum of 45 days", and gave parties of the second part the right "to pick this note up at any time prior to its maturity."

Thereafter, on September 28, 1951, I. Wellesley Beeman, president of Wes Beeman Productions, endorsed and delivered the $3,800 note to plaintiff Vermillion. At the same time, Beeman also gave to plaintiff the unsecured note of the Productions company for $2,200. In return, plaintiff gave to Mr. Beeman a cashier's check of Bank of America for $6,000 made payable to plaintiff and endorsed by him to Wes Beeman Productions.

This $6,000 was given to pay a "deficit in the cost of production" of a television picture, which Mr. Beeman stated he did not have money available to take care of.

Before he acquired the $3,800 note, plaintiff knew the terms and covenants of the preliminary agreement.

When the note became due, plaintiff demanded payment and upon defendant's refusal to pay, brought the instant action.

From the judgment in favor of plaintiff, defendant appeals.

It is here asserted that respondent Vermillion is not a holder in due course of the note sued upon. This for the reason that the preliminary agreement indicates that the note was conditionally delivered, was to be annexed thereto, and was to be retrievable by appellant Teters for a period of 45 days.

In order to be negotiable, an instrument must (1) be in writing and signed by the maker or drawer; (2) contain an unconditional promise or order to pay a sum certain in money; (3) be payable on demand, or at a fixed or determinable future time; (4) be payable to order or to bearer; and (5) where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. Sec. 3082, Civil Code.

A holder in due course is one who has taken the instrument under the following conditions: (1) that it is complete and regular on its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Section 3133, Civil Code.

The instrument here in question conforms to the requirements of section 3082, supra, in every respect.

The evidence is amply sufficient to support the trial court's conclusion of law that the respondent was a holder in due course of the note sued upon.

Respondent testified on direct examination that on September 28, 1951, when he received the $3,800 note he did not know of appellant's claims that (1) it "was not to be used until John L. Carpenter signed" it; (2) that there was no consideration for it; (3) that Wes Beeman Productions had not performed its contract with appellant; and (4) that the note was given to the productions company to be held for a period of 45 days and then to be returned to appellant if the latter requested it.

On cross-examination, respondent testified that at a meeting on September 27, 1951, in Wes Beeman's office, he first saw the note and at his request Mr. Landes looked at it and told him that "it was a negotiable instrument." At the same time, the preliminary agreement was passed around but said witness "never had the paper in my hand." Also, he did not ask to see the preliminary agreement because "I had taken Mr. Landes' word for it. * * After he had viewed the contract he said there was nothing binding in the contract as to the note; that the note was negotiable."

Mr. Landes, who had been in the banking business from 1926 to 1938, testified that he examined the note and told respondent that it was a negotiable instrument. Further, that "After reading the agreement, I couldn't determine any restrictive clauses in it but, to be further safe, I asked Mr. Beeman if there was any reason, oral or written, that he had not told us about, whereby he would be restricted from negotiating the note. Mr. Beeman told me that the note was given to him for the purpose of raising cash * * * because the maker of the note had his own money involved in some other studio and could not, at this time, put up the cash but would redeem the note at a later date. * * * He (Mr. Beeman) said he had taken it to his bank and * * to three or four banks and their answer, in each case, was that they did not wish to purchase any notes. * * * I asked Mr. Beeman what the words 'pick up' meant in that particular paragraph and he told me that * * * he could pick it up at any time he brought in thirty-eight hundred dollars plus interest."

Respondent not only paid full value for the $3,800 note, but he still had such confidence in Mr. Beeman that he put up another $2,200 against Beeman's unsecured note. As the trial court so aptly said, this is potent evidence of good faith on the part of respondent.

Moreover, it is apparent from the record that respondent purchased the note in reliance upon its unequivocal provisions and the lack of any limiting provisions in the preliminary agreement, coupled with the assurances given by Mr. Beeman and the comments of Mr. Landes upon the terms and effect of the documents. Nothing in the documents themselves or the verbal statements made aroused any suspicion in respondent's mind that appellant might claim an infirmity in the note or in the title of Wes Beeman Productions thereto, or in its unrestricted right to negotiate the note.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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123 Cal.App.2d 700

MASTER CHARGE v. DAUGHERTY.

Civ. 19642.

District Court of Appeal, Second District,
Division 3, California.
March 8, 1954.

Petition for writ of mandate to require Commissioner of Corporations to grant a permit for issuance of capital stock by corporation. From adverse judgment of Superior Court of Los Angeles County, Frank G. Swain, J., corporation appealed. The District Court of Appeal, Shinn, P. J., held that where corporation proposed to issue credit cards which would entitle holders to purchase, on credit, merchandise or service at specified businesses and card holder would sign an invoice which corporation would purchase at a discount from 6 to 10% and corporation would bill card holder for face amount of invoice and collect same from him, the corporation would be engaged in the business of loaning credit to its card holders and must procure a license as a lender before engaging in such business.

Judgment affirmed.

1. Guaranty 🔑36(3)

When one guarantees payment of another's note to enable him to borrow money, it is a loan of credit.

2. Pawnbrokers and Money Lenders 🔑6.1

The purpose of small loan law was to forbid use of credit as a substitute for money in what would be usurious transactions if money were loaned directly. Financial Code, §§ 24000–24651.

3. Pawnbrokers and Money Lenders 🔑6.1

Requirements of law that could only apply to loans of money were not intended to apply to loans of credit and one engaged in loaning credit would not be expected to comply with them. Financial Code, § 24473.

4. Pawnbrokers and Money Lenders 🔑3

Where corporation proposed to issue cards which would enable holders to purchase, on credit, merchandise or service at specified business places and card holder would sign an invoice which corporation would purchase at a discount from 6 to 10% and corporation would bill card holder for face amount of invoice and collect from him, transaction would be "loan of credit" to its card holders and corporation must procure a license as a lender before engaging in such a business. Financial Code, §§ 24007, 24200.

See publication Words and Phrases, for other judicial constructions and definitions of "Loan of Credit".

Buchalter, Nemer & Fields, Murray M. Fields and Leonard S. Beck, Los Angeles, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., John F. Hassler, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appeal from a judgment denying a petition for a writ of mandate to require the Commissioner of Corporations to grant a permit for the issuance of capital stock by

Master Charge. The application to the commissioner was denied upon the ground that Master Charge had not procured a license as a lender under the Small Loan Law, sections 24000–24651, Financial Code.

Appellant proposes to engage in business under the following plan: For a charge of $5 per year it will issue cards to persons deemed to be good credit risks which will entitle them to purchase, on credit, merchandise or service at stores, hotels and restaurants listed in its booklet; the card holder will sign an invoice, appellant will purchase, without recourse, at a discount of from 6 to 10 per cent such of the invoices as the creditor chooses to sell and assign to it; appellant will bill the card holder for the face amount of the invoices and the card holder will pay the same. If the card holder has personal credit with the tradesman and the purchases are charged to him directly, appellant does not acquire the account and the credit card does not enter into the transaction.

The question is whether appellant will be engaged in the business of loaning credit to its card holders. Although the briefs evidence diligent search for authority on the subject, little has been discovered in the way of precedent as to what constitutes a loan of credit.

Pertinent sections of the Financial Code are the following: "'Lender' includes all persons who are engaged in the business of lending their own money, credit, goods, or things in action." Section 24007. "No person shall engage in the business of making or negotiating, for himself, or another, loans of money, credit, goods, or things in action, in the amount or of the value of three hundred dollars ($300) or less, without first obtaining a license from the commissioner." Section 24200. The commissioner denied the application for a permit to issue stock pursuant to an opinion of the attorney general that appellant's plan of business was one for the loan of credit for which a license was required. We do not doubt that the contemplated plan involves the loan of credit.

Appellant says that "A loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed." Civ.Code, § 1912; and it asserts that there is not in its plan of business "the slightest semblance to a loan transaction."

One argument of the appellant is that in a conventional loan transaction there is an obligation to return the thing borrowed or its equivalent, and since credit cannot be returned, it cannot be borrowed. Even the respondent says credit cannot be loaned, citing Dry Dock Bank v. American Life Insurance, etc., 3 N.Y. 344, although he says further that appellant proposes to sell its credit, rather than loan it, but that there is no essential difference between a loan and a sale of credit, and therefore the statute covers sales of credit.

The words "loans of credit" used in the statute are to be given a meaning which fits them into the purpose to be accomplished. The definition urged by appellant would render them meaningless. And it would be ridiculous as applied to such common and well-understood expressions as "lend me your ears" or "lend me a hand". However, the Legislature has said, with unquestionable authority, that there is such a thing as a loan of credit. Anything to the contrary that has been said by courts or commentators must be disregarded.

No doubt the Legislature acted advisedly when it determined there were businesses consisting of the loan of credit, and that they should be regulated. One reason for that action is the fact, stated in 55 Am.Jur. 343, sec. 25, "It is well settled that the usury law is inapplicable to a transaction amounting merely to a loan or sale of credit, and a loan of money, to facilitate which a loan of credit is made, is not rendered usurious by the payment of, or agreement to pay, a sum exacted for a loan of credit."

[1] The Legislature has only recognized the existence of a common business practice. When a man guarantees payment of a friend's note to enable him to borrow money it is a loan of credit. See Morgan v. Shepherd, 171 Ga. 33, 154 S.E. 780.

The Legislature having spoken clearly all the administrators of the law have to do is identify the business of lending credit when it appears. The Attorney General, the Commissioner of Corporations and the trial court have done this, and a brief résumé of the facts will show that they were not mistaken.

[2] Under appellant's plan the holder of a credit card, for a consideration of $5 per year, paid to appellant, will acquire the right to make use of appellant's credit for a given time and to a limited extent. It is a temporary use. When he reaches that limit, or when he ceases to become a member, he may no longer use appellant's credit, that is to say, its financial standing and responsibility, but must rely upon his own. Following appellant's theory of immunity from regulation a money lender could make a business of guaranteeing his customer's loans at a bank and charging the customer for the loan of his credit, thus attempting to evade the usury laws. The obvious purpose of the law in question is to forbid the use of credit as a substitute for money in what would be usurious transactions if money were loaned directly. Appellant, of course, may increase its annual charge, or impose others, and although its proposed charges are small, the nature of its business is not determined by the amount its card holders may pay for the service.

[3] Appellant says it would be impossible for it to comply with all the requirements of the law, specifying several sections which apply to loans of money which would not be applicable to loans of credit. Its argument seems to be that since compliance on its part would be impossible, as, for example, delivery to the borrower of a statement showing the amount received by him, and the balance due on the loan, section 24473, it cannot be required to do the impossible, and therefore is not subject to regulation. The obvious answer is that the requirements of the law that could apply only to loans of money were not intended to apply to loans of credit, and appellant would not be expected to comply with them.

[4] Appellant says further that it proposes to do only what oil companies are allowed to do through the use of credit cards. We suppose the point is that since the practice is permitted it must be lawful. But the premise is erroneous. The methods are not the same. The customer of the oil company obtains the credit card on his own credit and the company is his only creditor. The dealer delivers products to the customer and charges the oil company, not the customer. Thus the company extends credit to the customer and the dealer extends credit to the company. There is no lending of credit. Extending credit is not loaning it.

The Corporation Commissioner found that it had not been shown that appellant proposes to transact its business fairly and honestly, but this finding was doubtless based upon the fact that appellant does not intend to become licensed. The commissioner does not urge anything else as support for the finding, and we attach no importance to it.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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123 Cal.App.2d 860

HOVER v. HAROUT et al.

Civ. 19545.

District Court of Appeal, Second District,
Division 1, California.

March 16, 1954.

Rehearing Denied April 5, 1954.

Hearing Denied May 6, 1954.

In action for damages for fraud in falsely representing, inter alia, the income of theater so as to induce plaintiff to lease the theater and to enter into certain written agreements relating to production of stage plays therein. The Superior Court, Los Angeles County, Allen W. Ashburn, J., entered judgment on verdict for plaintiff, and defendants appealed. The District Court of Appeal, Doran, J., held that the evidence supported the verdict.

Affirmed.

1. Appeal and Error 🔑1003

An appellate tribunal must refuse to enter into consideration of weight and credibility of evidence where record discloses substantial evidence in support of verdict and judgment.

2. Fraud 🔑58(2)

In action for fraud in reference to various false statements and representations made to induce plaintiff to lease theater and to enter into written agreements relating to production of stage plays, evidence supported plaintiff's claim of fraud.

3. Appeal and Error 🔑930(1)

An appellate court views evidence in light most favorable to respondent and indulges all intendments and reasonable inferences which favor finding of trier of fact.

4. Fraud 🔑66

In action for fraud in falsely representing, inter alia, the income from theater to induce plaintiff to lease the theater and to enter into certain written agreements relating to production of stage plays to be presented therein, wherein defendants cross-complained for breach of contract, where case was tried on theory that if plaintiff should recover under complaint, no recovery could be had under cross-complaints, fact that jury, in returning verdict for plaintiff, failed to make allowance for rent which plaintiff was obligated to pay under the lease was not error.

5. Fraud 🔑64(4, 5)

In fraud action, evidence presented question for jury as to whether plaintiff had relied upon the representation upon which action was founded and as to whether such representations were material.

6. Fraud 🔑58(1)

In fraud action based upon misrepresentations as to income of theater, which misrepresentations induced plaintiff to lease the theater and to enter into certain contracts for production of plays, wherein defendants contended that plaintiff's continued performance after learning of the fraud caused or contributed to the damages, evidence supported verdict which impliedly found that plaintiff's continuance for approximately seven weeks until closing of current play did not increase damages and was not a waiver on part of plaintiff.

7. Fraud 🔑62

In action for fraud in inducing plaintiff, by misrepresenting, inter alia, income from theater, to lease theater and to enter into certain agreements relating to production of stage plays to be presented therein, award of $26,927.46, representing difference between income and expenses, was not excessive.

Robbins & Loeb, Samuel D. Robbins, Beverly Hills, Keatinge, Arnold & Zack, George L. Arnold, Los Angeles, for appellants Eghiche Harout and Gohar Harout.

David J. Sachs, Hollywood, for appellant Harry Engel.

Parker, Stanbury, Reese & McGee, A. P. G. Steffes, Los Angeles, for respondent.

DORAN, Justice.

The complaint herein sought damages for fraud in reference to various false statements and representations made to induce the plaintiff to enter into certain written agreements relating to the production of stage plays to be presented at Harout's Ivar Theatre in Hollywood. There was a cross-complaint by appellants Harout for breach of contract; likewise, a cross-complaint by appellant Engel for breach of a contract whereby Engel was employed as manager of the Ivar Theatre. A jury found in favor of the plaintiff in the sum of $26,927.46, and against cross-complainants Harout and Engel, whose appeals were thereafter consolidated by stipulation.

On January 12, 1950, appellants Harout, husband and wife, leased from the Cosmo-Capital Corporation, owner, an entire building in which are located the Har-Omar Restaurant operated by appellants personally, and the Ivar Theatre involved herein. The Harouts then sublet the theatre to Actors Album at a weekly rental of $600, the latter taking possession on February 4, 1951. Of this rental, appellant

Engel, a real estate broker, received a 10% commission under written contract with Harout, dated May 15, 1950.

The record discloses evidence to the effect that plaintiff Hover had known Engel for many years as a theatre man, but did not know that Engel was a real estate broker acting for the Harouts. Engel first approached Hover on April 12, 1951 in reference to the production of stage plays at the Ivar Theatre, saying: "If you will let me work it out for you, put me in as your general manager for $200.00 a week * * * maybe we can get a smaller rent from Harout, and get Kennedy (the stage director) to take a little less; but, you come down and look at the theatre." Hover was and is the owner of Ciro's Restaurant in Hollywood.

There is evidence that Engel represented to Hover that Actors Album were making a profit of $2,000 a week or more, that the lease was about to expire, that difficulty existed between the members of Actors Album, and that there was an opportunity for Hover to get the lease. Engel also stated that "This place is beautifully air-conditioned. The man put in $30,000.00 for equipment and most of it went for air-conditioning"; also that "They are selling out about every night". That evening Hover attended the show, after which Engel took respondent to Harout's restaurant in the same building, where the three had a conversation in a booth. Harout remarked that "We have been doing this business every night". When Hover attended the performance, "it looked like a full house". Harout told Hover the same story of trouble between the Actors Album partners that Engel had previously mentioned.

A financial statement was finally given to Hover which purported to show a gross income of Actors Album that week, of $5,977.25, with current operating expenses of $4,326.18. When Hover remarked that this showed a profit of only $1,650 instead of the represented $2,000 profit, Harout then claimed that the expenses included $200 per week withdrawals by Adams and Austin which plaintiff would not have, and that "The thousand dollars newspaper advertising is high"; and concluded, "so that brings it up to about $2,000.00".

On April 25, 1951, relying on appellants' representations, Hover leased the Ivar Theatre for a period of 26 weeks commencing June 3, 1951, at a rental of $600 per week, plus 10% of the net profits. Hover also hired the defendant Kennedy as stage director at a salary of $200 per week, plus 4% of the gross box office receipts less admission tax, and 10% of the net receipts. Engel, the real estate broker who had interested Hover in the deal, was employed as manager for $200 per week, plus 10% of the net profits. The above mentioned agreements were all in writing.

Beginning with June 4, 1951, Hover operated the theatre, producing various stage plays until August 25, 1951, which operation resulted in a loss of $26,927.46,—the amount of judgment Hover recovered in this action. As hereinbefore mentioned, the jury denied recovery on cross-complainants' claim of breach of contract. One of appellants' complaints is that no allowance was made for rent which Hover was obligated to pay under the lease.

In addition to appellants' contention that the evidence is insufficient to support the judgment, and that the damages are excessive, it is argued the representations in question were not relied upon by plaintiff, and that "The plaintiff, at the time of his discovery of the falsity of the representations as to past profits, could have been fully compensated for all damages proximately caused by the fraud, through exercising his remedy of rescission; his continued performance with knowledge of the fraud caused or contributed to the damages * * *; and under such circumstances the law will not permit the plaintiff to recover or to have an allowance for damages". Complaint is also made that "instructions given were prejudicial and contained incorrect statements of law".

[1-3] Concerning appellants' contentions in reference to alleged insufficiency of the evidence, this situation is governed by the well established rule that an appellate tribunal must refuse to enter into a consideration of the weight and credibility

of evidence where the record discloses substantial evidence in support of the verdict and judgment. That the record of testimony received by the trial court in the instant case does reveal substantial evidence supporting respondent's claim of fraud, cannot be doubted. The fact that the evidence in respect to various matters appears to be in conflict, or that possibly some other court or jury might have arrived at a different conclusion, in no way affects the application of this well known principle. And, as said in Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557, 561, and elsewhere: "an appellate court will view the evidence in the light most favorable to the respondent", and will "indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of facts".

[4] The other points raised in appellants' briefs are likewise untenable. The complaint stated a cause of action based upon appellants' fraudulent representations resulting in the respondent's damage. Denying these allegations, appellants cross-complained for breach of contract. The case was tried on the theory that if respondent should recover under the complaint, then no recovery could be had under appellants' cross-complaints. The voluminous record indicates that the parties were accorded full opportunity to go into all these matters in extenso, and the matter was fully and fairly submitted to a jury which found against the appellants' contentions.

[5] Appellants' argument that "The evidence affirmatively shows that the representations alleged were not relied upon nor regarded as material by the Plaintiff", is not borne out by the record. Whatever conflict existed merely raised the ordinary question of fact, and involves matters of weight and credibility of evidence which, as previously mentioned, are not now open for appellate consideration. The jury had before it all the various items of evidence relating to such matters and must be deemed to have given adequate consideration thereto.

Another point put forth by appellants is that Hover, after learning of the fraud, continued to operate the theatre, and that "his continued performance with knowledge of the fraud caused or contributed to the damages". However, as noted in respondent's brief, the record affords no evidence "that after he became suspicious * * * respondent could have solved his difficulties by the simple process of informing appellants that he was ceasing operations".

[6] There is evidence that two weeks after the theatre opened, appellants were asked to reduce payments and salary called for by lease and agreement, and refused to do so; that respondent then carried on until August 25, 1951, the date of the closing of the current play. At that time "respondent realized that to continue on would merely increase his damages"; and sought to "minimize his damages by stopping further operations". In respect to this conduct, appellants appear to have no cause for complaint. The right of action for fraud had then crystalized and there is nothing to indicate any waiver on the part of the respondent. As hereinbefore indicated, a reviewing tribunal must "indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact". Appellants' argument would compel the consideration of inferences unfavorable to the verdict rendered.

[7] Nor does the record indicate any reason to believe that the damages awarded were excessive. There was testimony that Hover's income from theatre admissions during the period in question was $30,280.03, and that the total costs and expenses incurred amounted to $57,207.49. The jury's award was the difference between these two sums.

A review of the instructions given to the jury by the trial court, several of which were jointly requested by the parties, leads to the conclusion that the case was fairly submitted to the jury, and that no prejudice could have resulted in respect to appellants' fundamental rights. No grounds for reversal have been made manifest.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

123 Cal.App.2d 642

SOUTH v. WISHARD et ux.

Civ. 4655.

District Court of Appeal, Fourth District, California.

March 3, 1954.

Hearing Denied April 28, 1954.

Action against alleged constructive trustees and their alleged assignee to establish trust in certain oil rights, for an accounting, and to quiet title. The alleged trustees, being non-residents of county wherein suit was brought moved for change of venue. The Superior Court, Fresno County, George M. DeWolf, J., entered order granting the motion, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that the trial court had been justified in finding that alleged assignee had been made a party solely for venue purposes.

Affirmed.

1. Venue ⇨72

Upon hearing of motion for change of venue, court should not, upon conflicting affidavits, try issues of fact going to merits of cause of action stated against resident defendant. Code Civ.Proc. § 395.

2. Pleading ⇨6

In ruling upon motion for change of venue, trial court is authorized to read into pleading those facts of which it is required to take judicial notice to determine whether cause of action is stated against resident defendant and whether resident defendant is a necessary and indispensable party to the action. Code Civ.Proc. § 395.

3. Pleading ⇨53(1)

Where complaint contains several causes of action, one general and the other specific, and it appears that recovery under general count is dependent upon allegations and proof of specific count, complaint is considered as a whole and as stating but one cause of action, and if specific count is insufficient, whole complaint is bad as to any defendant against whom no cause of action is stated.

4. United States ⇨144

Where United States owned fee title to realty involved in action to quiet title to oil rights, but was not a party to the action and had not consented to be sued, no relief would be obtainable which would cloud or affect title of United States, and court would have no jurisdiction, as against the government, to so decree.

5. Venue ⇨5(1)

Action to establish constructive trust, for accounting and to quiet title in regard to overriding royalty interest in government oil lands was not required to be brought in county where land was located. Code Civ.Proc. § 392; Const. art. 6, § 5; 30 U.S.C.A. § 181 et seq.

6. Mines and Minerals ⇨6

Allegation that adverse party had acquired interest in overriding royalty interest in government oil land by written instrument raised presumption that such party had given valuable consideration for such interest. Civ.Code, §§ 856, 869a, 1614, 1615, 2243; Code Civ.Proc. § 1963, subd. 39; 30 U.S.C.A. § 181 et seq.

7. Limitation of Actions ⇨195(3)

Person seeking to quiet title in oil rights as against constructive trustee's assignee had burden of proving excuse for failure to proceed diligently within statutory period.

8. Venue ⇨22(1)

Where it was not proved, in action against alleged constructive trustees and their alleged assignee to establish constructive trust in oil rights, for an accounting, and to quiet title, that alleged assignee was not a bona fide purchaser without notice, and it appeared that assignee had not complied with federal requirement for recording assignment within 90 days and that plaintiff had delayed 11 years before taking any action against assignee, plaintiff would be deemed to have joined assignee as party defendant solely for venue purposes. Code Civ.Proc. § 392; Civ.Code, §§ 869, 869a; Const. art. 6, § 5.

9. Evidence ⇨48

Venue ⇨72

In determining, for venue purposes, whether cause of action was stated against resident defendant as to whom plaintiff sought to quiet title, court would take pleadings into consideration and would judicially notice record of United States Land Office which showed that alleged assignment to resident defendant by other (non-resident) defendants had not been recorded as required by federal regulations. Civ.Code, §§ 869, 869a.

10. Quieting Title ⚿10(2)

Action to quiet title will not lie in favor of holder of equitable title as against owner of legal title.

11. Mines and Minerals ⚿6

Before alleged assignee of overriding royalty interest in federal government oil lands could claim any interest in the property by reason of unestablished written assignment, it would be necessary that she establish the existence of such assignment and that she establish that she had complied with federal requirement that royalty interest in oil be recorded within 90 days from final execution. 30 U.S.C.A. § 181 et seq.

12. Venue ⚿43

A second motion for change of venue should be discouraged if complaint and conditions remain unchanged as they existed at time first motion was overruled.

13. Venue ⚿43

Although first motion for change of venue had been denied, where plaintiff amended pleadings in material respect before second such motion and upon hearing on second motion there was called to attention of trial court facts of which it was bound to take judicial notice, fact that first motion had been denied was not controlling.

James C. Janjigian, Lawrence W. Young, Fresno, for plaintiff and appellant.

James V. Paige, Los Angeles, for defendant and appellant.

J. E. Simpson, Los Angeles, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant brought this action to quiet title to and establish a trust in certain oil rights, and for an accounting. The original complaint alleged that plaintiff was the owner of a 1/16 interest of all oil, gas and other hydrocarbon substances saved and produced from certain described parcels of land in Fresno County, which rights were commonly known as landowner's royalty; that defendants H. A. Wishard, Stella Wishard, his wife, and Maudine Brown, claim and assert an interest therein adverse to plaintiff and that their claims "in said land or premises * * *" or "said oil", etc., "produced therefrom" are without right.

As a second cause of action plaintiff incorporates the same allegations above mentioned, and in addition he alleges that on May 19, 1933, one Sumpf was one of the owners of the above-described property and of the so-called overriding royalty interest above stated; that on May 19, 1933, defendant Wishard (an attorney) orally agreed with plaintiff (an attorney) to attend to drafting an agreement for him with Sumpf, to organize a corporation. As a consideration therefor plaintiff was to receive a 1/16 interest in all oil, etc. produced from the described premises; that such services were performed, but Wishard took an assignment of the 1/16 interest in his own name and has received large payments of money by virtue thereof; that accordingly defendant Wishard holds such interest and the proceeds in trust for plaintiff, all totaling the value of $234,000. It is then alleged that plaintiff did not discover these facts until five months prior to the date of filing his complaint. It was prayed that plaintiff be decreed the owner of same and for an accounting; that defendants be required to set forth the nature of their claims and that title be quieted in plaintiff.

It is conceded that at all times mentioned Wishard and his wife were and are residents of Los Angeles County, and that the defendant Brown was and is a resident of Fresno County.

Upon filing an affidavit setting out these facts, as well as many claimed reasons why no cause of action was stated against defendants and the claim that defendant Brown was not a necessary or proper party to the action, the Wishards moved for change of place of trial to Los Angeles County as being the proper place for the trial of the cause. General demurrers of the Wishards were filed and a time for hearing the motion was fixed. Four days before the motion was heard plaintiff filed a first amended complaint. It contained two causes of action. It alleged generally the same quiet title action against defendant Brown as alleged in the first cause of action in the original complaint. As a second cause of action plaintiff incorporates the provisions of the first cause of action and similarly alleges the facts pertaining to the claimed trust, with some elaboration. The hearing on the first motion was put off calendar. On September 4, 1951, defendants Wishard filed another motion for change of venue supported by similar affidavits and points and authorities.

Apparently both motions were argued and submitted, and on September 25, 1951, were denied. Defendants Wishard, on November 21, filed a notice of appeal from the order denying the motion. It is their claim that this application was made, relying upon the holding in Hagan v. Gilbert, 83 Cal.App.2d 570, 189 P.2d 548, but that they subsequently found that Monogram Co. of California v. Kingsley, 38 Cal.2d 28, 237 P.2d 265, overruled this authority and they accordingly abandoned their application. The record shows that the appeal was dismissed by this court on motion of plaintiff. Demurrers to the first amended complaint were filed by the respective parties. Apparently, on July 2, 1952, the demurrers were sustained and plaintiff was given ten days to amend. Thereafter, plaintiff filed a second amended complaint. In the first cause of action he alleges that defendant Brown resided in Fresno County; that the Wishards had full knowledge of the facts alleged in the second and third causes of action hereinafter stated; that a breach of trust arose by which the Wishards received a 1/16 interest in the oil, gas, etc., produced from the described land; and that each of the defendants asserts an interest therein adverse to plaintiff.

In the second cause of action directed against the defendants Wishard only, after incorporating the provisions of the first cause of action, he alleges that Sumpf and his wife were owners of an overriding royalty interest in and to all oil, gas, etc. produced and saved from the described real property, and then plaintiff relates in detail, a friendly and confidential relationship between plaintiff and the Wishards since 1933, as lawyers in the same office. It is alleged that one Caine came to plaintiff's office in 1933, and advised plaintiff that Sumpf desired to organize a corporation and that Caine had agreed with Sumpf to obtain a lawyer to organize it at no expense to Sumpf but, as a consideration therefor Sumpf agreed to assign to Caine a 2/16 interest in and to the oil, gas, etc. produced from said lands and that plaintiff was to receive one-half of Caine's interest for such legal services performed; that in the absence of plaintiff from the office Wishard volunteered to and did draw the necessary instruments and in addition, drew up, without plaintiff's knowledge, an assignment of the 1/16 interest running in his individual favor; that Wishard concealed this fact from plaintiff and represented to plaintiff that the parties had abandoned the formation of the corporation and that accordingly, based upon these facts, the Wishards held said interest in trust for plaintiff; that Wishard repudiated such trust and that defendant Brown claimed some interest in such assigned royalty by virtue of an agreement in writing executed in 1933, by which Wishard assigned a small interest therein to her; that subsequently Wishard likewise told her such assigned interest was worthless and not to record it because all matters pertaining to the incorporation had been abandoned, when in truth and in fact such representations were false and untrue; that Wishard has, ever since 1938, been receiving large sums of money from said transaction, based on the 1/16 royalty interest involved, and that plaintiff did not discover the true facts until 1951.

As a third cause of action against the Wishards only, plaintiff incorporates the provisions of the other causes of action and alleges that Wishard acted as agent for plaintiff and in violation of his trust divested him of said 1/16 interest.

As a fourth cause of action, similar allegations are made by reference to the previous causes of action, and plaintiff alleges that defendants Wishard, by reason of their wrongful acts, have fraudulently enriched themselves at the expense of plaintiff, in the sum of $234,000, and in equity and good conscience they are not entitled to any part of the royalty described or its proceeds.

The prayer is that plaintiff be decreed the owner of and entitled to the proceeds of the 1/16 interest in and to the oil, gas, etc. produced and saved from the real property described; that the court decree that defendants Wishard and Brown convey their respective interests to plaintiff; that the Wishards account to plaintiff for the money received by them; that all defendants be required to set forth the nature of their claims to said royalty interest and the proceeds thereof, and that it be decreed that defendants have no estate therein and that defendants be enjoined from asserting any claim thereto, or in the alternative that Wishards pay the value thereof to plaintiff. A copy of the assignment by Sumpf to Wishard, executed on May 19, 1933, was attached to the complaint.

On September 8, 1952, the Wishards moved for change of place of trial, in which it is alleged that they are residents of Los Angeles County and that defendant Brown, although named only in the first cause of action, and although a resident of Fresno County, was improperly joined as a defendant solely for the purpose of having the action tried in Fresno County, and that accordingly her residence should not be considered in determining the proper place of trial, and that said motion would be made upon the records, papers, pleadings and other documents then on file in the case, the affidavits of defendants, and the record of the Department of Interior of the United States, of which the court is required to take judicial knowledge.

In defendant Wishard's affidavit these general statements are reiterated. In addition it is alleged, and proof was submitted, that the records of the land department conclusively show that the lands described in the first cause of action are public lands of the United States; that on July 2, 1910, the President withdrew said lands from public entry and made them a part of the Petroleum Reservation No. 2; that they were subsequently opened for public entry for the purpose of prospecting thereon for oil and gas under the provisions of the Act of Congress approved February 25, 1920, 41 Stat. 437, 30 U.S.C.A. § 181 et seq., and that said documents disclose that on January 30, 1929, the Secretary of the Interior granted an oil and gas prospecting permit to Lena Getchel; that she assigned said permit to Petroleum Security Company, retaining an overriding royalty, and that she subsequently assigned to Sumpf an interest therein; that by a duly recorded instrument Sumpf assigned to Wishard "an undivided 1/16 interest in all of" the royalty interest acquired by her.

Wishard denied that he ever executed to Maudine Brown an assignment in writing of any interest in any overriding royalty. He also denied generally the allegations of plaintiff's complaint.

Demurrers to the second amended complaint were filed. Defendant Brown filed an affidavit in opposition to the motion for change of place of trial, and an answer to the second amended complaint and admitted she claimed and asserted an interest in "said property and the proceeds thereof" and denied it was without right.

In support of plaintiff's claim that the action should be retained in Fresno County plaintiff alleges that defendant Brown and many of plaintiff's witnesses lived in Fresno; that the agreement between plaintiff and Wishard was to be performed in Fresno County; that Maudine Brown is a necessary and indispensable party to said action; that one such motion for change of venue was previously denied and that no changed conditions or new grounds have presented themselves which would allow defendants to reapply for such a change; that defendant Brown has filed a verified affidavit setting forth the nature of her claim and interest in the property involved; that the court should not try the merits of the action at this time and accordingly the motion for change of place of trial should be denied. After consideration of the pleadings and the showing made the court granted the motion and plaintiff and defendant Brown appealed.

Counsel for plaintiff contends that a cause of action is stated against defendant Brown, as well as the Wishards in the usual and ordinary language of a quiet title action (22 Cal.Jur. p. 146, sec. 28); that since it is alleged, under a verified pleading, that plaintiff is the owner of an overriding royalty interest in and to, and entitled to the proceeds of, a 1/16 interest in all oil, gas and other hydrocarbon substances saved and produced from certain real property in Fresno County, and that defendants, without right, assert some interest therein, that the right to change the place of trial must be determined from this uncontroverted pleading; that the first cause of action involves an interest in real property and is not a transitory action and that the demurrers may not be considered as a part of the pleadings pending the determination of such a motion, citing such cases as Hayutin v. Rudnick, 115 Cal.App.2d 138, 251 P.2d 707; and White v. Kaiser-Frazer Corp., 100 Cal.App.2d 754, 758, 224 P.2d 833.

Defendants Wishard concede this general rule but contend it does not apply where the material allegations of the complaint are controverted and where the facts, of which the court must take judicial knowledge, are contrary to the facts alleged; that the verified complaint may be considered as an affidavit or evidence in opposition to the motion, but if the affidavit and showing made by the defendants contradict the facts alleged in the complaint, the court is not bound to accept plaintiff's averments as true and the court may look behind the general allegations of the complaint to determine whether defendant, other than the moving party, has been improperly joined to prevent the transfer, and that an order made on conflicting affidavits may not be disturbed on appeal, citing such cases as Heringer v. Schumacher, 88 Cal.App. 349, 263 P. 550; Eckstrand v. Wilshusen, 217 Cal. 380, 18 P.2d 931; Swartz v. California Olive Growers' Packing Corp., 56 Cal.App.2d 168, 133 P.2d 20; and Hayutin v. Rudnick, 115 Cal.App.2d 138, 251 P.2d 707, in which case the court considered the conflict in the affidavits as to the place of defendant's residence. The cases cited by defendants Wishard support the general proposition related by them.

Section 395 of the Code of Civil Procedure provides that if any person is improperly joined as a defendant or has been made a defendant solely for the purpose of having the action tried in the county in which he resides, his residence must not be considered in determining the proper place for the trial of the action.

[1] In Taff v. Goodman, 41 Cal.App.2d 771, 107 P.2d 431, it was held that in considering, as to their places of residence, conflicting affidavits used on a motion for change of venue, an appellate court must consider as established the facts stated in the affidavits of the prevailing party; that where there are several defendants who reside in different counties, the law gives the plaintiff the right of bringing the action in the county in which any one of them may reside; and that the usual test to determine whether a defendant has been joined in bad faith is whether or not the complaint states a cause of action against him. It is the rule, however, that upon the hearing of such motion, the court should not, *upon conflicting affidavits,* try the issues of fact going to the merits of the cause of action stated against the resident defendant. Gottesfeld v. Richmaid Ice Cream Co., 115 Cal.App.2d 854, 856, 252 P.2d 973, and cases cited.

In Freeman v. Dowling, 219 Cal. 213, 25 P.2d 980, it is stated that the test is to be made by ascertaining who are necessary parties to the action as it is set forth in the complaint, and what parties are necessary in order to enable the plaintiffs to obtain all of the relief which is properly included in the prayer for the relief sought therein, citing cases. For a further discussion of the subject matter see Badella v. Miller, Cal.App., 266 P.2d 208; and Marchese Bros. v. A. Lyon & Sons, 123 Cal.App.2d 193, 266 P.2d 556.

[2] Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987, involved four actions in the nature of quieting title to interests in certain lands. The question arose on demurrer whether the court was bound by the allegations of the complaint or whether it could consider various documents emanating from the General Land Office of the Department of Interior of the United States to ascertain facts of which it was bound to take judicial notice relative to the title or possession of the premises involved. It was there held, quoting from Chavez v. Times-Mirror Co., 185 Cal. 20, 195 P. 666, that there was no dissent from the proposition that in the consideration of a pleading the courts must read the same as if it contained a statement of all matters of which they are required to take judicial notice, even when the pleading contains an express allegation to the contrary. And also said [18 Cal.App.2d 535, 64 P.2d 990]:

> "Why should a general demurrer to a complaint be overruled, and the parties required to proceed to the trial of an issue of fact, when the court, looking to a law of which it is bound to take notice, can clearly see that one of the essential allegations of the complaint can never by any legal possibility be proved?"

The trial court, as well as this court, is therefore authorized to read into the pleadings here in question those facts of which, under the law, it is required to take judicial notice in determining whether a cause of action is stated against defendant Brown, whether plaintiff could recover any relief as against her by said action under any circumstances, and whether she was a necessary and indispensable party to it. Arnold v. Universal Oil Land Co., 45 Cal.App. 2d 522, 114 P.2d 408.

[3] Viewing, in this light, the decision of the trial court reached under the facts established, we conclude that the order, as made, has evidentiary as well as legal support. Where a complaint contains several causes of action, one general and the other specific, and it appears, as in the instant case, that recovery under the general count is dependent upon the allegations and proof of the specific count, the complaint is considered as a whole and as stating but one cause of action. If the specific count is insufficient, then the whole complaint is bad as to any defendant against whom no cause of action is stated. Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 110 P.2d 396; Ephraim v. Metropolitan Trust Co., 28 Cal. 2d 824, 172 P.2d 501; Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P.2d 1248; Dabney v. Philleo, 38 Cal.2d 60, 68, 237 P.2d 648; Estrada v. Alvarez, 38 Cal.2d 386, 388, 240 P.2d 278; Carlson v. Lindauer, 119 Cal.App.2d 292, 259 P.2d 925; Peninsula Properties Co., Ltd. v. County of Santa Cruz, 34 Cal.2d 626, 629, 213 P.2d 489.

[4] The uncontradicted facts show that the fee title to the real property involved is in the United States of America. Since the United States of America is not a party to this action and has not consented to be sued therein, no relief would be obtainable by any of the parties which would cloud or affect its title to the real property involved and the court would have no jurisdiction, as against the Government, to so decree. Livermore v. Beal, supra.

[5–7] It has been held that an oil royalty interest in United States lands, for an indeterminate period such as here involved, constitutes an interest in real property. Dougherty v. California Kettleman Oil Properties, Inc., 9 Cal.2d 58, 69 P.2d 155. Article VI, sec. 5 of our Constitution provides that actions to recover possession of or to quiet title to real property, can only be commenced in the county where the lands are situated. To the same effect is section 392 of the Code of Civil Procedure. However, it was held in Dougherty v. California Kettleman Oil Royalties, Inc., supra, that where an action is for royalties already accumulated and to be thereafter accumulated, based upon an alleged contract, it is primarily a transitory equitable action to enforce a trust, and even though the subject of the trust *were real estate,* such an action does not come within the purview of the Constitutional provision above mentioned; that where the action is to enforce a trust as to oil royalties, it is likewise enforceable against an assignee who takes *with notice of the outstanding royalty.* On the other hand, it has been held that the transferee of a trustee is not liable to the equitable claimant beneficiary in the absence of allegations and proof that the transferee did not acquire the interest in good faith or for a valuable consideration and with knowledge of the trust. Warnock v. Harlow, 96 Cal. 298, 31 P. 166; Kowalsky v. Kimberlin, 173 Cal. 506, 160 P. 673; Restatement of the Law of Trusts, Vol. II, p. 868, sec. 284; and Civil Code secs. 856, 869, 869a, and 2243. It is not so alleged in plaintiff's complaint. On the contrary, it is alleged, on information and belief, that defendant Brown acquired her claimed royalty interest "by a written instrument". Under such circumstances, there is a presumption of due consideration. Civ.Code, secs. 1614 and 1615; and sec. 1963, subd. 39, Code Civ.Proc. In plaintiff's affidavit in opposition to the motion, he recites that in 1933 defendant Brown received from Wishard, in writing, and for a good and sufficient consideration, an assignment of a certain overriding royalty interest described in the first cause of action, and the complaint alleges that in 1939 plaintiff learned and knew that Wishard had allegedly assigned a portion of this interest to defendant Brown. Plaintiff took no steps until 1951 to seek to recover or quiet title to this claimed interest. Instead, he waited eleven years before taking any action. The burden was upon plaintiff to excuse this failure to proceed diligently against defendant Brown within the statutory period following discovery. Lady Washington Consolidated Co. v. Wood, 113 Cal. 482, 45 P. 809; Arnold v. Universal Oil Land Co., 45 Cal.App. 2d 522, 114 P.2d 408. Apparently, from letters passing between Brown and the Wishards, submitted with the motion, the contents of which are not controverted, it was not until June 28, 1938, when defendant Brown wrote Wishard, that she noticed in the newspaper that oil had been struck on the Getchel lease, and wanted to know if he remembered a certain morning when he, "with some ceremony" presented her with a "very small interest in some venture because of her untiring services (as his secretary) * * * in connection with the writing up of the assignments"; and that her "greatest ambition in life was to have some interest in an oil well". It appears that again on July 11, 1939, she wrote and said she looked for such a signed document to record it but could not find it. Wishard wrote her on July 14, 1939, that he was surprised to learn of her claim and denied any such transaction. He advised her that if she was making any such claim she should see an attorney. Wishard stated that he heard nothing further in reference to her claimed interest until this action was commenced in June of 1951.

In Troll v. City of St. Louis, 257 Mo. 626, 168 S.W. 167, 175, cited in Arnold v. Universal Oil Land Co., supra, 45 Cal.App. 2d at page 531, 114 P.2d at page 412, it is said:

> " 'No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds.' "

Or, in other words, one is not permitted to stand by while another develops property in which he claims an interest, and then, if the property proves valuable, assert a claim thereto, and if it does not prove valuable, be willing that the losses incurred in the exploration be borne by the opposite party.

[8] The above showing substantiates the court's finding that the defendant Brown was made a defendant in the first cause of action solely for the purpose of having the action tried in the county of her residence, and the contention of defendant Wishard that if she had any interest in the property she should be a plaintiff and not a defendant, and accordingly, that she is improperly joined as a defendant.

[9] In considering whether a cause of action is stated against her we must take into consideration the pleadings and record of the United States Land Office which show that Wishard held legal title to the

1/16 interest here involved by virtue of a duly executed assignment; and that there was no record of an assignment of any portion of this interest to defendant Brown. See, secs. 869 and 869a, Civil Code.

[10, 11] It therefore appears that before plaintiff could recover under any cause of action against Wishard, he must first establish an equitable title against the legal title. That an action to quiet title will not lie in favor of the holder of an equitable title as against the owner of the legal title is a proposition settled by repeated decisions of our courts. Buchner v. Malloy, 155 Cal. 253, 100 P. 687; G. R. Holcomb Estate Co. v. Burke, 4 Cal.2d 289, 297, 48 P.2d 669. Before defendant Brown could claim any interest in the property by reason of some unestablished written assignment, it would be necessary that she establish the existence of such an assignment and that she had complied with the provisions of Title 43, Code of Federal Regulations, Cumulative Supplement, secs. 192.42(b) and (c), which require that royalty interests in oil and gas leases constitute holdings or control of lands and deposits, and that assignments of such interests in leases must be filed for record in the appropriate district land offices, and that they will not be approved unless and until a discovery of a valuable deposit of oil or gas is made. It further provides that such regulation is effective November 18, 1938, and applicable to all assignments of royalty interests in oil and gas leases not theretofore approved by the department regardless of the date on which the assignment was made. Section 192.141 provides that "all instruments of transfer of a lease or an interest thereon * * * including assignments of record title, working or royalty interests * * * must be filed for approval within ninety days from final execution." It is apparent that defendant Brown did not comply with any of these provisions, and there is no showing that she, at the time of trial, could establish that she had complied with them.

[12, 13] The fact that the trial court denied a previous motion for change of place of trial, based upon the original pleadings, is not controlling. It is true that a second motion for change of venue should be discouraged if the complaint and the conditions remain unchanged. Yellow Manufacturing Acceptance Corp. v. Stoddard, 93 Cal.App.2d 301, 208 P.2d 1040. Here, plaintiff amended the pleadings in a material respect and there was then called to the attention of the trial court the facts of which it was bound to take judicial notice. A different question was, accordingly, presented. The subsequent order transferring the action was authorized. Lyons v. Brunswick-Balke-Collender Co., 20 Cal.2d 579, 127 P.2d 924, 141 A.L.R. 1173; Connell v. Bowes, 49 Cal.App.2d 542, 122 P.2d 71.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.

In re SIMPSON'S ESTATE.*

KIRKWOOD v. SIMPSON.

Civ. 19893.

District Court of Appeal, Second District, Division 2, California.

March 8, 1954.

Hearing Granted May 6, 1954.

Proceeding upon executrix' objections to inheritance tax report which included, as taxable as gift in contemplation of death, benefits received by estate under County Employees Retirement Fund. The Superior Court of Los Angeles County, Newcomb Condee, J., sustained objections, and controller appealed. The District Court of Appeal, McComb, J., held that Government Code provision which specifically exempts from taxation certain rights of any person includes an exemption from an inheritance tax, even though such tax constitutes a privilege tax.

Affirmed.

1. Taxation 🔑856

An inheritance tax is a tax imposed upon right or privilege of receiving or succeeding to property upon death of another. Revenue and Taxation Code, §§ 13641–13648.

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* Subsequent opinion 275 P.2d 467.

2. Taxation ⚷872

Government Code provision which specifically exempts from taxation certain rights of any person includes an exemption from an inheritance tax, even though such tax constitutes a privilege tax. Government Code, § 31452; Revenue and Taxation Code, §§ 13641–13648.

3. Statutes ⚷226

Where statute of another state is adopted in California after such statute has been construed by courts of such other state, it will be presumed to have been adopted with the construction given it in such other state unless language of statute is changed in some way to express a different intent.

4. Courts ⚷95(2)

In construing statute of another state, decisions of court of such other state and pertaining to such statute are entitled to great consideration, and their interpretation of statute should ordinarily be followed.

5. Taxation ⚷856

Under both the New York and California law, estate, succession, or inheritance tax is considered as a tax upon right or privilege of receiving or succeeding to property and not as a tax upon the property itself. Revenue and Taxation Code, §§ 13641–13648; Tax Law N.Y. § 249–kk.

6. Statutes ⚷212.1

It is presumed that the California Legislature, in enacting statute providing an exemption from taxation for right of person to a pension and return of contributions, had knowledge of and was familiar with New York Act, together with interpretations thereof by New York courts, from which statute was taken. Government Code, § 31452; Tax Law N.Y. § 249–kk.

7. Statutes ⚷212.1

In interpreting a statute, it is presumed that the Legislature knew existing laws and judicial decisions.

8. Statutes ⚷226

Where, at time retirement law was enacted, courts of other states had interpreted identical statutes as exempting rights and benefits under statute from inheritance taxes, California Legislature, in adopting statute, presumably used such language as construed by courts of other states. Government Code, §§ 31450 et seq., 31452; Tax Law N.Y. § 249–kk.

9. Statutes ⚷228

Where statute is general in its terms, any exemption or exception from its operation must be specific.

10. Constitutional Law ⚷48
Statutes ⚷184, 212.4, 263

In interpretation of statutes, it is established that Legislature in enacting a statute intended one that was valid and that would operate prospectively, had some purpose in view, and intended that statute should have some effect and not be useless.

11. Statutes ⚷212.4

It is never presumed that the Legislature intended a useless proceeding or that its act should be a mere form without beneficial purpose.

12. Statutes ⚷191

It is not courts' function to rewrite statutory enactments limiting or enlarging statutory language.

13. Taxation ⚷872

Where statute exempting from taxation return of contributions provided for in retirement law did not contain any language limiting the exemption to property taxes, such statute should receive the broad general interpretation required by its broad language. Government Code, § 31452.

* * *

James W. Hickey, Chief Inheritance Tax Attorney, Sacramento, Walter H. Miller, Senior Inheritance Tax Attorney, Los Angeles, William R. Elam, Associate Inheritance Tax Attorney, Merced, for appellant.

J. E. Simpson, Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by the controller of the State of California from an order of the superior court sustaining respondent's objections to the corrected report of the inheritance tax appraiser in the probate proceedings, holding that $7,928.12, paid to respondent by the retirement board of the Los Angeles County Employees Retirement System was not subject to inheritance tax and should be excluded from the report of the inheritance tax appraiser.

There is no dispute relative to the facts, which are:

William E. Simpson and Ethel M. Simpson were married December 31, 1912, and were husband and wife at the time of the death of Mr. Simpson on April 28, 1951. Decedent for many years was an employee of the county of Los Angeles and a member of the Los Angeles County Employees Association. Pursuant to the provisions of the County Employees Retirement Law of 1937 (Government Code, Part 3, secs. 31451 to 31794), he had made contributions to Los Angeles County Employees Retirement Fund between August 1, 1940 and March 31, 1951. These contributions were paid to the fund by salary deductions and other means, and amounted to the sum of $7,676.42. He died while in government service, having previously, on July 9, 1940, pursuant to Government Code Section 31780, by writing designated Ethel M. Simpson, his wife, as the beneficiary to receive the benefits under the act. She received, pursuant to the provisions of Government Code Sections 31780–31781, the sum of $15,856.26, consisting of the following:

Return of contributions paid by decedent to the retirement fund	$7,676.42
Interest on the contributions ..	679.84
Contributions by the County pursuant to Government Code Section 31781(b), being 50% of annual compensation ..	$7,500.00
	$15,856.26

The inheritance tax appraiser in computing the inheritance tax, included the $15,856.26 as taxable as a gift in contemplation of death under Revenue and Taxation Code, sections 13641–13648.

Mrs. Simpson filed written objections to the inheritance tax report, contending that (1) the benefits payable to her under the retirement law were specifically exempt from all state taxation, including inheritance taxation under the express provisions of Government Code, section 31452, and (2) these benefits were not a transfer in contemplation of death because the contributions returned were community earnings and the death benefit was additional compensation under Government Code section 31451.

The trial court sustained her objections and specifically found that the rights and benefits accrued and paid to her were exempt from inheritance taxation under the provisions of Government Code section 31452, and that they were not taxable as a transfer in contemplation of death. The court ordered that the $15,856.26 be excluded from the taxable estate in determining the amount of inheritance tax.

Section 31452 of the Government Code reads:

> "Exemption from taxation, bankruptcy or insolvency: Execution, garnishment, or attachment: Unassignability. The right of a person to a pension, annuity, retirement allowance, return of contributions, the pension, annuity, or retirement allowance, any optional benefit, any other right accrued or accruing to any person under this chapter, the money in the fund created or continued under this chapter, and any property purchased for investment purposes pursuant to this chapter, are exempt from taxation, whether state, county, municipal, or district, and from any law relating to bankruptcy or insolvency. They are not subject to execution, garnishment, attachment, or any other process of court whatsoever, and are unassignable except as specifically provided in this chapter."

[1] An inheritance tax is a tax imposed on the right or privilege of receiving or succeeding to property upon the death of another. (In re Estate of Bloom, 213 Cal. 575, 581[4], 2 P.2d 753; In re Estate of Barter, 30 Cal.2d 549, 556[8], 184 P.2d 305; Title 18, California Administrative Code, page 89.)

[2] The sole question thus presented on this appeal is:

Do the words of the Government Code, section 31452, "are exempt from taxation" include an exemption from an inheritance tax, that is, a privilege tax?

Yes. Appellant contends that section 31452, Government Code, which sepcifically exempts certain rights of any person under the law "from taxation, whether state, county, municipal, or district" does not exempt those rights and benefits from inheritance taxation; that the exemption applies only from property taxation and does not exempt from a privilege tax.

[3, 4] Such contentions are not sound in the present case. When a statute of another state which has been construed by the courts of that jurisdiction is adopted in California, it will be presumed to have been adopted with the construction so given, unless the language is changed in some way to express a different intent. In construing such a statute the decisions of the courts of the state from which the statute was derived are entitled to great consideration and their interpretation of the statute should ordinarily be followed. Speaking through Mr. Chief Justice Gibson, in Holmes v. McColgan, 17 Cal.2d 426, 430 [2], 110 P.2d 428, 430, our Supreme Court approves the rule thus: "'It is a cardinal principle of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment. * * * A similar principle applies where a statute is patterned after legislation of another state, or of the federal government, or, indeed of a foreign country, which has been judicially construed in the jurisdiction of its enactment.'" (See also Canfield v. Security-First National Bank of Los Angeles, 13 Cal.2d 1, 14, 87 P.2d 830; Douglas v. State of California, 48 Cal.App.2d 835, 838[2], 120 P.2d 927; Gregory v. State of California, 77 Cal.App.2d 26, 29, 174 P.2d 863, 175 P.2d 542.)

Prior to the enactment of the retirement law in 1937, which embodied the provisions of section 31452 of the Government Code, supra, substantially identical exemption provisions in the statutes of other states had been interpreted and construed by the courts of those states as exempting the rights and benefits under the act from state inheritance and transfer taxes.

In re Morrison's Estate, (1927), 130 Misc. 438, 224 N.Y.S. 346, 347, was a case in which the State of New York sought to impose an inheritance tax on the amount paid to the estate of a retired school teacher in the New York City public schools from the teacher's retirement fund. Subdivision W of section 1092 of the Greater New York Charter provided as follows:

"'W. The right of a person to a pension, an annuity, or a retirement allowance, to the return of contributions, the pension, annuity, or retirement allowance itself, any optional benefit, any other right accrued or accruing to any person under the provisions of this act, and the moneys in the various funds created under this act, are hereby exempt from any state or municipal tax, and exempt from levy and sale, garnishment, attachment, or any process whatsoever, and shall be unassignable except as in this act specifically otherwise provided.'"

It will be observed that this statute is substantially identical with Government Code section 31452 in that it exempts from state taxation the rights to the benefits, the benefits themselves, and the moneys in the fund which are exempted by section 31452.

The court held that the amount paid to the estate of the deceased school teacher was exempt from state inheritance and transfer taxes by virtue of subdivision W above quoted. At page 347 of 224 N.Y.S., the court said:

"The right of the legal representatives of the teacher to receive the payments specified by the said subdivision is a right which accrues to them under the provisions of the said act, and any tax upon the transfer to them of the payments in question is clearly prohibited by the act itself."

Again, in In re Fischer's Estate, (1928), 132 Misc. 204, 229 N.Y.S. 826 the facts were substantially identical with those in the Morrison case. The court cited the Morrison case with approval and held that the payments from the teachers' retirement fund were exempt from the state inheritance and transfer tax.

In 1930 the New York tax law, McKinney's Consol. Laws, c. 60, was revised and Section 249–kk was enacted as a part of the New York Estate Tax Law. Section 249–kk provided: "No exemption provided for in any other article of this chapter or any other law of this state shall be construed as being applicable in any manner under this article."

Thereafter, cases arose on facts similar to those of the Morrison and Fischer cases. These later cases held that the amounts paid to a designated beneficiary or to the decedent's estate pursuant to the provisions of the retirement laws were subject to the New York estate tax. These cases were In re O'Donnell's Estate, (1934), 153 Misc. 480, 275 N.Y.S. 445; In re Newton's Estate, (1941), 177 Misc. 877, 32 N.Y.S.2d 473 affirmed (1945), 294 N.Y. 687, 60 N.E.2d 842. The holding in these cases was based solely on the fact that section 249–kk of the New York tax law had repealed by implication the exemption provisions contained in the New York Charter. In the Newton case the court distinguished payments received from the State Employees' Retirement System, which are exempt from the New York estate tax, on the grounds that the State Employees' Retirement System was governed by the Civil Service Law, McKinney's Consol.Laws, c. 7, which superseded section 249–kk. In neither of these cases did the court indicate, mention or imply that the phrase "'exempt from any state or municipal tax'" did not include an exemption from an inheritance tax. Instead the phrase "exempt from taxation" was expressly or impliedly interpreted by the court as including exemption from inheritance tax for otherwise there would have been no reason for the court going to great lengths in holding that Section 249–kk impliedly repealed subdivision W of Section 1092 of the Greater New York Charter.

[5] Furthermore, the New York estate or succession tax law was, and is, interpreted as an excise imposed upon the privilege or right of receiving property upon the death of another person. (In re Penfold's Estate, 216 N.Y. 163, 110 N.E. 497; In re White's Estate, 208 N.Y. 64, 101 N.E. 793, 46 L.R.A.,N.S., 714.) This tax is therefore considered in both New York and California as a tax upon the right or privilege of receiving or succeeding to property and not as a tax upon the property itself, yet the New York courts failed to interpret the statute as exempting only a tax upon property.

[6] It is clear from a comparison of subdivision W of Section 1092 of the Greater New York Charter quoted above that it is substantially identical with Government Code section 31452. The provisions are so similar that it is a reasonable assumption that section 31452 was copied from or patterned after that provision. Section 31452 was enacted in 1937. The two New York cases of Morrison and Fischer's Estates above cited were decided in 1927 and 1928. It is presumed in accordance with the foregoing rules that the Legislature in enacting section 31452 had knowledge of and was familiar with the New York Charter and the interpretation thereof by the New York courts, and that section 31452 was adopted by the California Legislature including the construction given to the similar statute by the New York courts. That construction was that the death benefits payable to a designated beneficiary or the estate of a deceased employee were exempt from inheritance taxation.

In Re Estate of Potter, 188 Cal. 55, 204 P. 826, the court had under consideration the California Inheritance Tax Acts of 1915 and 1917 and the interpretation thereof. It appeared that the California statute was taken from the New York statute. At page 68 of 188 Cal., at page 832 of 204 P. the Supreme Court said: "'Where a statute is adopted from another state or country and such statute has previously been construed by the courts of such state or country, the statute is deemed, as a general rule, to have been adopted with the construction so given it.' Lewis' Suth. on Stats. § 401; Silva v. Campbell, 84 Cal. 420, 424, 24 P. 316. Section 2 of the law was first enacted in this state in 1911. Stats.1911, p. 713, § 1. Subsequent acts have re-enacted it without change, except as to the number. The language is taken from section 1 of the New York Taxable Transfer Act of 1892 (Laws 1892, c. 399), of which it is substantially a literal copy."

The court, after citing New York cases interpreting the copied language, said with respect to the California statute: "The act must be understood to have the same meaning that at the time of its passage here had already been given to its language by the courts of New York."

[7] In addition to the rule above stated, it is further presumed, in interpreting a statute, that the Legislature knew the existing laws and judicial decisions (23 Cal.Jur. (1925) 782, 783, sec. 159).

Section 249–kk of the New York tax law had been adopted by the New York Legislature in 1930 which was seven years before the adoption of the County Employees' Retirement Law of 1937. The case of O'Donnell's Estate, supra, holding that section 249–kk impliedly repealed the exemption statute, was decided in 1934 prior to the enactment of section 31452. However, the California Legislature in enacting the retirement law did not include any repealing provisions similar to section 249–kk and this is evidence of a legislative intent that the rights and benefits of the designated beneficiaries should be exempt from inheritance taxation in accordance with the Morrison and Fischer cases, or otherwise the Legislature would have expressly included a specific provision excluding inheritance taxes from the exemption.

In Free's Estate, (Pa.Orphan's Ct., 1938), 52 York 125, the State of Pennsylvania sought to impose an inheritance tax on the amount paid to the estate of a retired state employee from the State Employees' Retirement Fund. The Act of June 27, 1923, as amended by the Act of May 14, 1929, P.L. 1723, 71 P.S. § 1731 et seq., provided as follows:

"The right of a person to a member's annuity, a State annuity, or retirement allowance, to the return of contributions, any benefit or right accrued or accruing to any person under the provisions of this act, and the moneys in the fund created under this act, are hereby exempt from any State or municipal tax, and exempt from levy and sale, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this act specifically otherwise provided." 71 P.S. § 1747.

This statute is substantially identical with section 31452 in that it exempts from taxation the right to the return of contributions and any benefit or right accruing to any person under the act. The inheritance tax claim presented for allowance was disallowed, the court holding that the amount paid to the estate of the retired state employee from the State Employees' Retirement Fund was exempt from inheritance tax under the section above quoted. In this connection the court at page 125 of 52 York said: "We take it that the above quoted Act of Assembly means exactly what it says, and that the fund upon which the tax is claimed is not subject to the payment of any transfer inheritance taxes and, therefore, we disallow the claim as presented by the register of wills."

We thus had in 1937, at the time that the California County Employees' Retirement Law of 1937 was enacted, two exemption statutes of other states substantially identical to section 31452 which had been interpreted by the courts of those states as exempting the rights and benefits of beneficiaries here involved from inheritance taxes.

[8] In the light of the rules governing statutory construction it follows that, at the time the California Legislature enacted the Retirement Law in 1937, the courts of other states had interpreted identical statutes as exempting the rights and benefits under the act from inheritance taxes and that in adopting our statute it presumably used the language as construed by the courts of the other states.

[9] Appellant contends that the words "are exempt from taxation" as used in section 31452 should be rewritten by the court so as to read "are exempt from property taxation." The language of the section is broad and general. The rule is well established that when a statute is general in its terms any exemption or exception from its operation must be specific. (Los Angeles Railway Corp. v. Los Angeles County Flood Control District, 78 Cal.App. 173, 182[4], 248 P. 532; In re Goddard, 24 Cal. App.2d 132, 139[2], 74 P.2d 818.)

In Johnson v. City of Glendale, 12 Cal. App.2d 389, 395[7], 55 P.2d 580, 582, the court said: "[the Act] states no exceptions * * *. If there were to be exceptions, they should have been stated in the act itself. It is not for the courts to create them."

In Tynam v. Walker, 35 Cal. 634, 640, 642, the court said: "General words in a statute must receive a general construction, and if there be no express exception, the Court can create none. * * * Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the Courts cannot arbitrarily subtract from or add thereto."

Since at the time of the adoption of the Retirement Law in 1937 the Legislature is presumed to have known that the New York and Pennsylvania courts had interpreted identical statutes as exempting the rights and benefits from inheritance taxation, the California Legislature, if it had intended to restrict the exemption to property taxes could have written the statute as appellant seeks to rewrite it. However, the Legislature failed to do so even though the New York Statute Section 249–kk had been adopted and interpreted as impliedly repealing the inheritance tax exemption.

[10, 11] It is well established, in the interpretation of statutes, that the Legislature in enacting a statute intended one that was valid, that it should operate prospectively, that the Legislature had some purpose in view, and that the statute should have some effect and not be useless. (San Joaquin, etc., Irrigation Co. v. Stevinson, 164 Cal. 221, 239, 128 P. 924.) It is never presumed that the Legislature intended a useless proceeding or that its act should be a mere form without beneficial purpose. (People v. McCreery, 34 Cal. 432, 439; Bickerdike v. State, 144 Cal. 681, 692, 78 P. 270; 23 Cal.Jur. (1925) sec. 158, p. 781.)

[12, 13] It is not the function of courts to rewrite statutory enactments limiting or enlarging the language of the statute. Since section 31452 does not contain any language limiting the exemption to property taxes it should receive the broad and general interpretation required by its broad language.

In view of the foregoing reasoning, the following cases, relied on by appellant, are inapplicable to the case at bar, to wit, People v. Naglee, 1 Cal. 232; People v. Coleman, 4 Cal. 46; San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 41 P. 291, 35 L.R.A. 33; Emery v. San Francisco Gas Co., 28 Cal. 345, 346; County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983; Ingels v. Riley, 5 Cal.2d 154, 53 P.2d 939, 103 A.L.R. 1; California Institute of Technology v. Johnson, 55 Cal.App.2d 856, 132 P.2d 61; Douglas Airchaft Co., Inc. v. Johnson, 13 Cal.2d 545, 90 P.2d 572, and City of Los Angeles v. Los Angeles, etc., Co., 152 Cal. 765, 93 P. 1006.

Affirmed.

MOORE, P. J., and FOX, J., concur.

FISHER
v.
GENERAL PETROLEUM CORP. et al.

Civ. 19653.

District Court of Appeal, Second District,
Division 2, California.

March 11, 1954.

Rehearing Denied March 30, 1954.

Hearing Denied May 6, 1954.

Action against petroleum company, which had granted license to gas company to lay pipe line on petroleum company's premises, for wrongful death of bulldozer operator, who was laying such pipe line, caused when bulldozer came into contact with bull plug, thereby releasing gas and oil under pressure and causing bulldozer to be enveloped in mass of flames. The Superior Court, Ventura County, Walter J. Fourt, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, McComb, J., held, inter alia, that since defendants did not control or supervise the work of the bulldozer operation, mere fact of their tolerance and acquiescence in his presence on right of way as licensee did not constitute invitation, express or implied, and defendants were not liable for failure to warn of existence of bull plug.

Reversed.

1. Licenses 🔑44(3)

In interpreting document, to determine whether it creates easement or license, courts look to intent of parties, rather than to words which they have used.

2. Licenses 🔑43

A "license," in respect to realty, is an authority to do a particular act or series of acts on another's land without possessing any estate therein, and is a personal, revocable and unassignable privilege conferred either by writing or parol.

See publication Words and Phrases, for other judicial constructions and definitions of "License".

3. Licenses 🔑44(3)

Where right, granted by petroleum company to gas company, to lay pipe line across premises of petroleum company was revokable for default in performance of terms of agreement and was subject to condition that petroleum company, upon 60 days' notice, could require change or relocation of pipe line without reimbursement, gas company had merely a "license," not an "easement," though instrument creating the license used the phrase "right of way."

See publication Words and Phrases, for other judicial constructions and definitions of "Easement".

4. Deeds 🔑121

A quitclaim deed does not purport to pass fee simple title but only to release any interest or claim that grantor possesses in grantee's property.

5. Licenses 🔑51

Fact that right of way agreement provided for delivery by company, to which right of way was granted, of quitclaim deed upon demand of company, which granted right of way, after termination of right of way, indicated that the agreement did not create any interest in the land.

6. Negligence 🔑32(1)

Licensor owed licensee and its agents no duty except not to inflict wanton or wilful injury upon licensee, its agents or employees while on the land subject to the license.

7. Negligence 🔑32(1)

Where person goes upon premises of another without invitation and simply as bare licensee, and property owner passively acquiesces in his coming, owner is not liable on negligence theory for injury sustained by licensee because of defect in premises.

8. Negligence 🔑32(2.10)

Where petroleum company granted license to gas company to lay pipe line on petroleum company's property, bulldozer and portable derrick operator, employed by construction company which was engaged by gas company to lay gas pipe line, was not an "invitee" of petroleum company.

See publication Words and Phrases, for other judicial constructions and definitions of "Invitee".

9. Negligence ⚿32(2, 2.4)

An invitation to use premises of another is inferred where there is a common interest or mutual advantage, but a license is not inferred where object is the mere pleasure or benefit of person using the premises.

10. Negligence ⚿32(2.2, 2.3)

Mere permission of property owner, or mere allowing a person to enter and use certain portion of premises, is indicative of license merely, not of invitation.

11. Negligence ⚿32(2.10)

Where petroleum company granted license to gas company to lay pipe line on petroleum company's premises, and petroleum company did not control or supervise work of bulldozer and portable derrick operator in laying gas pipe line, mere fact of petroleum company's tolerance and acquiescence in operator's presence as licensee did not constitute invitation, express or implied, and petroleum company was not liable for death of operator resulting when bulldozer came in contact with bull plug, thereby releasing oil and gas under pressure and causing bulldozer to be enveloped in mass of flames.

12. Principal and Agent ⚿136(1)

An agent is not liable as a principal to third persons for alleged nonfeasance.

13. Negligence ⚿52

Failure of managing agent of petroleum company, which had granted license to gas company to lay gas pipe line on its premises, to warn bulldozer operator, who was laying pipe line, of existence of bull plug, did not render managing agent liable for death of bulldozer operator caused when bulldozer came into contact with bull plug, thereby releasing oil and gas under pressure and causing bulldozer to be enveloped in mass of flames.

◆

Reynolds, Painter & Cherniss, Howard Painter, Los Angeles, Richard C. Heaton, Ventura, D. W. Woods and J. M. Jessen, Los Angeles, by Louis Miller, Los Angeles, for appellants.

M. Arthur Waite and James C. Hollingsworth, Ventura, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for the wrongful death of plaintiff's husband, defendants appeal.

Viewing the evidence as we must in the light most favorable to plaintiff (respondent) the essential facts are these:

On December 26, 1950, defendant General Petroleum Corporation entered into a writing with Southern California Gas Company reading in part as follows:

"Grantor, for and in consideration of the full and prompt performance of the things to be performed by Grantee as hereinafter set out and contained, hereby grants to Grantee, subject to termination as hereinafter provided and under the terms, conditions and provisions hereinafter contained, a right of way and easement to lay, construct, maintain, operate, repair, renew, from time to time change the size of, and remove a pipe line for the transportation of oil, petroleum, gas, gasoline, water or other substances in, under, along and across that certain real property situate in the County of Ventura, State of California, and described as follows, to-wit: (description of property).

"Said pipe line shall be installed in the location shown in red color on map number P–14055, dated November 17, 1950, attached hereto and made a part hereof.

"Grantee shall not interfere with or obstruct the use of said premises by Grantor, or injure or interfere with any person or property on or about said premises.

"Grantee, in the exercise of the rights granted to it hereunder, shall not do or permit to be done any welding or operations involving sparks or flame within a distance of 300 feet from any oil or gas well, or oil, gas or gasoline container, or place of discharge to atmosphere of oil, gas or gasoline, whether located on the premises or on adjacent lands, without prior consent of Grantor, and then only subject to and in accordance with the provisions hereof and such other conditions as may be expressed in said consent.

"Grantee shall bury its pipe line so that it will pass beneath previously laid pipe lines which it may cross, and so that it will be at all points at least eighteen (18) inches below the surface of the ground, and shall promptly and properly back-fill excavations made by or for Grantee on the premises.

"Whenever, in the opinion of Grantor, said pipe line interferes with Grantor's use of or operations upon the premises, Grantee shall, at its own expense and risk, within sixty (60) days after written request therefor by Grantor, lower or relocate and reconstruct said pipe line upon and across said premises to the depth or along the route specified by Grantor in such request, and shall restore said premises as nearly as possible to the same state and condition they were in prior to the lowering or prior to the reconstructing of said pipe line, as the case may be.

"Grantee and its employees and agents, at any and all times when necessary, shall have free access to the said pipe line, over such reasonable route as Grantor may designate or approve, for the purpose of exercising the rights hereby granted.

"The grant of right of way is personal to Grantee and shall not be assigned by Grantee, in whole or in part, without the written consent of Grantor first being had; provided, however, no consent shall be required in event Grantee assigns this agreement to a wholly owned subsidiary having assets in excess of One Million Dollars ($1,000,000). No written consent by Grantor hereunder shall be deemed a waiver by Grantor of any of the provisions hereof, except to the extent of such consent.

"It is further understood and agreed that this agreement and the rights and privileges herein given Grantee shall terminate in the event that Grantee shall fail, for a period of one (1) year, to maintain and operate said pipe line.

"This agreement and all interest of Grantee hereunder, at the option of Grantor, shall forthwith terminate upon breach by Grantee of any of the terms or conditions hereof and the failure of Grantee to remedy the same within thirty (30) days after written notice from Grantor so to do.

"In the event of the termination of this grant of right of way Grantee shall thereupon, at its own expense and risk, remove all pipe and any other property placed by or for Grantee upon said land, and restore said premises as nearly as possible to the same state and condition they were in prior to the construction of said pipe line, but, if it should fail so to do within sixty (60) days after such termination, Grantor may so do, at the risk of Grantee, and all cost and expense of such removal and the restoration of said premises as aforesaid, together with interest thereon at the rate of ten per cent per annum, shall be paid by Grantee upon demand.

"Upon the termination of the rights hereby granted, Grantee shall execute and deliver to Grantor, within thirty (30) days after service of a written demand therefor, a good and sufficient quitclaim deed to the rights hereby granted. Should Grantee fail or refuse to deliver to Grantor a quitclaim deed, as aforesaid, a written notice by Grantor reciting the failure or refusal of Grantee to execute and deliver said quitclaim deed, as herein provided, and terminating said grant shall, after ten (10) days from the date of recordation of said notice, be conclusive evidence against Grantee and all persons claiming under Grantee of the termination of said grant."

The privileges granted to Southern California Gas Company under the foregoing document were without consideration to defendant General Petroleum Corporation.

On the 12th of March, 1951, there existed on the General Petroleum property referred to in the above document, 65 subsurface pipe lines and said defendant owned and operated a well known as Barnard 29. This well was located in a general northerly direction from the right of way granted by General Petroleum to Southern California Gas Company for the laying and construction of a 20-inch gas line. The line running from Barnard Well No. 29 was three and one-half inches outside diameter and carried oil and casing head gas under pressure. This line ran in a southerly direction and was laid at a depth of 18 inches below the surface of the ground and crossed the granted right of way at a depth of 18 inches below the surface to a point approximately 32 inches south of the center line of the 20-inch line or ditch on the right of way, the right of way ditch being approximately 30 inches in width at which point the line came up approximately 12 inches and proceeded easterly, about 6 inches below the surface of the ground and traveled in an easterly direction which was parallel to the right of way. At the point where it made its right angle turn there was a "T" on top of which was installed a bull plug. The top of the bull plug was approximately two to four inches below the surface of the ground. This bull plug was approximately 17 inches south of the south wall of the excavated trench in which the 20-inch gas line was to be installed, and was owned and placed in position by General Petroleum in 1946, and had been there continuously since its installation. The line to which the bull plug was attached was carrying 50 pounds of pressure of oil and gas on the 12th day of March, the date of the accident hereinafter mentioned.

Following the execution of the conveyance of the right of way by General Petroleum to Southern California Gas Company on December 26, 1950, the Southern California Gas Company employed Ventura Pipeline Construction Company as an independent contractor to excavate and lay a 20-inch pipe line as a gas line. Earl M. Fisher was employed by Ventura Pipeline Construction Company as a bulldozer and portable derrick operator. The trench in which the 20-inch line was to be laid was excavated by Ventura Pipeline. Mr. Fisher had been working on the job from its start up to the time of the accident resulting in his death.

In excavating the trench it was necessary to uncover the various lines which crossed it in order to expose them and the 20-inch gas line was installed so as not to interfere with any of the lines on General Petroleum property. The 20-inch gas line had been installed under the particular three and one-half inch line crossing the trench or excavation at a depth of 18 inches below the surface of the ground. Following the laying and installation of the line the dirt which had been piled up parallel to the trench had to be pushed back in the excavation by the process known as back-filling. This loose dirt had been piled on top of the place where the bull plug was located.

Mr. Fisher, while operating his bulldozer in what is known as back-filling operations, pushing the loose dirt back into the excavation, came in contact with the bull plug with the blade of his bulldozer, breaking it, and releasing oil and gas under pressure. The oil and gas thus released was caused to spray over the bulldozer and in a matter of seconds the bulldozer was enveloped in a mass of flames. Mr. Fisher's clothing was ignited and he suffered severe burns as a result of which he died two days later.

Defendants contend:

First: *That the instrument of December 26, 1950, under which Southern California Gas Company entered upon the land of General Petroleum Corporation, created a mere license in the former to lay pipes on the General Petroleum Corporation's land subject to the conditions set forth in the documents.*

[1] This proposition is tenable. The words "easement" and "license" have been used indiscriminately by courts in interpreting documents and in interpreting a document the courts look to the intent of the parties rather than to the words which they have used. (Cohen v. Adolph Kutner Co., 177 Cal. 592, 594, 171 P. 424, L.R.A. 1918D, 410.)

[2] Therefore in interpreting the instrument in question in the instant case this rule must be applied with reference to its language wherein the words "right of way" and "easement" are used. A license in respect to real property is "an authority to do a particular act or series of acts on another's land without possessing any estate therein." Such a license is defined as a personal, revocable and unassignable privilege conferred either by writing or parol to do one or more acts on land without possessing any interest therein. It is an authority to do a lawful act which without it would be unlawful

and while it remains unrevoked is a justification for the acts which it authorizes to be done. It confers upon the licensee no interest in the premises. It is a mere personal privilege. (See cases cited in 16 Cal. Jur. (1924) Licenses, sec. 60, p. 277.)

[3] Applying the foregoing rule to the document in the instant case it is clear that the right of way agreement from General Petroleum to Southern California Gas Company created a license and not an "easement" as claimed by plaintiff. The Gas Company acquired no permanent interest in the land because it was given no more than a mere personal privilege to lay its pipe line across the premises of General Petroleum revocable for default in the performance of the terms of the agreement and subject to the condition that defendant General Petroleum Corporation, upon 60 days notice could require a change or relocation of the right of way without reimbursement. Clearly the Gas Company acquired no permanent interest in the realty, but merely a right of way which constituted a privilege to pass over defendant General Petroleum's land. (Cf. County of Alameda v. Ross, 32 Cal.App.2d 135, 143, 89 P.2d 460.)

[4, 5] The fact that the right of way agreement provided for delivery by the Gas Company upon demand of General Petroleum of a quitclaim deed after the termination of its rights, indicated that the Gas Company acquired no interest whatsoever in the lands belonging to General Petroleum, since a quitclaim deed does not purport to pass a fee simple title but only to release any interest or claim that the grantor possesses in the grantee's property. Since the grant of a right of way to the Gas Company created no more than a license, it logically follows that the rights and obligations of the parties for personal injuries arising out of the condition of the premises are measured by the law applicable to the relationship of licensor and licensee which brings us to defendants' second proposition:

[6] Second: *Since the Southern California Gas Company was a mere licensee on the land of the licensor, General Petroleum Corporation as such licensor owed the licensee and its agents no duty except not to inflict wanton or wilful injury upon the licensee, its agents or employees while on the land.*

[7] This proposition is likewise sound. The rule is well expressed by Mr. Presiding Justice Moore in Koppelman v. Ambassador Hotel Co., (1939), 35 Cal.App.2d 537, 540[2], 96 P.2d 196, 197, (hearing denied by the Supreme Court), thus:

"But as to the rights of a licensee, it is the law that where a person goes upon the premises of another without invitation and simply as a bare licensee, and the owner of the property passively acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises, the owner is not liable for negligence for such person has taken all the risk upon himself. Means v. Southern California Ry. Co., 144 Cal. 473, 77 P. 1001. *Such proprietor assumes no duty to the one who is on his premises by permission only and as a mere licensee, except that while on the premises no wanton or wilful injury shall be inflicted upon him.*" (Italics added.) (See also Means v. Southern California Ry. Co., 144 Cal. 473, 479, 77 P. 1001; Herzog v. Hemphill, 7 Cal.App. 116, 118, 93 P. 899; Kneiser v. Belasco Blackwood Co., 22 Cal. App. 205, 207, 133 P. 989; Brust v. C. J. Kubach Co., 130 Cal.App. 152, 161, 19 P. 2d 845.)

[8–10] The present record is totally devoid of any evidence that defendants or either of them wantonly or wilfully injured the decedent. The evidence is to the contrary. There is no merit in plaintiff's contention that decedent was an invitee of defendant General Petroleum Corporation. An invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using the premises. Mere permission of an owner or allowing a person to enter and use a certain portion of the premises is indicative of a license merely and not of an invitation. (Borgnis v. California-Oregon Power Co., 84 Cal.App. 465, 467, 258

P. 394; Hall v. Southern California Edison Co., Ltd., 137 Cal.App. 449, 454, 30 P.2d 1013.)

In Hall v. Southern California Edison Co., Ltd., supra, 137 Cal.App. at page 454, 30 P.2d at page 1015, the court states: "The work upon which appellant was engaged cannot fairly be said to have been beneficial to the Edison Company. It was beneficial to the Littles because they desired to change the location of the pump and they had procured appellant to perform the work which was necessary to be done to effect this change of location. The Edison Company was not at all interested in the proposed change of location of the pump. There was no contractual relation between the Edison Company and appellant or appellant's employer. We think, therefore, that the evidence clearly indicated that appellant entered upon the property of the Edison Company for purposes of his own and of the Littles and that the work in which appellant was engaged at the time the injury occurred bore no relation to the business of the Edison Company, owner of the pole. Aguilar v. Riverdale Cooperative Creamery Ass'n, supra [104 Cal.App. 263, 285 P. 889]. It follows that the trial court's action in granting the nonsuit as to respondent Southern California Edison Company was correct and must be sustained.

"We are also of the opinion that the court's action in granting the motion of respondents E. H. Little and Martin Little for a nonsuit was correct. Although appellant was an invitee on the premises of these respondents, no evidence was produced which showed that the Littles knew that the pole was unsafe. Nor do we think that it may fairly be said that these respondents owed to appellant the duty of discovering the hidden defect which caused the pole to break. The evidence therefore entirely failed to disclose that these respondents were guilty of negligence in any respect."

Again in Leslie v. City of Monterey, 139 Cal.App. 715, 720, 34 P.2d 837, 839 (hearing denied by the Supreme Court), the court said: "We think it must be conceded that, as to the appellants, plaintiff had not been expressly or impliedly invited to enter upon their property. There is no evidence which in the slightest degree indicates that there was an express invitation, nor is there any evidence that there was an implied invitation. The plaintiff was employed by a contractor and not by the appellants. The work upon which he was engaged cannot fairly be said to have been beneficial to the appellants herein, or to have been done at their request. It was beneficial only to the city of Monterey and to the contractor who performed the work. The appellants were not at all interested in the construction of the said fence and backstop nor was there any contractual relation between the appellants and plaintiff, or plaintiff's employer. We think, therefore, the evidence clearly indicates that the work on which plaintiff Leslie was engaged at the time the injury occurred, bore no relation to the business of the appellants, nor were they interested therein."

A similar holding is to be found in Aguilar v. Riverdale Cooperative Creamery Ass'n, 104 Cal.App. 263, 267, 285 P. 889 (hearing denied by the Supreme Court).

[11] From the foregoing authorities it is apparent that under the evidence in the case at bar there was no duty devolving upon defendants to inform Mr. Fisher of the bull plug which was the cause of the accident for the reason that the only relationship between him and defendants was that of licensee and licensor. Defendants did not control or supervise the work of decedent nor did they have the right to do so and the mere fact of their tolerance and acquiescence in his presence on the right of way as a licensee did not constitute an invitation express or implied. Therefore since none of defendants wantonly or wilfully inflicted injury upon decedent no liability attaches to them for the unfortunate injury which resulted in his death.

The rule announced in section 342, Volume 2, Restatement of the Law of Torts (1934) p. 932, is not, so far as the facts in the present case are concerned, the law in California. See innumerable California cases contrary to the stated rule cited in the California annotations to the Restatement of the Law of Torts, section 342.

Third: *Defendant Alex McLean, as managing agent of General Petroleum Corporation, the land owner, was not personally liable for the injury resulting to Mr. Fisher because of his failure to notify him of the conditions of the premises.*

[12] This proposition is also tenable. The rule is established in California that an agent is not liable to third persons for alleged nonfeasance. (Takashi Kataoka v. May Dept. Stores Co., 60 Cal.App.2d 177, 186[8], 140 P.2d 467 (hearing denied by the Supreme Court); Mears v. Crocker First Nat. Bank, 97 Cal.App.2d 482, 490, 218 P.2d 91).

[13] Applying the foregoing rule to the facts in the instant case the only basis of the judgment against defendant McLean was his failure to warn decedent of the existence of the bull plug. Such failure in view of the above stated rule did not give rise to any rights in favor of plaintiff.

Dressel v. Parr Cement Co., 80 Cal.App.2d 536, 181 P.2d 962, relied on by plaintiff, is not here in point. Such case merely held that the owner of a house, the roof of which was being shingled by plaintiff, was liable to an employee of the independent contractor engaged in the repair work for personal injuries sustained as a result of the defective condition of the roof known to him and to his supervisor of construction—that is, that a principal is chargeable with the knowledge of an agent received while the agent is acting within the scope of his authority and which is in reference to a matter over which his authority extends. It does not hold that liability is imposed upon the agent in favor of a third party for nonfeasance.

In view of our conclusions, it is unnecessary to discuss other propositions argued by counsel.

The judgment is reversed.

FOX, J., concurs.

MOORE, Presiding Justice.

I concur with reluctance. In disposing of the issues presented by the appeal, Mr. Justice McComb has with facile phraseology adhered to the prevailing rule in California that no duty devolves upon a licensor to apprise a licensee of the presence of a dangerous instrumentality in the licensor's land about to be used by the licensee, of its proximity to the surface and of its inherent perils. The facts in the instant action argue eloquently that the better, wiser, more social, more humane rule to be that pronounced by the Restatement of the Law of Torts (Vol. 2, p. 932, sec. 342) which in effect holds the possessor of land liable for bodily harm caused to a gratuitous licensee by a natural or artificial condition thereon, if such possessor knows of the condition, realizes that it involves an unreasonable risk to the licensee and has reason to believe that the latter will not discover the condition or realize the risk and still permits the licensee to enter or remain on the land without exercising reasonable care to remove the danger or to warn the licensee of the dangerous condition and of the risk involved.

The oil company had no valid excuse not to supply the gas company with a map of its concealed facilities and not to warn such licensee of the hidden perils. Its failure to do so is a matter of serious gravity.

Hearing denied; CARTER, J., dissenting.

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123 Cal.App.2d 882

In re LEE'S GUARDIANSHIP.

Civ. 8402.

District Court of Appeal, Third District, California.

March 16, 1954.

Petition by mother for her appointment as guardian of her son, who was residing with mother but whose custody had been awarded to father in Ohio divorce decree. Father filed notice of motion to dismiss petition wherein he stated that he was appearing specially for the purpose of the motion only. The Superior Court, Yolo County, McDonald, J., granted father's motion to dismiss and plaintiff appealed. The District Court of Appeal, Schottky, J., held that, because of the relief demanded, father's appearance was in effect a general appearance in the guardianship proceeding and that filing of the petition by mother gave court jurisdiction of subject matter for a hearing upon merits.

Order granting motion to dismiss reversed.

1. Guardian and Ward ⚷13(3)

The filing of petition for appointment of a guardian for person and estate of a minor gives court jurisdiction of the subject matter. Probate Code, § 1440.

2. Guardian and Ward ⚷13(3)

A petition for appointment of guardian for a minor is not subject to tests given to complaints in actions at law and if sufficient is stated to inform court that it should interfere for protection of persons dependent upon it for protection, petition is sufficient, and duty is then devolved upon court to inform itself and take such action as may seem necessary and proper. Probate Code, § 1440.

3. Guardian and Ward ⚷13(3)

Petition by mother in California for her appointment as guardian of her son, who was residing with mother but whose custody had been awarded to father in Ohio divorce decree, was sufficient to give court jurisdiction to hear petition upon the merits. Probate Code, § 1440.

4. Judgment ⚷815

The existence in full force and effect of a decree of a court in another state does not oust jurisdiction of appropriate California courts to entertain proceedings touching the custody of minors within the borders of the state. Probate Code, § 1440.

5. Appearance ⚷9(5)

Where a party appeared and filed notice of motion to dismiss petition for the appointment of guardian for a minor and stated in motion that he was appearing specially for purpose of the motion only, such appearance, because of the nature of the relief demanded, was in effect a general appearance in the guardianship proceeding.

6. Appearance ⚷19(1)

Where a party asks relief other than quashing service of process upon him, he submits himself to the jurisdiction of the court.

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James H. Phillips, Sacramento, for appellant.

MacBride & Gray, Sacramento, for respondent.

SCHOTTKY, Justice.

On August 18, 1952, appellant filed in the Superior Court of Yolo County a petition for her appointment as guardian of Thomas F. Lee, Jr., the five year old child of appellant and respondent. Her petition alleged that the minor was a resident of Yolo County and was residing with her in said county; that respondent father resides at Columbus, Ohio; that by a decree of the Court of Common Pleas in Franklin County, Ohio, on October 8, 1951, respondent was awarded the "exclusive care, custody and control" of said minor; that by reason of changed circumstances the custody of the minor child should be awarded to her, such changed circumstances being alleged to be that "Your petitioner is now married and has established her home in the said City of Woodland, County of Yolo, State of California; that the child is of tender years, to wit: five (5) years; that the health and well-being of said child will be promoted by awarding letters of guardianship to your petitioner in that she is able to provide a home and love and care for said child."

On December 2, 1952, respondent, appearing specially for that sole purpose in the proceeding, filed notice of motion to dismiss the guardianship petition on the grounds that the Ohio courts have a more substantial interest in the custody of the minor than do the courts of this state, that respondent is entitled to custody of the minor by reason of the Ohio divorce decree, that appellant brought the minor to this state in violation of the Ohio decree and is now in contempt thereof, that respondent was not personally served in this state in the guardianship proceeding, and that respondent is a resident of Ohio and it would be unjust to require him to come to this state to protect his custody rights in and to the minor. Respondent filed an affidavit in support of his motion and submitted a certified copy of the Ohio decree. Appellant filed an affidavit in opposition. The allegations of the affidavits are highly conflicting, the respondent claiming that he allowed appellant to take the child for a visit upon her promise to return the child to him, and appellant claiming that respondent agreed she should have and keep the child, that the child has been with her since October 1, 1951, and respondent has made no effort to see or get the child, nor has he contributed anything to the child's support, although respondent had appellant's California address, and that respondent obtained the Ohio divorce decree without her knowledge, by publication of summons using a fictitious address although he knew appellant's true address.

The motion to dismiss was made, heard and granted on December 8, 1952. The court's minutes show that the motion was made by counsel "on the ground that the California courts do not have proper jurisdiction of said minor by reason of a Decree of Divorce granted in the Court of Common Pleas, Franklin County, Ohio, Division of Domestic Relations, granting the exclusive care, custody and control of said minor child to petitioner herein [respondent]," and that the court "granted the motion as prayed." The order of dismissal with prejudice was filed the following day, and it recites that the court duly heard and considered the affidavits, proofs and arguments of the parties. This appeal is from the order granting the motion to dismiss.

Appellant contends that the court erred in dismissing her petition and that (1) the trial court does have jurisdiction to hear the matter, and (2) in the best interests of the child the court should hear and decide the matter on its merits. Appellant argues that she is entitled to assert in the superior court in California any legal grounds she may have for an order giving custody of the child to her or otherwise modifying the decree of the Ohio court, and that she is entitled to have the petition heard on its merits so that she may have an opportunity to show that since entry of the Ohio custody order the father has become an unfit or unsafe person to have the care and control of the child, or that changed circumstances affecting the welfare of the child have arisen. She further argues that the custody order can be modified even if there be no change in circumstances, and she points to the fraudulent manner in which, she says, respondent obtained the divorce decree, affording her no opportunity to resist his application for custody of the child. It may be noted in this regard that the divorce decree recites that appellant was legally summoned by publication but failed to appear. She argues also that even though she brought the child into California in defiance of the Ohio order, that order should be changed if she can establish by allegations and proof that the welfare and best interests of the child will be jeopardized by continuing custody in respondent.

Respondent in reply concedes that the court below has jurisdiction over the matter of the child's custody, but argues that the court properly decided to leave the matter to the Ohio courts for settlement. The motion to dismiss, says respondent, was made and granted on the grounds that the courts of Ohio have more substantial interest in the custody of the minor than do the courts of this state, and that it would be contrary to the interests of justice to require respondent to travel from Ohio to California to protect his custody rights. In support of this argument, respondent points to the notice of motion to dismiss, which states that the motion would be made on these grounds, and to the court's minutes which state that the motion was granted as prayed. Respondent also points out that appellant's petition contains no allegations that respondent has become an unfit or unsafe person to have the care and control of the minor, or allegations to the effect that the minor is in danger as to its safety, morals or reasonable comfort, or allegations attacking the Ohio decree on grounds of fraud or otherwise. Finally, respondent contends that the court below did not commit reversible error in dismissing appellant's petition.

[1, 2] Section 1440 of the Probate Code provides that the superior court of the county in which a minor resides or is temporarily domiciled may appoint a guardian for his person and estate or person or estate "When

it appears necessary or convenient". As stated in 13 Cal.Jur., p. 162: "The filing of the petition gives the court jurisdiction of the subject matter. The petition is not subjected to the tests given to complaints in actions at law. If enough is stated to inform the court that it should interfere, the petition is sufficient, and the duty then devolves upon the court to inform itself, and take such action as may seem proper." And as this court said in In re Tilton's Estate, 15 Cal.App. 244 at page 250, 114 P. 594 at page 596: "But in proceedings of the character here a petition is not subjected to the tests given to complaints in actions at law. If there is sufficient stated to inform the court that it should interfere for the protection of persons dependent upon it for protection, it is sufficient, and the duty is then devolved upon the court to inform itself and take such action as may seem to be necessary and proper."

[3, 4] It is clear that appellant's petition for the appointment of a guardian was sufficient to give the court jurisdiction to hear the petition. Indeed, respondent states in his brief that "no contention is made that the court did not have jurisdiction in the sense of power to hear the petition." And as respondent correctly states further:

> "It has often been held by our appellate courts that the existence in full force and effect of the decree of a court of another state does not oust the jurisdiction of appropriate California courts to entertain proceedings touching the cusody of minors within the borders of this state. In re Kosh, 105 Cal.App.2d 418, 421, 233 P.2d 598; Sampsell v. Superior Court, 32 Cal.2d 763, 780, 197 P.2d 739; Titcomb v. Superior Court, 220 Cal. 34, 39, 29 P.2d 206."

In Sampsell v. Superior Court, supra, 32 Cal.2d at pages 779, 780, 197 P.2d at page 750, the court said:

> "Thus, if the child is living in one state but is domiciled in another, the courts of both states may have jurisdiction over the question of its custody. It does not follow, however, that the courts of both states will exercise that jurisdiction and reach conflicting results. The courts of one state may determine that the other state has a more substantial interest in the child and leave the matter to be settled there. On the other hand, if the jurisdiction of one state has been exercised over the child, there is no reason why, if the welfare of the particular child is a matter of real concern to the courts of another state, those courts may not also have jurisdiction, which might be exercised in the interest of the child 'with respectful consideration to the prior determination of other courts similarly situated.' Stansbury, 10 Law and Contemp. Problems, supra at 830–831. See Foster v. Foster, 8 Cal.2d 719, 726, 68 P.2d 719; Titcomb v. Superior Court, supra, 220 Cal. 34, 39, 29 P.2d 206. In any event, there is no reason why the courts of one state should not be able to 'assume with confidence that the courts of the other jurisdiction will act with wisdom and sincerity in all matters pertaining to the welfare of this child.' Miller v. Schneider, Tex. Civ.App., 170 S.W.2d 301, 303.
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> "The problem is not one of rendering custody decrees for the courts of other states to regard as final and conclusive determinations. Indeed such decrees are not given conclusive effect in our own courts, for under Civil Code, section 138, the court granting the decree 'may at any time modify or vacate the same.' In order to avoid interminable and vexatious litigation it is generally required that before modification or vacation of such a decree 'there must be a change of circumstances arising after the original decree is entered, or at least a showing that the facts were unknown to the party urging them at the time of the prior order * * *.' Olson v. Olson, 95 Cal.App. 594, 597, 272 P. 1113, 1114, quoted with approval in Foster v. Foster, supra, 8 Cal.2d 719, 726, 68 P.2d 719. Whatever proof may be required for a modification or vacation of a custody decree, it is not a final judgment. Cooney v. Cooney, 25 Cal.2d 202, 208, 153 P.2d 334. As a matter of comity the courts of this state

treat valid custody decrees of the courts of sister states with the same respect as custody decrees of California courts. Foster v. Foster, supra, 8 Cal.2d 719, at pages 728, 729, 68 P.2d 719; Titcomb v. Superior Court, 220 Cal. 34, 39, 29 P.2d 206. No more or less respect for California decrees is expected from the courts of other states. If the decrees of California courts with respect to child custody are subject to modification or annulment in this state, they are likewise subject to modification or annulment in any state having jurisdiction over the subject matter, for such a decree 'has no constitutional claim to more conclusive or final effect in the State of the forum than it has in the State where rendered.' (People of State of New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S.Ct. 903, 906, 91 L.Ed. 1133 [1136]; see Harper, Conflict of Laws, 47 Col.L.Rev. 883, 907–909.)

"Since the courts of this state do not finally and conclusively determine custody in a divorce proceeding, there is no reason to attempt to arrive at some basis for jurisdiction that should be accepted as final and conclusive in all states. It is a sufficient basis for jurisdiction that the state 'has a substantial interest in the welfare of the child or in the preservation of the family unit of which he is a part * * * and this jurisdiction may exist in two or more states at the same time.' (Stansbury, 10 Law and Contemp. Prob. supra at 831.)" See, also, Beabout v. Beam, 119 Cal.App.2d 768, 260 P.2d 145.

Respondent argues that the question presented here is whether or not the court should exercise its jurisdiction. However, the difficulty with respondent's position is that while admittedly the court did have jurisdiction to determine the merits of appellant's petition, it did not do so, but, instead, dismissed the petition with prejudice.

[5, 6] As hereinbefore set forth, appellant had filed a petition for the appointment of a guardian for the minor. Respondent filed a notice of motion to dismiss the petition, the two grounds of the motion being (1) that the courts of Ohio have a more substantial interest in the custody of the minor than do the courts of California; and (2) that respondent had not been personally served with notice of the petition in the guardianship proceeding and that it would be unjust to require him to travel from Ohio to California to protect his right to custody of said minor. Respondent's notice of motion stated that he was appearing specially for the purpose of the motion only, but because of the nature of the relief demanded it was in effect a general appearance in the guardianship proceeding, for the rule is that where a party asks relief other than quashing service of process upon him he submits himself to the jurisdiction of the court. For as stated in Roberts v. Superior Court, 30 Cal.App. 714, at page 720, 159 P. 465 at page 467:

> "* * * Their motion, as will be noted, was not to quash the summons, which was their proper remedy, but for a dismissal of the complaint on the ground that the court was without jurisdiction 'over the persons of the defendants *and the subject-matter of the litigation.*'
>
> "The motion to dismiss the complaint on the ground that the court was without jurisdiction of the subject-matter of the action amounted, substantially or in legal effect, to a demurrer to the complaint on that ground. At all events, a motion to dismiss on the ground of want of jurisdiction of the subject-matter of the action necessarily calls for relief which may be demanded only by a party to the record. It has been uniformly so held, as logically it could not otherwise he held, and, furthermore, that where a party appears and asks for such relief, although expressly characterizing his appearance as special and for the special purpose of objecting to the jurisdiction of the court over his person, he as effectually submits himself to the jurisdiction of the court as though he had legally been served with process. (Citing cases.)
>
> "'It is the character of the relief asked, and not the intention of the par-

> ty that it shall or shall not constitute a general appearance, which is material.' 2 Ency. Pl. & Pr. 625, notes and cases; In re Clarke, 125 Cal. 388, 392, 58 P. 22."

It is clear that appellant was entitled to a hearing upon the merits of her petition for appointment of a guardian, and that there was no hearing upon the merits. It may well be that if there had been such a hearing and the evidence introduced was substantially the same as set forth in the affidavits, the court could have determined, under the authorities hereinbefore cited, that it was not "necessary or convenient" that a guardian be appointed or that the Ohio courts have a more substantial interest in the custody of said minor than do the courts of California. These, however, are matters that could only be determined after a hearing upon the merits of the petition itself, and the court was in error when it granted respondent's motion to dismiss the petition for appointment of a guardian without such a hearing.

No other points raised require discussion.

The order granting the motion to dismiss is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

124 Cal.App.2d 25

HAUSEN v. GOLDMAN.

Civ. 4672.

District Court of Appeal, Fourth District, California.

March 19, 1954.

Action to determine ownership of a royalty interest in certain oil land. The interest had been acquired by defendant four years subsequent to oral partnership agreement with plaintiff. The Superior Court, Kern County, Robert B. Lambert, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Mussell, J., held, inter alia, that evidence sustained finding that royalty interest involved was not created as a result of terms of oral partnership agreement.

Judgment affirmed.

1. Mines and Minerals 🔑98

In action to determine ownership of a royalty interest in oil land, evidence sustained finding that royalty interest, assigned to a partner four years after formation of partnership agreement, was not created as a result of terms of oral partnership agreement.

2. Evidence 🔑183(1)

Under statute requiring that proof of loss of a document must first be made before evidence can be given as to its contents, the sufficiency of preliminary proof of the loss before testimony as to its contents is received is addressed to sound discretion of trial judge. Code Civ.Proc. §§ 1855, 1919, 1937.

3. Appeal and Error 🔑970(2)

Determination of trial judge that substantial evidence has been introduced to show loss or destruction of an original document so that evidence as to its contents may be received, will not be disturbed by reviewing court, in absence of showing that proof of loss or destruction was manifestly insufficient. Code Civ.Proc. §§ 1855, 1919, 1937.

4. Trial 🔑105(5)

Where no objection is made to the admission of secondary evidence for purpose of proving terms of an agreement, there is no error in trial court's consideration of such evidence.

5. Frauds, Statute of 🔑125(3)

Even if an agreement for the sale of an interest in oil land had not been in writing it would not have been void but voidable.

6. Frauds, Statute of 🔑104

An oral agreement may be taken out of the statute of frauds by a written memorandum executed subsequently, even though the agreement has already been performed by one party.

◆

Pines & Walsh, Los Angeles, for appellant.

Mack, Bianco & King, Bakersfield, for respondent.

MUSSELL, Justice.

This is an action to determine the ownership of a one-third of one per cent royalty interest in certain oil land in Kern county. Plaintiff claims fifty per cent of said interest by reason of a partnership or joint venture agreement entered into with defendant in the latter part of 1943. Defendant denied that there was a joint venture between the parties and denied that plaintiff had an interest in said royalty or in the money which defendant had received or was to receive from it in the future.

The trial court found that the interest involved was not created as a result of the agreement of the parties; that they had entered into an oral agreement to work on an oil deal with the Midway McKittrick Oil Company, a corporation, in connection with working out an operating agreement between the Petroleum Supply Company and the Midway McKittrick Oil Company whereby Petroleum Supply Company would share on an equal basis whatever proceeds arose out of said transaction as a result of said operating agreement; that said Petroleum Supply Company has conveyed to plaintiff his undivided one-half interest in each and all of said interest so created in said oral agreement; that it was not true that plaintiff, pursuant to said agreement, obtained for the mutual benefit of plaintiff and defendant an assignment from Midway McKittrick Oil Company of the one-third of one per cent overriding royalty involved.

Judgment was entered that plaintiff take nothing of and from the defendant and the plaintiff appeals therefrom contending principally that the evidence is insufficient to support the findings and judgment.

Plaintiff, who was a dealer in leases and oil property, had known defendant Goldman, who was manager of the Petroleum Supply Company, for many years. Plaintiff testified that in the latter part of 1943 he had a conversation with Goldman as follows:

> "Mr. Goldman asked me to see if I could obtain an operating agreement in the name of the Petroleum Supply Company. If we could get that agreement he thought we could make some money on it, and in his opinion there was oil on the property. He says, 'You can go and see Mr. Scoon and some of the other directors, and see if you can obtain that agreement', and I said 'Upon what basis' and he said 'Fifty-fifty, as we have always worked up to date'."

That nothing was said about any interest Goldman may have had in the property; that while he was in Modesto doing business with the Midway McKittrick Company on the operating agreement with the Petroleum Supply Company he ascertained that there was an outstanding royalty on the books of the Midway McKittrick Company of one-third of one per cent in the name of one Herb Whiston; that he informed Goldman as to the Whiston interest and Goldman stated that the one-third of one per cent interest (involved herein) belonged to him and that Whiston had owed him a lot of money; that he went to see Whiston on August 10, 1946, and Whiston wrote a letter to the Midway McKittrick Oil Company requesting it to transfer all of his interest to said royalty to Frank Goldman; that the company refused to recognize the letter and requested a formal assignment; that on October 31, 1946, he obtained a formal assignment from Whiston as requested; that Mr. Scoon, secretary of Midway, would not execute the assignment until commercial production on the lease was shown (production was shown in 1947 and on September 16 of that year an assignment was executed by Midway McKittrick Oil Company to Goldman of the one-third of one per cent interest here involved); that he also obtained a two per cent overriding royalty in an oil lease for the partnership (one-half of this override royalty was sold and the remaining one per cent was divided between Hausen and Goldman); that Goldman refused to give him an assignment of one-half of the one-third of one per cent interest, claiming that it belonged to him and not to the partnership or joint venture.

Goldman testified that in 1934 he obtained an operating agreement with Midway

McKittrick Oil Company; that prior thereto he had obtained quitclaims of the Whiston interest in the lease; that he paid Whiston $1,000 to sign his right, title and interest in the operating agreement to him; that he gave the assignment to one Nick Girard; that at the time he paid Whiston he told him that he would cancel all indebtedness which Whiston had with the Petroleum Supply Company; that in 1943 he had the following conversation with plaintiff Hausen:

> "Anyway, I told Mr. Hausen—I said that this is a good piece of property if we can get the thing clean and we can make some money on it, and we will see that the Petroleum Supply Company finance it and you will do the leg work, and you go to Modesto, and I will call the people in Modesto, and you go up there and find out what kind of a deal we have to make, and if it suits me I will execute it on behalf of the Petroleum Supply Company, and I will pay whatever expense is necessary to be paid and anything that is made out of that deal, whether it is rental, bonus or whether it is a royalty interest, the Petroleum Supply Company will give you half of it, not as an assignment of interest, but the money, and the Petroleum Supply Company would retain the title always. That was my original conversation with him, and I explained to him at that time I had given Mr. Whiston $1,000 to sign a quitclaim deed on this property in 1934, and I explained I didn't know what interest Mr. Whiston had in the property, but he had some sort of a royalty interest as well as the cloud on the title of the lease."

That Hausen said "O.K. I will go ahead and half of what we get from now on belongs to me"; that he was not giving Hausen any assignment in the matter and that he agreed that Hausen was to receive fifty per cent of everything that he, Goldman, received out of the assignment from the Midway McKittrick Petroleum Company; that when the assignment was made, there was no reference to the interest, if any, of Whiston therein; that in 1934 he knew that Whiston had some sort of an interest in the nature of an override interest in the United States prospecting permit; that after plaintiff inspected the records of the Midway McKittrick Oil Company he, Goldman, ascertained the exact percentage of Whiston's interest as shown by the records of the corporation; that he immediately called Whiston and said "Herb, I paid you for your interest a long time ago, and if I prepare an assignment now, will you sign it?"; that Whiston agreed and did execute a written assignment to Goldman of the one-third of one per cent interest involved on October 31, 1946; that in 1943 he told plaintiff when he had paid Whiston and when he got the quitclaim from him and also told plaintiff that he, plaintiff, would not share in it.

Whiston testified that he was indebted to Goldman and the Petroleum Supply Company for various sums; that in 1934 he sold all his interest in Goldman's drilling contract to him for $1,000 and Goldman waived any claim he might have for bills incurred; that he recalled signing some kind of an agreement assigning his interest to Goldman but that he was unable to find the document; that Goldman bought him out and that later he, Whiston, signed the necessary papers.

[1] Plaintiff contends that the one-third of one per cent royalty became an asset of the partnership under the terms of the partnership contract. We are not in accord with this contention. This interest was not discussed by the parties until long after the agreement between plaintiff and Goldman was made. The evidence shows that Goldman had "bought out" Whiston for $1,000 in 1934 and acquired the disputed interest by assignment. The Midway McKittrick Oil Company would not recognize this assignment and would not execute an assignment to Goldman pursuant thereto until commencement of oil production on the lease was shown in 1947. The transfer of the disputed interest was then made to Goldman long after the agreement between plaintiff and defendant had been consummated. Plaintiff paid nothing for this interest and procured the necessary papers showing title thereto in Goldman while he was negotiating with the oil company for another royalty interest in behalf of the partnership. Plaintiff performed services for defendant in pro-

curing the execution of the assignment by the Midway McKittrick Oil Company to Goldman but it does not follow that there was an agreement that said interest was, therefore, partnership property. Defendant testified that the agreement was that plaintiff would go to Modesto and see what kind of a deal he could make with the Midway McKittrick Oil Company; that he, Goldman, would execute it on behalf of the Petroleum Supply Company; that the Petroleum Supply Company would pay one-half of anything made out of that deal in money and not as an assignment of interest. Apparently this testimony was believed by the trial court. It is sufficient to support the finding that the agreement between plaintiff and defendant was in connection with the working out of an agreement between Petroleum Supply Company and Midway McKittrick Oil Company whereby the Petroleum Supply Company would share the proceeds of the operating agreement. The Petroleum Supply Company did share such proceeds and plaintiff received his interest therein. This interest, as plaintiff admits, was separate and distinct from the disputed royalty interest and its ownership is not an issue in this action.

[2, 3] Plaintiff argues that defendant's oral testimony in respect to the allegedly lost 1934 assignment from Whiston to him did not constitute competent and admissible evidence under the parol and best evidence rules for the reasons that there was no evidence on the part of defendant that he had made any reasonable effort to locate the lost assignment and that his oral testimony was legally insufficient to establish the contents of said lost document under section 1937 of the Code of Civil Procedure. This section provides that an original writing must be produced and proved except as provided in sections 1855 and 1919. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. However, whether there has been a satisfactory accounting of the document is primarily a question for the trial court. The rule is established in California that the sufficiency of the preliminary proof of the loss of a document before testimony as to its contents is received is addressed to the sound discretion of the trial judge, Kenniff v. Caulfield, 140 Cal. 34, 42, 73 P. 803, and that the determination of the trial judge that substantial evidence has been introduced to show the loss or destruction of the original document will not be disturbed by an appellate court, in the absence of a showing that the proof of loss or destruction was manifestly insufficient, Kenniff v. Caulfield, supra, 140 Cal. at page 42, 73 P. at page 805; Brown v. Gow, 128 Cal.App. 671, 18 P.2d 377; White v. White, 39 Cal.App.2d 57, 60, 102 P.2d 432.

[4-6] In the instant case Whiston testified that he remembered the agreement but was unable to find it in his files. Goldman testified that he had given it to a Mr. Girard and did not have it. Moreover, Whiston testified, without objection, that he signed an agreement with Goldman assigning his interest in the royalty to him. Where no objection is made to the admission of secondary evidence for the purpose of proving the terms of an agreement, there is no error in the trial court's consideration of such evidence. Sublett v. Henry's Turk & Taylor Lunch, 21 Cal.2d 273, 276, 131 P.2d 369. There is no dispute between Whiston and Goldman as to the execution of the assignment or as to its terms. They were the only parties to it and there is substantial evidence as to its execution. On October 31, 1946, Whiston executed a formal transfer to Goldman of this interest. Even if the agreement between Whiston and Goldman concerning the sale of this interest was not in writing it was not void but voidable. An oral agreement may be taken out of the operation of the statute of frauds by a written memorandum executed subsequently, even though the agreement has already been performed by one party. Ayoob v. Ayoob, 74 Cal.App.2d 236, 242, 168 P.2d 462.

Plaintiff argues that the trial court's findings are deficient for failure to make findings on essential and material issues. We find no merit in this argument. Counsel for plaintiff stated to the trial court that "the sole controversy is the issue of the creation of the one-third per cent." His principal contention here is that the subject royalty became an asset of the partnership under the terms of the partnership contract made by appellant with respondent Goldman in his individual capacity. The court specifically found that the disputed royalty interest was not created as the result of the oral agreement between the plaintiff and defendant. It was found that the agreement of the parties related to royalty interests other than the one in dispute. Further findings were made that the allegations in certain paragraphs of the complaint were untrue. The findings are sufficient to support the judgment and we cannot here hold as a matter of law that the evidence and reasonable inference to be drawn therefrom are legally insufficient to support the findings.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

PEOPLE v. SEARS et al.

Cr. 5048.

District Court of Appeal, Second District, Division 2, California.

March 12, 1954.

Rehearing Granted March 24, 1954.

Prosecution for violation of Corporate Securities Act and for grand theft. The Superior Court, Los Angeles County, Clement D. Nye, J., granted defendants' motion to set aside information. On appeal, the District Court of Appeal, McComb, J., held that finding, that defendants had not solicited sale of Nevada corporation's stock in California, was sustained by the evidence.

Affirmed.

Moore, P. J., dissented.

1. Criminal Law 🔑1144(3)

On appeal from order granting defendants' motion to set aside information charging violation of Corporate Securities Act and for grand theft, District Court of Appeal would view evidence in light most favorable to action of trial court. Corporations Code, § 25000 et seq.

2. Criminal Law 🔑1147

An appellate court will not divest a trial court of the discretionary power reposed in it, unless a clear abuse of discretion is shown.

3. Indictment and Information 🔑140(2)

In prosecution for violation of Corporate Securities Act and for grand theft, finding on motion to set aside information, that defendants had not solicited sale of Nevada corporation's stock in California, was sustained by the evidence. Corporations Code, § 25000 et seq.; Bankr. Act, § 101 et seq., 11 U.S.C.A. § 501 et seq.

4. Indictment and Information 🔑140(2)

In prosecution for grand theft, evidence, on motion to set aside information, justified determination that there was not reasonable or probable cause to believe defendant had committed grand theft. Corporations Code, § 25000 et seq.; Bankr. Act, § 101 et seq., 11 U.S.C.A. § 501 et seq.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Los Angeles County, Jere J. Sullivan, Robert Wheeler, Deputy Dist. Attys., Los Angeles, for appellant.

Gendel & Raskoff, Los Angeles, by Bernard Shapiro, Los Angeles, for respondents.

McCOMB, Justice.

From an order granting defendants' motion to set aside an information charging (1) both defendants with violating the Corporate Securities Act, and (2) defendant Sears in seven counts with grand theft, the people appeal.

[1, 2] Viewing the evidence as we must in the light most favorable to supporting the action of the trier of fact, the rule being established that unless an appellate court "is able to say that a clear abuse of discretion is made to appear, it will not divest the trial court of the discretionary power reposed in it. It will rather be pre-

sumed in favor of the action of the court that its discretion was properly exercised, and the burden rests on the appellant to show an abuse." (4 Cal.Jur.2d (1952) Appeal and Error, sec. 592, p. 469.)

The record discloses that on November 25, 1949, defendant Sears made an application to the Corporation Commissioner of the State of California to sell stock in Western Research Laboratories, Inc., of which said defendant was a director and chairman of the board. An amended application was also filed on December 13, 1949, with the California Corporation Commissioner. The commissioner proposed to issue what was known as a "closed permit," meaning that stock could not be sold to the general public but only to certain persons named in the permit, and on the conditions therein set forth. Before any permit was issued, however, the applicant requested that the application be withdrawn and an abandonment order was issued on April 26, 1950. On February 15, 1950, Articles of Incorporation of the Sierra Nevada Oil Company were filed in Nevada, defendants being the organizers thereof.

Thereafter the complaining witness and a representative of other persons living in and near Artesia contacted defendants stating they desired to purchase stock in the Sierra Nevada Oil Company. They were each informed that defendants had no authority to sell such stock but that on the contrary it would be necessary for anyone desiring to invest money in the company to write directly to Nevada in order to obtain such certificates of stock.

As an example, Mr. Harm Bensema, the manager of the United Dairymens Association, located in Artesia, California, stated that the fact oil was being drilled for was "common talk" in the community, and he approached defendant Kiers because he had heard so much about the drilling and wanted to tell Mr. Kiers he was willing to take some of the stock even though he knew Mr. Kiers could not sell it; that he went to the well site and at that time met defendant Sears, but to the best of his recollection did not speak to Mr. Sears about stock, but immediately upon returning home from the well site he purchased stock in the Nevada corporation; that he was too busy to write a personal letter, but asked defendant Kiers to "do the errand" for him.

There is no evidence that any representations were made to Mr. Bensema relative to the stock and so far as the record indicates he purchased the same under his own volition without discussing the matter with anyone, sending his check and order to Nevada.

After a period this same general situation obtained as to the other stock holders in the corporations.

Thereafter the various stock holders in California met on several occasions at the home of Mr. Vogel, one of the investors. These individuals had a long distance telephone conversation with defendant Sears at one of these meetings. Subsequently Mr. Vogel, Mr. Bensema and the other stock holders loaned sums of money to defendant Sears, receiving the latter's personal notes therefor, and with the knowledge that defendant Sears was to lend the money to the Sierra Nevada Oil Company and that no stock could be issued therefor, but that possibly in the future they might be able legally to obtain shares of stock in payment of the money they had advanced if they so desired. If at such time they did not want the stock, the money would be repaid. The money was loaned by defendant Sears to the Sierra Nevada Oil Company and used in the course of its business.

In June of 1951 the affairs of the company were brought under the jurisdiction of the United States District Court of Nevada, pursuant to Chapter X of the Bankruptcy Act, 11 U.S.C.A. § 501 et seq., and all rights, claims and disputes were amicably adjusted by all the parties concerned with the help of the court and the representative of the Securities and Exchange Commission. Since then the affairs of the Sierra Nevada Oil Company have been supervised by the Reorganization Court in Nevada, and everyone interested has been represented before that court. Proceedings were long and complicated and a plan of reorganization has been approved and confirmed.

During this extended period all contentions were aired in open court before representatives of the various interests involved. The Security and Exchange Commission was at all times aware of and participated in the proceedings in Nevada and knew of the California Corporations Commissioner's activities. The complaining witnesses in the present case were represented, among others, before the United States District Court and participated in the proceedings. All of the loans involved in the present case were disposed of as direct obligations of the corporation debtor with the consent of everyone concerned.

[3] Since from the foregoing evidence it is clear that all the investors knew that the Sierra Nevada Company could not sell stock in California and were so advised by defendants, the evidence sustains the finding that neither defendant solicited the sale of the stock of the Sierra Nevada Company in California. The trial court's finding that each defendant had been indicted without reasonable or probable cause to show a violation of the Corporate Securities Act is sustained by the evidence.

[4] Turning to the counts charging defendant Sears with grand theft, the record discloses that defendant Sears informed the borrowers he could not sell stock in the Sierra Nevada Oil Company; that the money which they advanced to him was a personal loan and his wife would sign the notes. The record also discloses that Mrs. Sears did not sign the notes. So far as appears from the record this was a mere inadvertence and no witness at the preliminary examination seemed to attach any importance to her failure to do so. The reason is apparent. In the present case the notes, which would form the basis of the grand theft count as stated above, were recognized in the bankruptcy proceedings as obligations of the corporation because Mr. Sears had advanced the money to the corporation and each lender was found to be an unsecured creditor of the oil company.

A certified copy of the order of the United States District Court, acting as a reorganization court, that all of the lenders, including the complaining witnesses herein, would look to the debtor corporation, Sierra Nevada Oil Company, for payment of the loans, was before the trial court on the motion from which an appeal has been taken. Clearly the trial court in the instant case was justified in holding that the evidence did not support a finding that there was reasonable or probable cause to believe that defendant Sears had committed grand theft.

B. C. Turf & Country Club v. Daugherty, 94 Cal.App.2d 320, 329 et seq., 210 P.2d 760, is in accord with the views expressed herein.

Affirmed.

FOX, J., concurs.

MOORE, P. J., dissents.

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123 Cal.App.2d 735

PEOPLE v. ALVES.

No. 15841.

District Court of Appeal, First District,
Division 1, California.
March 9, 1954.

Rehearing Denied April 8, 1954.
Hearing Denied May 6, 1954.

Action seeking to impose penalties upon highway carrier for violations of Highway Carriers' Act in that carrier had allegedly transported fresh fruit at rates lower than the minimum rates established by Public Utilities Commission pursuant to such Act. The Superior Court, Alameda County, Chris B. Fox, J., entered judgment imposing half the maximum penalty under each count, and the carrier appealed. The District Court of Appeal, Bray, J., held, inter alia, that proof of service upon carrier of tariffs which established minimum rates was sufficient.

Affirmed.

1. Automobiles ⚷121

Certificate stating that it "appeared" from records of Public Utilities Commission that tariffs applicable to highway carrier had been served upon carrier by enclosing true copies thereof in sealed envelopes, with postage prepaid, addressed to last known address of carrier, and deposited in United States Post Office in San Francisco on specified date, was merely conclusion as to what records showed and was not the type of "certificate" contemplated by statute authorizing proof of service to be made by certificate of employee of commission. Public Utilities Code, § 3735.

See publication Words and Phrases, for other judicial constructions and definitions of "Certificate".

2. Trial ⚷81

In action to impose penalties for violation of Highway Carriers' Act in that highway carrier had transported fresh fruits and vegetables at rate lower than those established as minimum rates by Public Utilities Commission's tariffs, objection that Commission's records could not be proved by certificate, though broad enough to cover fact that certificate was conclusion and not a copy of the records, was insufficient to require exclusion of certificate, and certificate thereby became sufficient competent evidence as to fact of service of tariffs. Public Utilities Code, § 3735.

3. Carriers ⚷20(10)

Complaint alleging that Public Utilities Commission had established certain minimum rates for transportation of fresh fruits and vegetables by highway carriers and that defendant carrier had charged specified sums, which were less than minimum rates, "in violation of Highway Carriers' Act," stated causes of action for penalty imposed by such act, though quoted phrase constituted conclusion. Public Utilities Code, § 3803.

4. Carriers ⚷20(10)

In action for penalty imposed by Highway Carriers' Act for transporting fresh fruits and vegetables at rates lower than minimum rates established by Public Utilities Commission, evidence showing number of boxes of fruit transported, weight of the shipments, rates per hundred pounds and the total charges was not at variance with complaint, which made no reference to either weight or rates per hundred pounds, but which referred to total number of boxes and ultimate charges. Public Utilities Code, §§ 3662–3665, 3667, 3732–3737, 3803.

5. Appeal and Error ⚷197(1)

Claim of variance between evidence and pleading cannot be raised for first time on appeal.

6. Appeal and Error ⚷221

Claim that penalty, imposed for violation of Highway Carriers' Act by transportation of fresh fruit at rates less than minimum rates established by Public Utilities Commission, was excessive, could not be raised for first time on appeal. Public Utilities Code, §§ 3662–3665, 3667, 3732–3737, 3803.

7. Carriers ⚷20(7)

Trial court, in imposing half the maximum penalty for each violation of Highway Carriers' Act, did not abuse discretion. Public Utilities Code, §§ 3662–3665, 3667, 3732–3737, 3803.

8. Carriers ⚷20(1)

Intent of highway carrier to violate Highway Carriers' Act need not be shown to impose penalty prescribed by such act. Public Utilities Code, §§ 3662–3665, 3667, 3732–3737, 3803.

9. Carriers ⚷20(12)

The circumstance that highway carrier, charged with violating Highway Carriers' Act by transporting fresh fruit at rates less than those established by Public Utilities Commission, was charged with only ten violations in three-month period, during which carrier claimed to have sent out over 3,300 bills, was matter for trial court to consider in determining penalty to be imposed. Public Utilities Code §§ 3662–3665, 3667, 3732–3737, 3803.

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Marquam C. George, Oakland, for appellant.

Everett C. McKeage, J. Thomason Phelps, H. J. McCarthy, Mary M. Pajalich, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment in favor of plaintiff, in an action for violation of certain sections of the Highway Carriers' Act, Stats.1935, ch. 223, as amended, now Public Utilities Code, § 3501 et seq.

Questions Presented.

1. Sufficiency of proof of service of Public Utilities Commission's decision establishing minimum rates.
2. Sufficiency of pleadings.
3. Variance.
4. Was the judgment excessive?

Pleadings.

There are ten counts in the complaint. Each count is similar in form to the others, but charges a different transportation of fruit at less than the minimum rate fixed by the commission. The first count is typical of the others. It charges that defendant is engaged in the transportation of property for compensation or hire as a business over the public highways of California by means of motor vehicles, operating as a highway carrier other than a highway common carrier. Pursuant to the act, particularly section 10 thereof, the commission by its Decision No. 33977 (Highway Carriers' Tariff No. 8) established minimum rates to be charged by all highway carriers of defendant's type for the transportation of fresh fruits and vegetables between various points. On July 19, 1950, defendant as such carrier transported 125 boxes of grapefruit from Villa Park and 325 boxes of oranges from Kathryn, over the public highways to Oakland, for the transportation of which defendant charged $177.15, when the minimum charge then applicable to the transportation of said fruit was $206.60. Charging and receiving said sum of $177.15 in full payment of said transportation violated sections 10, 12(a) and 13⅝ of said act and made defendant subject to a penalty of not more than $500 as provided in section 15(a) of the act, said penalty being payable to plaintiff.

Plaintiff prayed for the full penalty for the violation set forth in each of the ten counts. Defendant answered, admitting the correctness of the transportation charges actually collected but denying that the amount alleged in each count as the minimum charge was correct or that he violated the act. The court found all of the allegations of the complaint to be true and rendered judgment in favor of plaintiff for $250 on each count.

1. Service of Decision.

Defendant's main contention is that he was not bound by Decision No. 33977 as there is no proof it was served upon him. Section 13⅝ of the act (now Pub. Utilities Code, § 3737) provided that upon the issuance by the commission of any decision or order affecting a particular class of carriers, a copy shall be served upon each carrier affected, and that each carrier shall be bound to observe any tariff, decision or order "after service thereof." Section 13½ (now Pub. Utilities Code, §§ 3732, 3733, 3734 and 3735) provided that service of all decisions and orders may be made personally or by mail as outlined. Service by mail shall be complete upon the expiration of four days after mailing. "Proof of service may be made by the certificate of any officer or employee of the commission or the affidavit of any person over the age of 18 years, naming the person served and specifying the time, place, and manner of service." Public Utilities Code, § 3735.

It is conceded that to subject defendant to penalties for violating Decision No. 33977 there must be proof that defendant was served with a copy of it, as prescribed in the act. As there is no contention he was personally served, this means proof that a copy was mailed to him in an envelope properly addressed, etc. This brings us to the proof offered at the trial. Over defendant's objection there was admitted in evidence the following:

"Certificate of Service.

"I, Leonie Casabonne, an employee of the Public Utilities Commission of the

State of California, namely, senior clerk, having custody of the records of said Commission showing service of said Commission's decisions, orders, tariffs, rules and regulations upon the highway carriers subject to the jurisdiction of said Commission, and various other official records of said Commission pertaining to such carriers, hereby certify *that it appears from said records* that the following decisions, orders, tariffs, rules and regulations of said Commission were served upon Walter Alves, by enclosing true and correct copies of said decisions, orders, tariffs, rules and regulations in sealed envelopes, with postage prepaid, addressed as shown below, and deposited in the United States Post Office in the City and County of San Francisco, State of California, on the dates shown below:

Decision, Order Tariff, Rule or Regulation	Addressed to	Date Mailed
Decision No. 33977 and Appendix 'C' thereto.	Walter Alves as copartner of Walter Alves and Clifford Fontes 1932–90th Avenue, Oakland	April 2, 1941

[Here follow three other orders or tariffs mailed to defendant on other days.]

and that the addresses shown above were the last known addresses of the person indicated as shown by said records of said Commission at the time of such service.

"/s/ Leonie Casabonne

"Leonie Casabonne

"Dated, San Francisco, California
"October 10, 1952.

"I hereby certify that Leonia Casabonne is regularly employed by the Public Utilities Commission of the State of California in the position of Senior Clerk.

"/s/ R. J. Pajalich"

(Emphasis added.)

[1, 2] This type of certificate is not the type contemplated by section 13½ (the present § 3735) as it is merely the conclusion of what the custodian of the records claims the records show. It is not even a certified copy of the record. Had it set forth a properly certified copy of the record it would at least have satisfied the method of proving entries in an "official document" ("by a copy, certified by the legal keeper thereof") sanctioned by subdivision 6 of section 1918 of the Code of Civil Procedure. The original "entries" thus in evidence would then be "prima facie evidence of the facts stated" therein, Code Civ.Proc. §§ 1920 and 1926; hence, prima facie evidence of the fact of service upon the defendant. However, while this certificate did not comply with section 13½ (the present § 3735), under the peculiar facts of this case its admission was not error. While defendant's objection to the certificate was broad enough to cover the fact that the certificate was the clerk's conclusion and not a copy of the record, the discussion which followed showed that defendant's real objection was not that the certificate was not a correct copy of the record, but that the record could not be proved by certificate at all, and that it was necessary to produce either the certificate or affidavit of the person actually doing the mailing. Plaintiff offered to bring the commission records and to bring Miss Casabonne in for cross-examination if defendant so desired. Defendant stated that he was not interested in either, that the section required the certificate or affidavit of the very person who made the service, that the production of the records "wouldn't serve any useful purpose." Had defendant's objection been merely to the form of the certificate, the matter could have been easily taken care of by the production of the records as offered. His failure to make an appropriate objection to the introduction of this certificate rendered the certificate and its contents competent as evidence of the fact of service. While defendant was under no duty to assist plaintiff in making out its case, he

was under the duty of making clear the objection upon which he stood. Here the record shows that he was standing on an objection without merit, and not on the question of the form of the certificate. See Nichols v. McCoy, 38 Cal.2d 447, 448, 240 P.2d 569. While defendant's answer to the complaint can be construed as a denial of receipt of the order, and his counsel stated that he was making an issue of not receiving the order, it is significant that neither defendant himself nor any one in his behalf testified that he had not received the order. The proof of service was sufficient under the circumstances of this case.

2. Sufficiency of the Complaint.

[3] Defendant contends that his motion for judgment on the pleadings should have been granted because the complaint did not state a cause of action. This contention is based on his claim that the following allegations (which appear in similar form in all counts) are conclusions of law. "The lowest lawful charge then applicable to the transportation of said property, as aforesaid, was $206.60." (The complaint theretofore had alleged the establishing of the minimum rate by the commission.) "The charging * * * said sum of $177.15, as full payment for said transportation, was in violation" of the above mentioned sections of the act. "By reason of the aforesaid violation of said" act "defendant is liable to plaintiff and subject to a penalty of not more than Five Hundred Dollars ($500.00), as provided in section 15(a) * * *." While it is probably true that the allegations that defendant had violated the act are conclusions, the allegations that defendant charged a certain figure for transporting the property and what was the lowest lawful charge then applicable to the transportation of said property, were allegations of facts. From the fact that defendant had charged less than the minimum rate fixed by the commission, it naturally followed that defendant had violated the act and a cause of action was established whether or not plaintiff alleged that such fact constituted a violation of the act.

3. Variance.

[4,5] Plaintiff's exhibit 7 which contrasted the rates actually charged and the minimum rates allowable, shows not only the number of boxes of fruit but the weight in pounds of the shipment and the rate per 100 pounds and then the total charge. Defendant contends the showing of the weight and the rate per 100 pounds constitutes a variance from the allegations of the complaint which made no reference to either weight or rate per 100 pounds, but referred to total number of boxes and ultimate charges. The detail as to the charges collected by defendant came from defendant's own books. We can see no variance. Moreover, no claim of variance was made below. It cannot be raised for the first time on appeal. See 21 Cal.Jur. 253.

4. Was the Judgment Excessive?

[6–9] The trial court imposed half the maximum penalty under each count. The claim that this was excessive cannot be raised on appeal unless first presented to the trial court on a motion for new trial. Bate v. Jolin, 206 Cal. 504, 274 P. 971; Reid v. Gillespie, 87 Cal.App.2d 769, 197 P.2d 566; 3 Cal.Jur.2d 613–614. This was not done. Moreover, we find no abuse of the discretion lodged in the trial court in determining the penalty. There is no requirement that intent to violate the act be shown. The circumstance that defendant is charged with only ten violations in a 3-month period during which he claims to have sent out over 3300 bills, was a matter for the trial court to consider. The judge remarked about the injury which in his experience he had observed done the trucking business by undercutting rates. He could have awarded the full penalty.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

123 Cal.App.2d 810

BARKER v. SHERMAN et al.

Civ. 19849.

District Court of Appeal, Second District, Division 1, California.

March 15, 1954.

Action on written contract by insurance agent for renewal commissions on life policies. From adverse judgment of Superior Court, Los Angeles County, Otto J. Emme, J., insurance company appealed. The District Court of Appeal, Drapeau, J., held that where contract provided for renewal commissions for a period of nine years if agent sold $50,000 of life insurance each year and contract was amended to provide renewal premiums would become nonforfeitable three years from date of amendment if agent sold $50,000 of life insurance each year for that time, agent who had not sold $50,000 of insurance per year for the three year period had no rights under amendment.

Judgment reversed and remanded with directions.

1. Insurance ⚷84(4)

Where contract provided for renewal commissions, while agent continued in insurer's service, for a period of nine years provided agent sold a stipulated amount of new insurance each year, and contract was amended to provide that under certain conditions renewal commissions would become non-forfeitable at end of three full years from date of amendment, amendment guaranteeing renewals was to apply only if agent remained in employ of company and he was not entitled to renewal commissions after termination of employment.

2. Insurance ⚷84(4)

Where contract provided for renewal commissions, while agent remained in the employ of insurer, for period of nine years provided agent sold a stipulated amount of new premiums each year, and amendment provided that renewal commissions would become non-forfeitable at end of three years from date of amendment if agent had sold a minimum of $50,000 of new insurance per year, agent, who had not sold $50,000 of life insurance each year from date of amendment, had no rights under the amendment and must look to original contract for renewal commissions.

3. Contracts ⚷147(2)

In construing a contract, intention of parties must be ascertained from writing alone, if possible. Civ.Code, § 1639.

4. Contracts ⚷143

When language of a contract is plain and unambiguous, it is not province of a court to make a new one, or to re-write or alter by construction what has been agreed upon.

E. W. Miller, Los Angeles, for appellants.

Fred G. Kennedy, Los Angeles, for respondent.

DRAPEAU, Justice.

This action involves renewal commissions on life insurance claimed by an agent to be due him from the general agent of Pacific National Life Assurance Company, and from that company.

The parties entered into a written contract dated July 16, 1945. It was agreed that the agent would be paid commissions upon the cash premiums on new policies, in accordance with a schedule in the contract, and renewal commissions, while he continued in the service of the agency, for a period of nine years on all second and subsequent years' premiums, also in accordance with a schedule in the contract.

Paragraph 11 of the contract provides:

"Renewal commissions, as shown above, are payable under this contract only when new business issued and paid for in each contract year is equal to or exceeds the sum of Fifty Thousand Dollars ($50,000.00).

"Should renewals of the previous year's business be less than 65%, it shall in and of itself be deemed cause for modification or cancellation of this agreement."

By subsequent written agreement the parties amended paragraph 11 of the contract, as follows:

"Amending and modifying Paragraph 11 —but no other:—At the end of three full years from date, providing this contract is in force at that time, renewals under this Contract shall become non-forfeitable for the term herein provided, if the agent has had issued, paid for and delivered business of the minimum of $50,000 per year on the annual basis. Dated January 1st, 1946."

The amendment was executed by the parties about July 1, 1946, and was pre-dated six months.

Defendants notified plaintiff that they would pay no more renewal commissions; whereupon he brought this action.

It was stipulated at the trial that plaintiff sold according to his contract $50,000 worth of life insurance each year for three years from July 16, 1945 through July 16, 1948, and did not sell $50,000 worth of life insurance for three years from January 1, 1946 through January 1, 1949. It is conceded that plaintiff remained in defendant's employ for more than three years from the date of the amendment. He was paid renewals each year, including 1948.

The trial court found and adjudged that the agreement was that if the agent worked for his employers for three years from the date of the amendment he would be entitled to non-revocable renewal premiums; that he did so work, and was, therefore, entitled to renewal commissions due, and as they would fall due for nine years from July 16, 1945. Defendants were directed to account to plaintiff as adjudged.

Defendants appeal from the judgment and from an order denying their motion for a new trial.

The vital question in controversy, then, centers upon the construction of the amendment. Plaintiff contends, as he testified, that the amendment was "to guarantee the renewals for nine years whether I was in the employ or not after I put in the full three years."

[1] This question must be resolved in favor of defendants, for there is no uncertainty in the contract as amended. Its terms are plain.

The original contract provided that while the agent continued in the service of the agency, for each year during which he sold $50,000 worth of life insurance he would be paid renewal commissions for nine years.

[2] The amendment provided that if the contract was in force three years from January 1, 1946, and if the agent sold $50,000 of life insurance each year from the date of the amendment, renewal commissions would become non-forfeitable. Under the stipulation that he did not write the required amount of insurance from the date of the amendment, plaintiff has no rights under it. He must look to the original contract for his recovery.

[3, 4] In construing a contract the intention of the parties must "be ascertained from the writing alone, if possible". Civil Code, Sec. 1639. When the language of a contract is plain and unambiguous it is not the province of a court to make a new one, or to re-write or alter by construction what has been agreed upon. Jones v. Pollock, 34 Cal.2d 863, 215 P.2d 733; Sass v. Hank, 108 Cal.App.2d 207, 238 P.2d 652.

However, there is no evidence in the record that the contract has been terminated. Paragraph 25 of the contract reads as follows:

"25. Termination of Contract. Violation by the Agent of any law, rule or regulation of any State Department having charge of the business of insurance in the territory assigned, or of the rules and regulations prescribed by the Company, or default in or violation of the terms and conditions of this agreement shall constitute due cause for termination of this agreement at once and without notice; and this agreement may also be terminated, by either party by a notice in writing delivered personally, or mailed by registered mail to the other party at the last known address, at least thirty days before the date fixed in such notice for such termination."

The judgment is reversed; the Superior Court is directed to re-try the case in accordance with the construction of the contract and the views hereunder set forth; the appeal from the order denying a new trial is dismissed. (3 Cal.Jur.2d 500.)

WHITE, P. J., and DORAN, J., concur.

BERRI
v.
SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.*

No. 16051.

District Court of Appeal, First District, Division 1, California.

March 8, 1954.

Rehearing Denied April 7, 1954.

Hearing Granted May 6, 1954.

Proceeding on petition for writ of mandate to compel entry of judgment in trial court either by trial judge or clerk of court. The District Court of Appeal, Bray, J., held, inter alia, that rendition of judgment being a function of the court and strictly judicial in nature, clerk had no authority to enter judgment until court rendered judgment on order sustaining demurrer without leave to amend, and that mandamus would not lie to compel clerk so to do.

Petition denied.

1. Pleading ⚷223

Order sustaining demurrer without leave to amend is not a "judgment".

See publication Words and Phrases, for other judicial constructions and definitions of "Judgment".

2. Pleading ⚷218(5)

After entry of order sustaining demurrer without leave to amend and before entry of judgment, control of proceedings is still in the trial judge, who can set aside or change the order if he sees fit. Code Civ. Proc. § 472c.

3. Mandamus ⚷26

Mandamus will not lie to compel a clerk to perform a service which involves the exercise of judicial power.

4. Dismissal and Nonsuit ⚷60(2)

The Code section providing for dismissal of an action not brought to trial within five years unless parties have stipulated in writing that time may be extended does not contemplate that time consumed by court in considering and passing upon demurrers be excluded in computation of the five year period. Code Civ.Proc. § 583.

5. Judgment ⚷271

Rendition of judgment being a function of the court and strictly judicial in nature, clerk had no authority to enter judgment until court rendered judgment on order sustaining demurrer without leave to amend; and mandamus would not lie to compel clerk so to do.

6. Mandamus ⚷14(1)

Mandamus will not lie to compel a trial judge, who has sustained a demurrer without leave to amend, to render judgment on such order, until a motion requesting him to do so has been made and improperly denied. Code Civ.Proc. §§ 472c, 583.

7. Judgment ⚷210

Under statute providing for dismissal of actions not brought to trial within five years, trial court could not, after expiration of five year period, render judgment on order which sustained demurrer without leave to amend and which was entered within five year period. Code Civ.Proc. § 583.

◆

Alfred J. Hennessy, San Francisco, for petitioner.

Samuel B. Stewart, Jr., Christopher M. Jenks and Arthur V. Toupin, San Francisco, for respondents.

BRAY, Justice.

Petition for writ of mandate to compel entry of judgment in the superior court by either the trial judge or the clerk of the court.

The question presented is primarily whether a superior court clerk must enter judgment automatically upon the entry of an order sustaining a demurrer without leave to amend.

Record.

April 21, 1948, the complaint was filed. A first and second amended complaint was filed prior to the appearance of the real parties in interest. Thereafter their demurrers to the second, third and fourth amended complaints were sustained with leave to amend. March 4, 1953, an order sustaining their demurrer to the fifth amended complaint *without* leave to amend was entered in the minutes of the court. This was approximately one and a half months prior to the expiration of five years from the filing of the complaint. (See Code Civ.Proc. § 583 providing for dismissal after five years.) April 10, still prior to the expiration of the five year period, petitioner filed notice of appeal. About October 19th (and after the five year period had expired) petitioner discovered that no judgment had been entered. Petitioner presented a form of judgment to the trial judge for signing and entry. Petitioner alleges that he refused because the five years had expired. The judge states that he stated that he wanted a formal motion for entry to be made so that all parties could be heard on the propriety of entering judgment at that late date. November 9, 1953, we dismissed the appeal as prematurely brought. November 16, petitioner demanded that the superior court clerk enter the judgment. He refused. There is pending in the trial court a motion to dismiss the action because of the expiration of the five year period, which motion is held in abeyance awaiting the result of this petition.

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* Subsequent opinion 279 P.2d 8.

Order Sustaining Demurrer Without Leave Is Not Rendition of Judgment.

[1-3] Petitioner contends that it is and cites many cases as well as the code sections to the effect that where judgment is rendered its entry is ministerial and must be automatically entered by the clerk. Therefore, she contends, the clerk having failed to perform his mandatory duty, the five year period is extended until he does. Petitioner cited no cases holding that the entry of such an order constitutes the rendition of a judgment, although there are some early authorities seeming to hold to that effect. Lang v. Superior Court, 71 Cal. 491, 12 P. 306, 416; Gallardo v. Reed, 49 Cal. 346; Le Breton v. Stanley Contracting Co., 15 Cal.App. 429, 114 P. 1028; Litch v. Kerns, 8 Cal.App. 747, 97 P. 897. Moreover, reason and the later authorities are to the contrary. Originally a party against whom a demurrer had been sustained without leave to amend could not appeal without first moving the trial court for leave to amend. Thus the trial court still had judicial control over its action in sustaining the demurrer, which control existed until judgment was entered. This judicial control is completely inconsistent with the theory that the making of the order constitutes the rendition of a judgment, or that the entry of the judgment following the order is merely ministerial. Since the adoption of section 472c, Code of Civil Procedure, in 1939, the motion to amend is no longer required. However, until the judgment is entered, the control of the proceedings is still in the judge, who can set aside or change the order if he sees fit. Taliaferro v. Wampler, 118 Cal.App.2d 391, 257 P.2d 674, held in effect that neither a minute order nor a written order sustaining a demurrer without leave to amend constitutes a judgment for appeal purposes. In addition, there must be a judgment. What the court said in De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717, concerning the sustaining of a demurrer with leave to amend, applies equally to an order sustaining a demurrer without leave,—that it is not a judgment but may form the basis for rendering a judgment, and that until judgment is actually rendered the court may reconsider its ruling. See also American Nat. Ins. Co. v. Yee Lim Shee, 9 Cir., 104 F.2d 688, where the court applied the same rule to an order sustaining demurrer without leave to amend. In Davis v. Stroud, 52 Cal.App.2d 308, 126 P.2d 409, we said: "The court had jurisdiction at any time prior to judgment to reconsider its ruling sustaining the demurrer without leave to amend (21 Cal. Jur. 124; 9 Cal.Jur. [10-Yr.] Supp. 221)." 52 Cal.App.2d at page 315, 126 P.2d at page 413. In Frantz v. Mallen, 204 Cal. 159, 267 P. 314, in holding that the trial court had jurisdiction to permit the amendment of a complaint after order sustaining demurrer without leave to amend and before judgment entered, the court referred to the order as an "interlocutory order." 204 Cal. at page 161, 267 P. at page 315. Rendition of the judgment is a function of the court and is strictly judicial in nature. "Mandamus will not lie to compel a clerk to perform a service which involves the exercise of judicial power * * *." 5 Cal.Jur. 229.

Time Consumed by Demurrers.

[4] Petitioner contends that in computing the five year period, the time during which the trial court had the various de-

murrers under submission must be deducted. This contention has been decided flatly and adversely to petitioner's position in Breakstone v. Giannini, 70 Cal.App.2d 224, 229, 160 P.2d 887.

[5–7] As the rendition of a judgment in this case is a matter of judicial action, the clerk has no authority to enter such a judgment until it is rendered by the trial judge; therefore mandamus will not lie to compel the clerk to enter a judgment. No formal motion was made requesting the trial judge to render a judgment. Were the question of the expiration of the five year period absent in this case, mandamus would not lie to compel the judge to render a judgment until a motion requesting him to do so had been made and improperly denied. For this reason as well as the fact that the five year period has expired and the judge could not properly now render judgment, mandamus will not lie to compel the judge to do so.

The alternative writ is discharged and the petition is denied.

PETERS, P. J., and FRED B. WOOD, J., concur.

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123 Cal.App.2d 900

RICHARD et al. v. RICHARD et al.

Civ. 19926.

District Court of Appeal, Second District,
Division 2, California.
March 17, 1954.

Action for partition. From adverse judgment of Superior Court, Los Angeles County, Arthur Crum, J., plaintiff appealed. The District Court of Appeal, McComb, J., held that brief, which asserted that evidence was insufficient to support the judgment and did not direct the court's attention to the specific errors of law alleged to have been committed by trial court, did not conform to requirements prescribed for a brief on appeal and court would not consider merits of case.

Judgment affirmed.

1. Appeal and Error 🔑758(3)

Where there were several findings of fact, general assignment of error in brief that judgment was not supported by evidence was insufficient to call to reviewing court's attention correctness of any particular finding of fact in manner required by statute and reviewing court will not pass upon merits of appeal. Rules on Appeal, rule 15(a).

2. Appeal and Error 🔑761

The headings in a brief on appeal should not only show the points involved but should be so stated as to compel a reversal in event that points are well taken. Rules on Appeal, rule 15(a).

3. Appeal and Error 🔑758(3)

When it is contended that the evidence is insufficient to support the judgment, specifications in brief as to insufficiency of such evidence must be directed to material findings of fact.

4. Appeal and Error 🔑901

An appellant must make it affirmatively appear that error was committed by trial court.

5. Appeal and Error 🔑761

The purpose of rule requiring that brief on appeal shall set forth each point separately under an appropriate heading which is generally descriptive of the subject matter covered and that statement of any matter in record shall be supported by appropriate reference to the record and a preface containing table of authorities, statutes, etc., is to facilitate disposition of cases upon appeal and to direct the reviewing court's attention to specific error of law allegedly to have been committed by trial court. Rules on Appeal, rule 15(a).

6. Appeal and Error 🔑762

Matters presented for first time in appellant's closing or reply brief will not be considered by reviewing court as opposing counsel is not afforded an opportunity of answering contentions of appellant or of assisting reviewing court by furnishing it with benefit of research.

John A. Jorgenson, Los Angeles, for appellants.

Halverson & Halverson, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court in an action for partition, plaintiffs appeal.

We do not pass upon the merits of the appeal in this case for the reason that appellants' opening brief wholly fails to meet the requirements of Rule 15(a), Rules on Appeal, 36 Cal.2d 1, 15. Rule 15(a) reads thus:

"Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. Such headings need not be technical 'assignments of errors' but should be concise headings which are generally descriptive of the subject matter covered. The statement of any matter in the record shall be supported by appropriate reference to the record. Every brief shall be prefaced by a topical index of its contents and a table of authorities, separately listing cases, statutes, court rules, constitutional provisions, and other authorities."

In the instant case the only attempt to comply with this rule in appellants' opening brief is this statement, "The evidence is insufficient to support the judgment."

[1] Where there are several findings of fact, as in the instant case, a general assignment of error that the judgment is not supported by the evidence is insufficient to call to the appellate court's attention the correctness of any particular finding of fact.

[2] The rule is accurately stated in Cal. Jur.2d (1952), Appeal and Error, § 481, page 313, thus: "The headings should not only show the points involved in the appeal but should be so stated as to compel a reversal in the event that the points stated in the headings are well taken."

[3] A judgment supported by a verdict or findings cannot be assailed on the ground that it is not supported by the evidence so long as the verdict or findings remain undisturbed. The attack must therefore be not upon the judgment directly but upon the verdict or findings. Specifications as to the insufficiency of such evidence must be directed to material findings of fact. (Cf. Coveny v. Hale, 49 Cal. 552, 555; Rosseau v. Cohn, 20 Cal.App. 469, 478, 129 P. 618.)

[4] Error is never presumed, but must be affirmatively shown. (See cases cited 3 Cal.Jur.2d (1952), Appeal & Error, § 260, notes 10 and 11, p. 781.) It is incumbent upon an appellant to make it affirmatively appear that error was committed by the trial court. (Cockrill v. Clyma, 98 Cal. 123, 126, 32 P. 888; Utz v. Aureguy, 109 Cal.App.2d 803, 806, 241 P.2d 639.) It is likewise settled that appellant has the burden of showing error. (Blair v. Williams, 109 Cal.App. 2d 516, 519[4], 240 P.2d 1043.)

[5] It is the duty of counsel to comply with the provisions of Rule 15(a), Rules on Appeal, supra. The provisions of this rule are not mere technical requirements, but are prescribed for the purpose of facilitating disposition of cases upon appeal and directing the court's attention to the specific errors of law alleged to have been committed by the trial court. Not only must an appellant raise the point in his brief properly but he must point out the error specifically showing accurately wherein the lower court's action is deemed erroneous. (See cases cited in 4 Cal.Jur.2d (1952), Appeal & Error, § 480, note 4, p. 311.)

In the present case in appellants' opening brief he does not meet any of the above requirements. It merely recites various bits of evidence which were received and the brief writer's opinion that the evidence does not support the *judgment*. Clearly neither this court nor opposing counsel was informed of defendants' contentions. Therefore having failed to sustain the burden cast upon him of pointing out any error in the decisions of the trial court the judgment must be affirmed.

[6] It is the general rule, which is here applicable, that matters presented for the first time in an appellant's closing or reply brief will not be considered by an appellate court. (Graner v. Hogsett, 84 Cal.App.2d 657, 662 [7], 191 P.2d 497 (hearing denied by the Supreme Court); Monk v. Ehret, 192

Cal. 186, 190 [4], 219 P. 452; Hibernia Sav. & Loan Soc. v. Farnham, 153 Cal. 578, 584, 96 P. 9; Kahn v. Wilson, 120 Cal. 643, 644, 53 P. 24.) The obvious reason for this rule is that opposing counsel is not afforded an opportunity of answering the contentions of the appellant or of assisting the appellate court by furnishing it with the benefit of research, and in the case of questioned findings of fact, references to the record where evidence might be found in support of such findings.

Affirmed.

MOORE, P. J., and FOX, J., concur.

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123 Cal.App.2d 915

PEOPLE v. BUZZIE.

Cr. 879.

District Court of Appeal, Fourth District, California.

March 17, 1954.

Defendant was convicted of first degree burglary and assault by force likely to produce great bodily injury. From an order of the Superior Court of Kern County, Warren Stockton, J., denying defendant's petition for a writ of error coram nobis after expiration of the time for appeal from a judgment imposing prison sentences on the convictions, he appealed. The District Court of Appeal, Barnard, P. J., held that defendant's contentions that the assault count of the information was faulty, that his trial was incompetently handled by appointed counsel, and that he was placed in double jeopardy, denied a speedy trial, and fraudulently induced to admit alleged prior offenses by the district attorney's false promise that they would not be referred to during the trial, if admitted, were insufficient to justify granting of the writ, as such matters were known at the time of trial and could have been raised on appeal from the judgment.

Order affirmed.

1. Criminal Law 🔑997(2)

Defendant's contentions that information charging burglary and assault was faulty in that assault count did not clearly state means by which crime was committed, that his trial was incompetently handled by appointed counsel, and that he was placed in double jeopardy, denied speedy trial, and fraudulently induced to admit alleged prior offenses by district attorney's false promise that they would not be referred to during trial, if admitted, were insufficient to justify granting of writ of error coram nobis after expiration of time for appeal from judgment on verdicts of conviction, as such matters were known at time of trial and could have been raised on appeal from judgment.

2. Criminal Law 🔑997(2)

On application for writ of error coram nobis after expiration of time for appeal from judgment on jury's verdicts convicting applicant of burglary and assault, his affidavit that he found in his attorney's file a letter to applicant, stating that attorney would not be able to enter appeal, and attorney's affidavit that appeal was mentioned in conferences with applicant and that affiant agreed to and did move for new trial, thereby leading applicant to believe, in affiant's opinion, that such motion would constitute beginning of appeal, were insufficient to establish reasonable grounds for applicant to believe that appeal had been taken or to justify review of evidence in coram nobis proceedings and hence did not warrant relaxation or extension of rules applicable to such proceedings.

3. Criminal Law 🔑997(2)

A writ of error coram nobis cannot be used as a substitute for an appeal.

4. Criminal Law 🔑997(12)

A writ of error coram nobis, applied for 2½ years after entry of judgment on jury's verdicts convicting applicant of burglary and assault, was properly denied, in absence of showing of adequate excuse for applicant's failure to use required diligence.

Wayne M. Hamilton, Bakersfield, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Dep. Atty. Gen., for respondent.

BARNARD, Presiding Justice.

Appeal from an order denying a petition for a writ of error coram nobis. The appellant was charged with burglary and, in a second count, with assault with intent to commit murder. An attorney was appointed to represent him. An amended information was filed adding charges of three prior convictions of burglary, one in this state and two in other states. When appellant denied the priors his attorney was permitted to withdraw, and the court appointed another able and experienced attorney to represent him. Thereafter the appellant admitted the prior convictions. A jury found him guilty of burglary in the first degree and, on the second count, guilty of assault by means of force likely to produce great bodily injury. His motion for a new trial was denied, it was adjudged that he was not an habitual criminal, and he was sentenced to prison on each count the sentences to run concurrently. Judgment was pronounced on January 23, 1951, and no notice of appeal was given.

On June 22, 1953, the appellant filed an application for a "writ of coram nobis" in the trial court. This appeal is from the order denying that application. After appellant had filed an opening brief, he requested this court to appoint counsel for him. Counsel thus appointed has filed an additional brief.

[1] The appellant contends that the information filed against him was faulty in that the assault count did not clearly set forth the means by which the alleged crime was committed; that his trial was incompetently handled by his appointed counsel; that he was placed in double jeopardy in that the alleged assault was relied on as an element of both counts; that he was denied a speedy trial; and that he was fraudulently induced to admit the prior offenses in that he was told that if he admitted them they would not be referred to during the trial, whereas the district attorney brought it to the attention of the jury by asking him if he had ever been convicted of a felony.

All of these matters were known at the time, could have been raised upon an appeal, and none of them would justify the granting of the writ applied for. People v. Chapman, 106 Cal.App.2d 51, 234 P.2d 716. Moreover, as counsel for appellant apparently concedes, the facts relied on by the appellant in connection with these matters would not have supported these contentions had they been made upon an appeal.

[2, 3] Counsel for appellant contends, however, that where the time for appeal has elapsed and the defendant had reasonable grounds for believing that an appeal would be taken, the court should relax or extend the rules applicable to coram nobis proceedings and review the sufficiency of the evidence. In support of this contention counsel argues that he believes, based on his talks with the attorneys who tried the case, that the evidence with respect to the burglary count was insufficient to justify an inference of intended theft; that this appellant had reasonable grounds to believe that an appeal would be taken; and that the proposed extension of the rules applicable to this proceeding is supported by People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868 and In re Byrnes, 26 Cal.2d 824, 161 P.2d 376.

Neither of these cases involved a coram nobis proceeding. In the Slobodion case a motion to dismiss the appeal was denied on the ground that the delay in filing a notice of appeal was caused by the prison authorities, without fault on the part of the appellant. In the Byrnes case a timely appeal had been taken and, on habeas corpus, the defendant was afforded an opportunity to apply for relief from a default in the presentation of the record.

In support of the contention that the appellant had reasonable grounds to believe that an appeal would be taken for him, two affidavits are attached to counsel's brief. In his own affidavit counsel states that he found in the file of the attorney who represented the appellant at the trial a letter from that attorney to the appellant dated March 1, 1951, stating:

> "Concerning the appeal, we would not be able to enter the same. I don't know whether there are other attorneys who would be willing to prosecute such an appeal for you; however, the appointment made by the court covered only the trial of the action in the superior court."

The affidavit of the attorney who represented appellant at the trial states that he had one or two conferences with the appellant in which an appeal was mentioned; that he agreed to make a motion for a new trial, and did so; that he recalled no promise to prepare an appeal; and that, in his opinion, the appellant was thus confused and led to believe that the motion for a new trial would constitute the beginning of an appeal.

These affidavits were not presented in the trial court and are not a part of the record on this appeal. City of Chico v. First Ave. Baptist Church, 108 Cal.App.2d 297, 238 P. 2d 587; Acme Investment Corp. v. Thompson, 216 Cal. 335, 14 P.2d 87. Had this been done they would hardly be sufficient to establish reasonable grounds for believing that an appeal had been taken; and time for taking an appeal cannot be thus extended. In any event, they are not sufficient to justify a review of the evidence in this proceeding. No extrinsic fraud is disclosed and the matters now relied on are not such facts as would have prevented the entry of a judgment had they been known at that time. People v. Cowen, 118 Cal.App.2d 106, 257 P.2d 79. The purpose and limitations of a coram nobis proceeding are well established, and such a writ cannot be used as a substitute for an appeal.

[4] A further consideration is that this writ was applied for some 2½ years after judgment was entered, and no adequate excuse appears for the failure to use the diligence required of one seeking relief by this form of writ. People v. O'Connor, 114 Cal. App.2d 723, 251 P.2d 64.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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123 Cal.App.2d 728

LOCKHART et al.
v.
CITY OF BAKERSFIELD et al.

Civ. No. 4656.

District Court of Appeal, Fourth District, California.

March 8, 1954.

Action for injunction against city and its executive officers to prevent alleged irregular and unauthorized zoning and other action. The Superior Court, Kern County, R. B. Lambert, J., sustained defendants' demurrer and entered judgment of dismissal and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that resolution which was passed pursuant to statute giving cities power, when exercised in connection with housing projects, to rezone any part of their territory or to make exceptions to building regulations by resolution of their governing bodies, was not subject to referendum provisions of city charter of city which entered into agreement with housing authority, and city's action in rezoning, by resolution, one part of area, which had been first zoned after housing authority obtained approval for development, was valid, even though prior ordinance to same effect had been suspended by referendum.

Judgment affirmed.

1. Municipal Corporations ⚷54

Where city had entered into binding cooperation agreement with housing authority to develop housing project and housing authority had acquired site involved and had expended funds thereon, city's only function under the agreement was to administer the law. Health and Safety Code, §§ 34200 et seq., 34500 et seq.

2. Municipal Corporations ⚷54

When acting pursuant to the Housing Authorities Law, city is an agency of the state functioning under state law to fulfill state purposes and is not acting pursuant to its fundamental law to effect solely municipal objectives. Health and Safety Code, §§ 34200 et seq., 34500 et seq.

3. Municipal Corporations ⚷108.6

Resolution which was passed pursuant to statute giving cities power, when exercised in connection with housing projects, to rezone any part of their territory or to make exceptions to building regulations by resolution of their governing bodies, was not subject to referendum provisions of city charter of city which entered into agreement with housing authority, and city's action in rezoning, by resolution, one part of area, which had been first zoned after housing authority obtained approval for development, was valid, even though prior ordinance to same effect had been suspended by referendum. Health and Safety Code, §§ 34326, 34512, 34513, 34521.

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Siemon & Siemon, Bakersfield, for appellants.

Charles Carlstroem, City Atty., Bakersfield, for respondents.

MUSSELL, Justice.

Plaintiffs appeal from a judgment of dismissal entered after the demurrer of defendants City of Bakersfield, Leland Gunn, Justus A. Olssen and Marian S. Irvin was sustained without leave to amend. The action was for injunction against the city and its executive officers to prevent alleged irregular and unauthorized zoning and other action. The principal question involved is whether the city may by resolution rezone a portion of the city while its ordinance rezoning the same portion of the city was suspended by referendum.

The area involved herein was zoned as an R-1 (one family residential) district and was duly rezoned as a two family residential district by ordinance No. 953, New Series, on September 29, 1952. A referendum petition was thereafter filed requiring the submission of this ordinance to the voters and the city council fixed the date of the referendum election for March 24, 1953.

On December 29, 1952, the city council, pursuant to the Housing Co-operation Law, Health & Safety Code sections 34500-34521, inc., adopted a resolution (No. 66-52) relating to co-operation with the housing authority of the county of Kern in the development of low-rent housing project No. CAL-8-6. It is recited therein that on January 22, 1951, the city consented that the housing authority operate in the city and thereafter authorized the execution of a co-operation agreement with the said authority; that on January 29, 1951, the city council approved the development of a housing project which was planned at that time for development in a then recently annexed area of the city known as the "Sunset-Mayflower District" and thereafter proceeded with plans and specifications and undertook to acquire title to the site for the development of the dwelling unit identified as "project CAL-8-6"; that the "Sunset-Mayflower District" was not subject to city zoning at the time the housing authority sought and obtained the approval of the planning commission for the development of the project therein; that the city council at about the time the housing authority commenced the acquisition of the lands for the project and without considering that fact, adopted ordinance No. 923, New Series, on September 17, 1951, to restrict all development in the newly annexed area to single family residential structures until necessary studies were made to properly classify the entire district; that upon approval by the city of the project, the housing authority acquired the site for the project and expended considerable sums for the preparation of plans and specifications therefor; that on October 27, 1952, the city council reaffirmed the said co-operation agreement; that reduction in the land area of the site makes possible the development on the remainder of approximately 184 dwelling units of duplex construction; that certain changes in streets and alleys were agreed upon; that the housing authority submitted to the council a map of the revised project site plan; that the co-operation agreement of January 29, 1951, contains an agreement on the part of the city to make such changes in any zoning of the site and surrounding territory of such project as are reasonable for the development and protection of such project and the surrounding territory; that the city council finds that a change in the interim zoning of that part of the "Sunset-Mayflower District" described in the resolution to permit the construction of duplex units and other buildings is reasonable and necessary for the development and protection of the low-rent housing project and the surrounding territory. The city council then approved the development of the said 184 dwelling units on the site, approved the said revised map, and agreed to the improvements shown thereon. It was then resolved "That pursuant to the Housing Authorities Law [§ 34200 et seq.] and Housing Co-operation Law of the State of California, the site hereinafter described is hereby rezoned to permit the construction of duplex dwellings, and administration and maintenance building and yard and a community hall, and the City Council of the City of Bakersfield, pursuant to the laws referred to, expressly approves the site hereinafter described for the development of approximately 184 dwelling units of the low-rent housing project known and described as Project CAL–8–6 of the Housing Authority of the County of Kern." It was further resolved that the use of the lands described therein for the public buildings to be developed by the housing authority is necessary and that the proposed low-rent housing project will not be injurious to property, and will not be detrimental to the health and general welfare of persons residing or working in the neighborhood of the project and "that this Resolution, adopted in furtherance of the City's obligation under the Co-operation Agreement of January 29, 1951, and pursuant to the Housing Co-operation Law of the State of California, shall take effect immediately and shall supersede any existing ordinance or resolution inconsistent or at variance with the provisions of this Resolution."

In January, 1951 the city consented that the housing authority operate in the city of Bakersfield and authorized the execution of a co-operation agreement with the authority approving the development of a housing project. Pursuant to this agreement, the housing authority acquired the site involved and expended considerable sums for the preparation of plans and specifications therefor. Blodgett v. Housing Authority, 111 Cal.App.2d 45, 49, 243 P.2d 897. The city approved the development of 184 dwelling units on the site and rezoned the property by resolution under the provisions of Section 34521 of the Health and Safety Code.

The Housing Authorities Law and the Co-operation Agreement Law of the State of California were held to be constitutional in Housing Authority v. City of Los Angeles, 38 Cal.2d 853, 861, 243 P.2d 515, and in Housing Authority v. Superior Court, 35 Cal.2d 550, 558, 219 P.2d 457, 461, it is said that the court in determining that said law was constitutional necessarily established that its public purpose and policy was to be effective throughout the state; that "'the act also prescribed the powers, duties and obligations of the authority and of the city in carrying out its salutary purposes. Every necessary legislative act was completed by the legislature. There was nothing left to do except to administer the law * * * to gain those advantages the city must proceed in the manner specified in the act. Furthermore, since the statute is the only authority under which the city may act in the premises, and the subject matter of the action is of more than local concern, the city is bound to proceed in accordance therewith.'" It was further held that the actions of the local governing bodies under the statewide housing laws are administrative only for the purpose of giving statewide effect to the declared legislative policy.

In Housing Authority v. City of Los Angeles, supra, 38 Cal.2d 862, 243 P.2d 515, it was held that the city of Los Angeles, under the Housing Authorities Law, is an agency of the state, functioning under the state law to fulfill state purposes, and is not acting pursuant to its fundamental law to effect solely municipal objectives; that upon the formation of the housing authority the state law thereupon and thereafter controlled the city and the housing authority and no other law concerning the acquisition, operation or disposition of property is applicable to the authority except as specifically provided; that the city, having taken the initial discretionary action to bring the housing authority into operation and having approved a project and entered into a co-operation agreement, there was nothing left to be done by either contracting party but to perform administratively whatever was necessary to carry the agreement into effect.

[1] In the instant case, after the city entered into a binding co-operation agreement in accordance with the housing law and co-operation agreement law and the housing authority had acquired the site involved and had expended funds for plans and specifications, there was nothing left for the city to do except to administer the law. This it did by rezoning the property by resolution authorized by section 34521 of the Health and Safety Code, which provides as follows:

> "*Procedure for exercise of powers.* The exercise by a state public body of the powers granted in this chapter may be authorized by resolution of its governing body adopted by a majority of the members present at a meeting. The resolution may be adopted at the meeting at which it is introduced. The resolution shall take effect immediately and need not be laid over, published, or posted."

[2] Prior to the adoption of the resolution involved the city had passed an ordinance rezoning the property in the same manner. A referendum petition requiring the submission of this ordinance to the voters was filed, an election was called, and a date fixed for such election. Appellant argues that by reason thereof the city was thereby deprived of legislative power pending the referendum to deal with the subject by reenactment of the suspended ordinance or to take other action of substantially the same effect; that section 34521 of the Health and Safety Code merely authorizes the city to take jurisdiction of a housing project by resolution, leaving succeeding procedures to be governed by existing laws and regulations and subject to applicable ordinances; that the resolution involved was violative of section 34326 of the Health and Safety Code, which provides:

> "*Planning, Zoning and Building Laws.* All housing projects are subject to the planning, zoning, sanitary, and building laws, ordinances, and regulations applicable to the locality in which the housing project is situated. In the planning and location of any housing project, an authority shall take into consideration the relationship of the project to any larger plan or long-range program for the development of the area in which it functions."

We do not agree with appellants' contentions. The city of Bakersfield, acting under the provisions of the State Housing Law and the Housing Authorities Law, is an agency of the state, functioning under state law to fulfill state purposes and is not acting pursuant to its fundamental law to effect solely municipal objectives. Housing Authority v. City of Los Angeles, supra, 38 Cal.2d 862, 243 P.2d 515. Under sections 34511 and 34512 of the Health and Safety Code the city may cause parks, playgrounds, recreational, community, educational, water, sewer or drainage facilities, or any other works which it is otherwise empowered to undertake, to be furnished adjacent to or in connection with housing projects, and may furnish, dedicate, close, pave, install, grade, regrade, plan, or replan streets, roads, roadways, alleys, sidewalks, or other places which it is otherwise empowered to undertake. Section 34513 provides that a state public body may: (a) Plan or replan, zone or rezone any part of its territory; and (b) Make exceptions to building regulations and ordinances. These granted powers are not made subject to referendum filed by the electorate of the city. Under the provisions of section 34326 of the Health and Safety Code housing projects are subject only to such zoning laws as are applicable to the locality in which the housing project is situated and in the instant case the city may not be restrained from performing the administrative acts required of it by state law. The referendum, therefore, is inapplicable to prevent the performance of the co-operation agreement by the city.

Appellant cites Drake v. City of Los Angeles, 38 Cal.2d 872, 243 P.2d 525, 526, in support of his contentions. However, in that case the factual situation here presented was not before the court. The plaintiff there sought an injunction to restrain the city and housing authority from proceeding with the housing project by an ordinance which had not been submitted to the planning commission for report and recommendation. The court held that there was no provision in the statute requiring submission or report to the planning commission prior to the city's approval of the project and dismissed the action. It was therein stated that the housing authority was required by section 34326 of the Health and Safety Code to conform the plans for location, use, sanitary improvements and building restrictions to the laws and ordinances applicable in the locality selected. However, it was also held that:

> "Section 34320 of the Housing Authorities Law provides that no law concerning the acquisition, operation, or disposition of property by other public bodies is applicable to the housing authority unless the legislature specifically so states. The provisions of the charter and of the state conservation and planning act apply to the property which is the subject thereof, namely, city acquired, owned and operated public sites and buildings. Const., art. XI, Sec. 6; see also Riedman v. Brison, 217 Cal. 383–387, 18 P.2d 947. The property and projects contemplated under the Housing Authorities Law are those to be acquired, developed, constructed, owned and operated by the housing authority, and are governed by that statute except as otherwise specifically required. The local law governing the acts and authority of the city council as to slum-clearance and low-rent housing projects has been superseded by the statute. Housing Authority v. Superior Court, 35 Cal.2d 550, 219 P.2d 457."

It was further held that the city is vested with power to zone or rezone and make exceptions to building regulations and that "The exercise of any of the granted powers is authorized to be taken by resolution of the city council adopted by a majority of the members present at a meeting. The resolution may be adopted at the meeting at which it is introduced, is to take effect immediately and need not be laid over, published or posted. Sec. 34521, Health & Safety Code."

[3] In the instant case the statute does not provide that zoning or rezoning ordinances or resolutions adopted pursuant to the state housing laws are subject to the referendum provisions of the city charter and such provisions are therefore inapplicable.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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123 Cal.App.2d 741

PEOPLE v. SKINNER.

Cr. 2879.

District Court of Appeal, First District, Division 2, California.

March 9, 1954.

Rehearing Denied March 24, 1954.

Hearing Denied April 7, 1954.

Defendant was convicted of manslaughter, committed by setting a fire in which several people died. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered judgment, and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Dooling, J., held, inter alia, that admission of defendant's extrajudicial statements concerning the starting of the fire was not prejudicial error.

Judgment and order affirmed.

1. Criminal Law 🔑1169(12)

In murder prosecution arising out of fire, allegedly set by defendant, in which several people died, admission of defendant's extrajudicial statements to effect that, at time fire started, he was prowling in building to see if there was anything worth while taking, was not prejudicial error, as against contention that such statement constituted confession of murder, where jury was not instructed on burglary and could not have found defendant guilty of murder on theory that death occurred in commission of burglary, and where no specific objection was made that statements constituted confession of murder because of admission of burglary therein.

2. Criminal Law 🔑1043(3)

On appeal from conviction for manslaughter, arising out of fire, allegedly set by defendant, in which several people died, defendant could not raise objection to admission of his extrajudicial statements on ground that such statements amounted to confessions of manslaughter, where no such objection was made in trial court, and where defendant's counsel, at trial, had by his own conduct directed attention of trial judge away from any such theory by the specific objection, abandoned on appeal, that the statement constituted confession of murder.

3. Criminal Law 🔑1169(12)

Failure to require laying of proper foundation for a confession is without prejudice if proof is subsequently introduced.

4. Criminal Law 🔑736(2)

In murder prosecution arising out of fire, allegedly set by defendant, in which several people died, wherein defendant testified that he made an extrajudicial statement that the fire started accidentally for reason that he was told by police inspector that he would be charged with murder if he did not admit that he set fire accidentally but that if he did admit that he set it accidently he would be charged with nothing, statement of inspector, called in rebuttal, that, as he recalled, there was no such conversation, was for jury to weigh and to give such effect in contradiction of defendant's testimony as jury found it entitled to.

5. Criminal Law 🔑516

A "confession" is a statement by one who is a defendant in a criminal trial by which he acknowledged certain conduct of his own that constitutes a crime for which he is on trial.

See publication Words and Phrases, for other judicial constructions and definitions of "Confession".

6. Criminal Law 🔑406(1)

An "admission" is something less than a confession, in that it does not alone, even if true, support a deduction of guilt.

See publication Words and Phrases, for other judicial constructions and definitions of "Admission".

7. Criminal Law 🔑517(1)

Jury, before it may take a confession into consideration, must for itself find whether or not it was a voluntary confession, and if jury concludes that a confession was not made voluntarily, it is duty of jury to entirely disregard it and not consider it for any purpose.

8. Criminal Law 🔑1169(5)

In murder prosecution arising out of fire, allegedly set by defendant, in which several people died, admission of defendant's extrajudicial statements to effect that fire was accidentally started was not prejudicial error, in view of fact that, before trial was concluded, circumstances surrounding and preceding the making of such statements were placed before jury, and that jury was instructed that it could not consider any extrajudicial statement of defendant by which he acknowledged conduct constituting crime of manslaughter, if such statement were not freely and voluntarily made.

9. Criminal Law 🔑388

The reception or rejection of type of testimony designated as experiments lies largely within discretion of trial court, with limitation that it must be shown that substantially the same conditions existed, and that evidence shall be of such character as to aid rather than to confuse minds of jurors with collateral matters.

10. Criminal Law 🔑650

Whether an experiment will aid or confuse jurors is within sound discretion of trial court.

11. Criminal Law 🔑650

In murder prosecution arising out of fire, allegedly set by defendant, in which several people died, court did not abuse its discretion in refusing to permit certain experiments, mainly dealing with combustibility of certain materials, to be performed before jury, where none of such experiments would help to establish that defendant did not set the fire, and where there was no way for court to determine if experiments were performed under similar conditions.

Leslie C. Gillen, William F. Cleary, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Charles E. McClung, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

This is an appeal from a judgment and an order denying a motion for a new trial. Appellant was charged in an indictment with eight counts of murder. He was convicted of the included offense of manslaughter in eight counts and was sentenced to the state prison at San Quentin for the period prescribed by law for each count, the sentences to run concurrently.

Early in the morning of July 22, 1951 the College Court Apartment house at 214 Haight Street in San Francisco was destroyed by fire. Eight persons who were tenants in the apartment house died in the fire.

The fire apparently started some time between 4:35 and 5 in the morning. Mr. James Pope delivered the Examiner newspaper to 214 Haight on the morning of the fire. He arrived at the premises around 4:35 a. m. and stayed there approximately three minutes. Pope entered the building, passed through the lobby, delivered papers on the first, second and fourth floors. He noticed no smoke or fire nor did he see anyone in the lobby or corridors of the building.

Mr. Bernard Nosker, a branch manager for the San Francisco Examiner, was driving north in a delivery truck on Laguna towards Haight Street on the same morning. When he arrived at the corner of Laguna and Haight he heard a woman screaming with her head out the window. He drove in front of the building and stopped. She was shouting "fire". Nosker saw no evidence of fire or smoke but immediately backed up his automobile to the corner and turned in a fire alarm at the corner of Laguna and Haight. He returned to the building and with the aid of his helper began ringing the doorbells of the individual apartments. The Battalion Chief arrived within 3 or 4 minutes in a coupe. Upon observing the extent of the fire he transmitted a greater alarm immediately. The Battalion Chief stated that he received the alarm at 5:12 a. m.

Frank Kelly, Chief of the Division of Fire Prevention and Investigation of the San Francisco Fire Department, arrived at the fire about 5:30 a. m. on the day of the fire. He examined the premises several times after that. He stated that the point of origin of the fire was in the lobby of the apartment house. In his opinion the fire originated in two separate places in the lobby. One fire originated in the storeroom in the northwest section of the lobby area, and the other originated in the passageway between the west side of the storeroom and the stairway extending from the passageway to the second floor. In Kelly's opinion the fire was of incendiary origin. He based this opinion on several facts and observations including the following: (1) the point of origin; (2) the rapidity with which the fire burned; (3) the damage done to the surrounding partitions; (4) the separation of the two points of origin on opposite sides of heavy partitions; and (5) several holes burned in the first floor which indicates some volatile substance was sprayed on the floor.

The lobby was a comparatively large room and at one side was a solid wood counter with a pencil sharpener fastened to it. Across the lobby was the elevator and the stairway which extended to the roof. Next to the stairs was a room which had monks cloth curtains extending across the front of it. This room was used as a storeroom and contained miscellaneous objects stored there by the tenants. Mrs. Monroe, one of the lessees of the building, testified that to her knowledge there was no paint thinner in this room

There was a toolroom off the lobby in an area referred to as an annex. Mr. Monroe had formerly been a paint contractor and among other things kept his painting supplies including paint thinner in this toolroom. The room had been kept padlocked for at least two years before and there was only one padlock key which was kept in the possession of the Monroes.

Francis J. Ahern, a police inspector in charge of the homicide detail of the San Francisco Police Department, was called upon to investigate in the course of his official duty because eight people had lost their lives in the fire. He first saw the appellant in a service station at which he worked on the night of Wednesday, July 25. He asked appellant to come down to the Hall of Justice to answer some questions and the latter followed in a truck. Appellant said in the statement, which was read at the trial by the interrogator and witness Ahern, that he delivered papers on the morning of the fire to 214 Haight Street around 3:30–3:40 a. m. Appellant had a key to the front door of the apartment house so that he could deliver the papers directly to the individual apartments. He did not see any fire or smell any smoke or any volatile liquid during the time that he was in the building. Appellant first heard about the fire about 6:30 or 7 on the same morning when it was necessary for him to return to the same area to deliver a paper that he had forgotten to deliver on his regular rounds. The newspaper route on which the appellant was working belonged to Russell Hardy. Appellant had been helping Hardy out for about a month prior to the fire and on the morning of July 22 the appellant delivered the route by himself. On Sundays the papers were usually picked up about 4:30 a. m. and it took from two to two and a half hours to deliver the entire route.

On the afternoon of the day following the first interview with appellant, Inspector Ahern interviewed him a second time. Appellant stated that he lighted a cigarette with a lighter on the fourth floor. He returned to the lobby and went behind the counter located there in order to look for a pencil with which he could write down charges in the route list. He found no pencil. He left the counter and crossed the lobby to the spot where the drapes were hanging. He looked behind the drapes and admitted that he would have taken anything he found if he could have used it. In the meantime his cigarette had gone out so he attempted to relight the cigarette while standing in the room or closet. He was standing "half in and half out" of the drapes and when he lit the cigarette with the lighter the drapes caught fire with a "poof". He became frightened and ran out of the building. Appellant noticed later that the jacket he was wearing that morning had a burned hole on the shoulder which was not there before the fire. He told no one that he had started the fire. After leaving the building he delivered some more papers. After that he went to a coffee shop in order to figure what to do. He decided to go out to Hardy's house. He told Hardy that he needed help with the route. They finished delivering papers and also looked at the fire.

The police found the cigarette lighter in an automobile with the partially burned jacket. It was determined that the burned hole in the right shoulder had been caused by a cigarette and not by the fire.

As a result of this statement by appellant he was booked on the charge of manslaughter.

The next day Skinner was taken to 214 Haight Street where another statement was made by appellant. He repeated the same explanation of the cause of the fire that he had given the day before at the Hall of Justice, that is the fire started accidentally when he lighted his cigarette.

Inspector Ahern again interviewed appellant on Monday, July 30. Appellant's mother was present at the interview. The Inspector told the mother that he did not believe appellant's version of what happened. Mrs. Skinner then asked her son if he was afraid to tell the truth due to the fact that many people lost their lives in the fire. The appellant stated that he was afraid on account of the lives that had been lost. Mrs. Skinner told appellant to tell the whole truth and not a half truth. As a result appellant stated that he deliberately set the fire. He knocked down and broke a jar of fluid that smelled like paint thinner while he was rummaging around in back of the drapes. He stooped down, cupped it in his hand on the floor and threw it around and lit it.

Later that same day appellant made a confession. He stated that he had delivered the newspapers, he came downstairs and snooped around the lobby and the closet with the drapes hanging in front of it. While snooping in the closet he knocked over two quart mayonnaise jars of paint thinner that were located in the cabinet in back of the shelf. Appellant got a crazy idea to see how the curtain would burn so he splashed the fluid that was in a puddle on the floor over the curtains. Then he lit the drapes with his lighter. He splashed the fluid by swinging his hand through the puddle and following through to the curtain. He stated that his reason for saying that the fire started accidentally in his previous statements was that he did not mean to kill the people and did not want to get charged with the murders. He admitted that it was not true that his jacket caught on fire when he ignited the curtains. He stated that his version of what happened as given in his previous statements was true except that the fire was deliberately set and did not start accidentally.

Appellant also gave a statement to the District Attorney shortly after the statement referred to above was taken by Inspector Ahern. Skinner made substantially the same confession. He scooped up the fluid that spilled on the floor in the palm of his hand and got about one-half pint on the drapes. The drapes were light colored, soft textured, and felt sort of hairy. He admitted that his previous stories were false and that he decided to tell the truth when his mother was present with Inspector Ahern. He said, "I just got tired of lying."

Appellant testified before the grand jury and again gave substantially the same story that is stated above. That is, he admitted snooping in the closet, knocking over the jars, splashing the fluid on the curtains and lighting them. He became frightened and ran outside but he thought the blaze was dying out when he left the lobby. His motive remained the same: "I just got a crazy notion all of a sudden." He lit the fluid because he thought "it would go out and they would have a minor mystery about how the curtain burned."

Appellant's counsel objected to the introduction of the above extrajudicial statements on the ground that they were not freely and voluntarily given. There was an extensive voir dire examination of Inspector Ahern before he was allowed to read the statement made by appellant on July 26. This is the statement in which Skinner admitted that he accidentally started the fire. The room in which the statement was taken was approximately 20 by 14 feet in area. Besides the appellant and the Inspector there were several men in the room including the District Attorney, Chief Assistant District Attorney, the Fire Marshal, three Inspectors of Police, and a Police Reporter. The interrogator did not tell Skinner that if the fire was an accident he was guilty of no crime. The Inspector did not recall anyone else stating to Skinner that if the fire was an accident it would not be a crime. The Inspector did not tell appellant that he would be kept there until an admission was got out of him one way or another. There is no evidence from the transcript that the appellant was subject to any duress nor was he promised any immunity. Before the extrajudicial statements were allowed in, in which Skinner admitted deliberately setting the fire, appellant's counsel extensively examined all those present including appellant on voir dire. With the exception of Skinner none of those questioned indicated that appellant was subjected to any duress or physical coercion. Skinner testified that he had nothing to do with the fire nor did he see any fire when he delivered the papers to the apartment on the morning of July 22, 1951. He was informed that if he accidentally caused the fire no crime was committed and the police would have to let him go. When he was informed of this he admitted that he accidentally caused the fire although this was not true. That evening Skinner was put in the juvenile tank and during the night the lights were turned off and on. Early the following morning he was awakened and questioned by some man. After he left another man pulled up a chair outside the cell and remained there looking at him until the homicide inspectors came in. The same thing happened on the following morning. He admitted that he deliberately set the fire because he was at the point that he would say anything just so they would leave him alone. The police also seemed to have turned his mother against him. He testified that he lied when he admitted deliberately or accidentally setting the fire. Skinner did not understand the admonition that was read to him by the foreman of the grand jury before he testified before them. He testified that he was confused because he was informed that he did not have to testify but that if he did his statements could be used against him. The foreman of the grand jury read the admonition to the appellant at the end of which Skinner stated he was willing to testify.

There was more voir dire examination before the testimony before the grand jury was read.

Testimony was introduced by the District Attorney that rebutted Skinner's statements that the lights were turned on and off during the night and that a man sat outside the cell and stared at him every morning during his stay in the juvenile tank.

Appellant's main contention is that his extrajudicial statement in which he stated that he accidentally set the fire should not have been admitted without requiring preliminary proof that it was freely and voluntarily made, with full opportunity on voir dire to explore that question.

[1] While no such claim was made in his opening brief, in his closing brief and on oral argument appellant argued that these statements constituted a confession of the crime of murder, because of appellant's admission that he went into the room behind the curtain to see if there was anything worthwhile taking; that he was prowling and if he had seen anything in there which he could have used he would have taken it. Appellant argues that this constituted an act of burglary and that the deaths resulting therefrom would consequently constitute murder by statutory definition. No such objection was made in the trial court, and more important the jury was not instructed by the judge on what constitutes the crime of burglary although in one sentence the prosecuting attorney in his argument stated that he expected the judge to give such an instruction. Since the jury was not instructed on that theory it could not have found appellant guilty of murder on the theory that the deaths occurred in the commission of a burglary. Under these circumstances, in the absence of a specific objection that the statement constituted a confession of murder because it contained an admission of burglary, we cannot find any prejudice to appellant on that theory.

[2] The more serious argument is that in any event these statements amounted to confessions of manslaughter, an included offense of which the jury in fact found the appellant guilty. Appellant concedes that no objection was made in the trial court on this ground; but he argues that a timely and sufficient objection is not necessary where a fundamental matter of public policy is involved, citing People v. Rodriguez, 58 Cal.App.2d 415, 421, 136 P.2d 626.

The only question presented to the trial court by counsel for appellant was whether the statement of the accidental setting of the fire, taken with appellant's later confessions of murder, was part of a confession of murder. Having pointed the trial court's attention so specifically to this question appellant should not now be permitted to raise another objection which occurred to no one during the trial and which appellant's counsel by his own conduct directed the attention of the trial judge away from, by the specific objection (abandoned on this appeal) that the statement together with appellant's later ones was an integral part of a confession of murder.

[3] We hold this the more readily since before the trial was concluded the circumstances surrounding and preceding the telling of the "accident" story by appellant were placed before the jury. It has been held that the failure to require the laying

of a proper foundation for a confession "is without prejudice if the proof is subsequently introduced." 8 Cal.Jur., Criminal Law, sec. 205, p. 116.

[4] Appellant testified that he gave the "accident" statement because Inspector Jorgensen told him that he would be charged with murder if he did not admit that he set the fire accidentally, but if he did admit that he set it accidentally he would not be charged with anything. Inspector Jorgensen, called in rebuttal testified "The exact conversation I do not recall. * * * As I recall there was no such conversation." Appellant argues that this amounted to no more than a statement that the witness did not remember whether or not such a conversation took place. In this we believe the appellant is putting too narrow a construction on the testimony. "As I recall" does not mean "I do not recall", but rather "as I recollect it" or "as I remember it." It was for the jury to weigh this statement and to give it such effect in contradiction of appellant's testimony as they found it entitled to.

[5–7] The jury was correctly instructed that: "A confession is a statement * * by one who is a defendant in a criminal trial * * * by which he acknowledged certain conduct of his own that constitutes *a* crime for which he is on trial * * *." We have emphasized the indefinite article: "*a* crime", not "*the* crime". From the court's other instructions the jury knew that appellant was on trial for manslaughter as an included offense. The jury was further instructed correctly: "An admission is something less than a confession, in that it * * * does not alone, even if true, support a deduction of guilt." The jury was also correctly instructed that: "The jury, before it may take a confession into consideration, must for itself find whether or not it was a voluntary confession. If the jury concludes that a confession was not made voluntarily, it is the duty of the jury to entirely disregard the same and not consider it for any purpose."

[8] When it came to consider the crime of manslaughter these instructions told the jury that it could not consider any extrajudicial statement of appellant "by which he acknowledged certain conduct of his own that constitutes" the crime of manslaughter, if it concluded that it was not freely and voluntarily made. On all the facts of this case we can find no prejudicial error in connection with the admission of the "accident" story.

Appellant's second contention on appeal is that the trial court erred in refusing to permit certain experiments to be performed in front of the jury and in refusing to permit testimony of certain experiments performed outside the presence of the jury.

There are four series of experiments which the trial court refused to allow the defense to perform in the courtroom and in some cases refused to allow testimony of the results of such experiments.

The first series of experiments involved the igniting of monks cloth, the material out of which the drapes were made, in order to determine if the material would go "poof" as stated by appellant. It was tried first without the benefit of paint thinner and then it was tried with a piece of cloth soaked in the solvent. The expert witness for the defense was allowed to testify that the normal reaction on the burning of monks cloth with a volatile substance on it would be that it would catch fire but not go off with a "poof". Without the benefit of a volatile substance, the monks cloth would not ignite with a "poof". The expert witness was not allowed to testify what the actual results of his own experiments with monks cloth were for the reason that the cloth used in the experiment could not be shown to be similar in age, weave, etc., to the cloth that was ignited at the source of the fire.

Another series of experiments involved the dropping of sealed quart mayonnaise jars containing water equivalent in weight to a quart of paint thinner from a height of 3 and 6 feet. This experiment was done in order to ascertain whether or not the glass would break and if so the size of the pieces of glass and how far the pieces would spread. The purpose of the experiment was to show (1) the glass invariably broke, and (2) it would have been impossible for the appellant to scoop his hands through the solvent without cutting himself. The trial court did not allow any testimony on the results of such experiments nor did he allow the witness to perform the experiment in court in front of the jury. The court's reason for refusing to admit such testimony or allow such an experiment was based on the lack of knowledge of the type of glass in the container, the amount of fluid in the containers, the exact manner in which they fell from the shelf, etc. In short, there were too many variables to allow in such testimony or experiments. But the witness was allowed to testify of the breaking propensities of glass containers filled with fluid as contrasted with an empty container.

Another experiment was the pouring of paint thinner on a hardwood floor in order to see how rapidly it would spread and whether it would remain in a puddle. The expert witness was allowed to testify that the fluid would spread evenly on a level floor to about the thickness of a dime.

Another group of experiments concerned the burning of paint thinner on a pine floor in order to demonstrate that paint thinner would not burn through the flooring. Like the others the court refused to allow the performance of this experiment in the presence of the jury. The witness was allowed to testify to the results of an experiment in which he ignited paint thinner spread out on an oak floor. None of the wood was burned, and the fire had a slight bleaching effect only, turning the surface black at the most. The results of this experiment were introduced primarily to rebut the fire inspector's testimony that he observed charred spots in the toolroom that indicated some volatile substance had been burned there.

[9, 10] In People v. Ely, 203 Cal. 628, 633, 265 P. 818, 820 the court had this to say about the type of testimony designated as experiments: "The reception or rejection of such testimony lies largely within the discretion of the trial court, with this limitation—that it must be shown that substantially the same conditions existed, and, further, that the evidence shall be of such a character as to aid rather than to confuse the minds of the jurors with collateral matters." Today it is fundamental law that it is within the sound discretion of the trial court to determine whether or not an experiment will aid or confuse the jurors. People v. King, 104 Cal.App.2d 298, 307, 231 P.2d 156.

[11] Applying this principle to the facts here we can find no abuse of discretion. The experiments were of primary importance in relation to the extrajudicial statements. Appellant argues that these experiments if performed in front of the jury would illustrate in a much more forceful manner the physical impossibility that the fire began as appellant stated than by merely relating to the jury the results of such experiments. It should be noted that none of these experiments help to establish that appellant did not set the fire. There was no way for the trial court to determine if the experiments were performed under similar conditions. The apartment house was demolished, and there were too many variables that would offset any value that might result from performance of such experiments, for example the degree of smoothness of the floor or lack of it. If such experiments had been allowed to be performed in the courtroom, it would have unduly emphasized the inconsistencies of appellant's story without first establishing similar conditions. The inconsistencies also go to collateral facts and do not help to rebut the admission of the basic fact—that he started the fire.

Appellant cites and relies on two cases to support his contention that the court abused its discretion in failing to allow the performance of the experiments. In People v. Freeman, 107 Cal.App.2d 44, 236 P.2d 396, the court held that it was not an abuse of discretion for the trial court to allow the prosecution to show motion pictures of an experiment conducted by officers under similar conditions demonstrating the physical fact that matches will stay lighted after being tossed from a moving automobile. Appellant argues that if it is not an abuse of discretion to allow such evidence on behalf of the prosecution, it is an abuse of discretion to fail to allow in a similar type of evidence in this case on behalf of defendant. As pointed out by respondent the case is not directly in point. The Freeman case cannot be said to stand for the proposition that a failure to allow such evidence would have been an abuse of judicial discretion. Judicial discretion has a wide range within which to swing, and to be an abuse of discretion there must be no logical reason for the court's action.

The other case, People v. Halbert, 78 Cal.App. 598, 248 P. 969, is even less in point since it dealt only with the failure to allow evidence of experiments, not the refusal to permit experiments in the courtroom. At pages 607–608 of 78 Cal.App., 248 P. 969, of that case the court held that evidence of experiments should only be admitted where the conditions are substantially identical. We can find no abuse of discretion in the trial court's rulings.

Judgment and order denying a new trial affirmed.

NOURSE, P. J., and O'DONNELL, J. pro tem., concur.

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123 Cal.App.2d 918

PEOPLE v. ALEXANDER.

Cr. 882.

District Court of Appeal, Fourth District, California.

March 17, 1954.

Defendant was convicted of burglary. The Superior Court of Fresno County, Strother P. Walton, J., entered judgment on verdict and an order denying new trial, and defendant appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to corroborate testimony of accomplice.

Judgment and order affirmed.

1. Criminal Law ⇨511(1)

In burglary prosecution, evidence was sufficient to corroborate testimony of accomplice. Pen.Code, § 1111.

2. Burglary ⇨41(1)

Evidence sustained burglary conviction.

3. Criminal Law ⇨673(5)

Where court, in prosecution for burglary of motel, fully instructed jury that evidence concerning other similar offenses was admitted only for limited purpose of showing plan, scheme, or system of defendant and others to burglarize offices of motels, admission of evidence concerning other similar offenses did not prejudice jury against defendant and cause jury to disregard evidence produced by defendant.

4. Criminal Law ⇨372(10)

In prosecution for burglary of motel, admission of evidence concerning other similar burglaries of motels in same manner was admissible to show common design and pattern, even though other burglaries were committed shortly after burglary charged in information.

5. Criminal Law ⇨1169(11)

Where defendant in burglary prosecution admitted having committed other similar offenses, concerning which evidence was admitted to show common plan or scheme, or they were otherwise sufficiently established, alleged error in permitting defendant's accomplice to testify concerning other offenses was not prejudicial error. Pen.Code, § 1111.

6. Criminal Law ⇨1036(1)

Objection to testimony of witness may not be raised for first time on appeal.

7. Criminal Law ⇨1186(4)

Where accomplice of defendant in burglary prosecution implicated defendant in another similar burglary of a motel, and defendant did not object when witness for prosecution described scheme employed by those, who burglarized the motel, admission of such testimony, though witness did not independently identify defendant as a participant in such burglary, was not prejudicial error. Const. art. 6, § 4½.

8. Criminal Law ⇨1169(11)

Where witnesses in burglary prosecution were properly permitted to testify concerning other similar burglaries, and defendant admitted that he was convicted of such burglaries, it was not prejudicial error to admit in evidence certified copies of minutes of court showing that defendant entered pleas of guilty to those other burglary charges.

9. Criminal Law ⚷1038(3)

Where court in burglary prosecution instructed jury that evidence of other similar offenses was received for limited purpose of showing identity of defendant, intent to commit burglary, or to prove existence of plan, scheme, or system used by defendant and others to burglarize offices of motels, and no further cautionary instruction was requested by defendant, he could not be heard to complain for first time on appeal concerning instruction given.

10. Criminal Law ⚷829(1)

Where defendant's requested instructions were covered by instructions given, refusal of requested instructions was proper.

11. Criminal Law ⚷909

In burglary prosecution, record supported conclusion of trial court that defendant was not entitled to new trial.

12. Criminal Law ⚷959

In passing on motion for new trial, trial court has a very broad discretion and is not bound by conflicts in evidence.

13. Criminal Law ⚷1156(1)

Reviewing courts are reluctant to interfere with decision of trial court in denying or granting motion for new trial, unless there is a clear showing of abuse of discretion.

Lester N. Gonser, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Martin M. Ostrow, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged with and was convicted by a jury of burglarizing the Palm Motel on December 31, 1952. A motion for new trial was denied.

The claim on this appeal is that the evidence was insufficient to justify the verdict, that the testimony of an accomplice was not sufficiently corroborated; that evidence of similar offenses was inadmissible; that there was no proper identification of the defendant; that improper and inadequate instructions were given; and that the court erroneously refused to give certain proffered instructions offered by defendant.

The evidence shows that on December 31, 1952, between 10 and 11 a. m., two men burglariously entered the office of the Palm Motel. One was identified and conceded to be George Rathwick, who pleaded guilty to the offense charged. At the time, they asked to be shown a room by the manager. Defendant Alexander stayed in the office, which was otherwise unoccupied at the time, presumably to read a newspaper. Rathwick was shown a room and thereafter he told the manager that he wanted to bring his prospective bride back to look at it. Rathwick and Alexander departed. About one hour later the manager discovered that $90 in cash was missing from the cash drawer where Alexander had been seated during the manager's absence.

The accomplice Rathwick testified at the trial that he and Alexander had planned and had committed this burglary, and that they subsequently had committed other similar burglaries, using the same scheme and design. He stated that about 9:30 that morning he picked up Alexander at Hart's restaurant in Fresno, after he had taken his wife to work at a near-by store; that after talking over their plans they went to the Palm Motel and committed the burglary as described; that subsequently, they split the proceeds of the $90 that Alexander had taken. He then testified that thereafter, about January 2d, 1953, they went to the Casa Grande Motel in Madera; that he told the manager he was interested in looking at a room for himself and his prospective bride; that Alexander remained in the office and read a book; that Alexander removed cash from the till drawer and they subsequently split the proceeds.

The clerk of that motel identified Rathwick and Alexander as "the two boys" involved and testified to about the same set of facts indicated by Rathwick. Alexander subsequently pleaded guilty to this charge.

The evidence further shows that on January 10, 1951, Alexander, Rathwick and one Fred Wright went to the Phylnor Motel in Modesto and attempted to use the same scheme, but when the switchboard operator would not assist him in looking at the rooms, Rathwick made his own investigation and returned. He then told the clerk he would bring his bride and would be back at a later time. Alexander left with him and joined Wright, who remained in the car.

On that same day Rathwick and Alexander entered the Anderson Motel in Modesto and Wright remained outside in the car. The same procedure was followed and Alexander and Rathwick returned and divided with Wright the money they had obtained. This performance was again repeated that same day by "the three boys" at the Villa Motel in Modesto. Alexander pleaded guilty to the burglaries involving the Villa and Anderson motels.

As to the Palm Motel, the one here under consideration, one of the owners, C. Gambucci, Sr. positively identified Rathwick as the one who asked to see the room, and stated that the other man seated himself in the office; that he did not pay much attention to him, but the two left in an automobile that had been parked near the office building. This office building was attached to the living quarters of the complaining witness, which were so constructed that there was a glass window separating the living room and the office. The window was covered by a Venetian blind and by a road map which was attached to the lower part of it.

Vickie Gambucci, granddaughter of the complaining witness, aged about 12½ years and in the 7th grade in school, testified she had been sleeping in these quarters that morning; that she looked through the Venetian blinds into the office and saw defendant Alexander sitting there reading a paper; that her grandfather had gone with another man to show a room; that she was within a few feet of defendant and would recognize him if she saw him again; that the man she there saw was the defendant who was then seated at the counsel table in a blue suit (indicating defendant Alexander); that she did not recognize Rathwick; that she saw defendant before at the preliminary examination, and that after looking at him through the Venetian blinds she also saw a dark blue Chevrolet coupe parked near-by and that she then went back to bed. Counsel for defendant confronted her with her testimony taken at the preliminary examination. On cross-examination, in response to a question as to whether she would be able to identify the defendant as being the man she saw sitting in the chair, she replied: "I am pretty sure". Pointing to defendant she said: "He looks something like that one there * * * in the blue suit". On redirect examination she stated she had a side view of his face and from that view she was able to identify him.

Defendant testified that he had known Rathwick since his school days; that he (Alexander) was working at his place of employment on December 31, 1952, from 8 a. m. to 1 p. m., in taking inventory, and did not enter the Palm Motel that morning; that he did, however, at a later date, enter the other motels at Modesto and Madera, and pleaded guilty to those offenses. He stated that if the same operations were used at the Palm Motel as he had used at the other motels, some other person must have been with Rathwick on that occasion, and intimated that it might have been Fred Wright.

Several witnesses, employed where defendant Alexander was employed, testified in his behalf to the effect that during the days of December 29th, 30th and 31st, defendant worked as a clerk for 12 hours; that he was off from work one day during that interval but they believed it to be December 29th; that in their opinion he was working on the morning of December 31st, because he shook hands with some of them about noon on that day and wished them a Happy New Year; and that they did not believe he left the office more than five or ten minutes that morning.

In rebuttal the people produced the former wife of Rathwick, who testified that on the morning of December 31st she was living with Rathwick; that between 9:30 and 9:45 a. m. he took her to work in his car; that he let her out and that he proceeded up the alley; that he then met defendant Alexander who was standing near Hart's restaurant, one block away; that she later, that day, accused her husband of meeting Alexander on the corner and he denied it but later admitted that to be a fact.

Fred Wright was then sworn as a witness and testified he was not with Alexander and Rathwick at the Palm Motel on December 31st. Defendant denied meeting Rathwick at the Hart's cafe on the morning of December 31st, but claims he did meet him there the following week. Defendant's mother testified she drove defendant to work on the morning in question.

[1, 2] It is apparent from the testimony of the accomplice that defendant Alexander aided and abetted him in the commission of the crime; that there was sufficient corroboration and identification of the defendant indicating that he was the one with Rathwick on that occasion. This was a factual question for the determination of the jury, notwithstanding the claimed alibi of the defendant. Sec. 1111, Penal Code; People v. Negra, 208 Cal. 64, 280 P. 354; People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681; People v. Griffin, 98 Cal.App.2d 1, 219 P.2d 519; People v. Gallardo, 41 Cal. 2d 57, 257 P.2d 29. The rule relating to the quantum of evidence necessary to sustain a criminal conviction is sufficiently set out in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[3] Passion or prejudice on the part of the jury causing it to disregard the evidence produced by the defendant by reason of the testimony pertaining to other similar offenses, as claimed by the defendant, is not established, particularly since the court fully instructed the jury that such evidence was admitted only for the limited purpose of showing the plan, scheme or system of defendant and others to burglarize offices of motels. The facts relied upon in People v. Singh, 11 Cal.App.2d 244, 53 P.2d 403, are not synonymous.

[4] The evidence concerning other offenses was admissible to show common design and pattern even though they were committed shortly *after* the offenses charged in the information, where there was no conflict in the scheme, plan or design. People v. Talbot, 220 Cal. 3, 17, 28 P.2d 1057; People v. Ferdinand, 194 Cal. 555, 560, 229 P. 341; People v. James, 40 Cal.App.2d 740, 105 P.2d 947; People v. Craig, 111 Cal. 460, 467, 44 P. 186; People v. Peete, 28 Cal.2d 306, 169 P.2d 924; 8 Cal.Jur. p. 69, sec. 173.

[5] It is next argued that the accomplice was not a competent witness under section 1111 of the Penal Code to establish that there were other distinct offenses committed, citing People v. Washburn, 104 Cal. App. 662, 286 P. 711. No prejudicial error was committed in this respect since defendant admitted having committed these offenses or they were otherwise sufficiently established. People v. Clough, 73 Cal. 348, 15 P. 5.

[6, 7] The contention that the witness was not authorized to describe the system and scheme employed in respect to the attempted burglary of the Phylnor Motel in Modesto on January 10, 1953, since she did not sufficiently and independently identify the defendant as a participant therein, is without merit since it did not result in prejudicial error, particularly where the accomplice, over objections, implicated the defendant in such offense, and where the defendant made no objection to the testimony of the witness when offered. The objection to the testimony of such witness may not be raised for the first time on appeal. People v. Goff, 100 Cal.App.2d 166, 171, 223 P.2d 27. At least no miscarriage of justice resulted. People v. Liss, 35 Cal. 2d 570, 575, 219 P.2d 789; Sec. 4½, art. VI, California Constitution.

[8] Complaint is next made that the court erroneously received in evidence a certified copy of the minutes of the court and of the information to which defendant entered a plea of guilty of the two charges of burglary committed in Modesto, as above indicated. No prejudicial error resulted where the record received in evidence showed the identity of the accused

in connection with the crime, where the facts surrounding these convictions were described by witnesses as indicated, and where defendant subsequently admitted the convictions.

[9] Lastly, defendant argues that the court erroneously instructed the jury as to the purpose for which evidence of the similar offenses was admissible. The instruction, generally speaking, follows the language of CALJIC Instruction No. 33, p. 54 et seq. Defendant's attack upon the instruction, as given, is that it told the jury that evidence of similar offenses was offered for the purpose of showing that the *defendant committed crimes other than the one of which he is accused*, and was not limited to the purpose of showing a plan and scheme. A fair reading of the instruction, when considered as a whole, and reasonably interpreted, shows that the court did instruct the jury that such evidence was received "not to prove distinct offenses or continual criminality", but for the "limited purpose only" of showing the identity of the accused, the intent to commit the act charged, or whether it tended to prove the existence of a plan, scheme or system used by defendant and another, or others, to burglarize the offices of motels. An instruction so limiting the application of such evidence was orally given by the trial judge at the time the evidence was admitted. No further cautionary instruction was requested by defendant in this respect and he may not now be heard to complain for the first time on appeal. People v. Warren, 16 Cal.2d 103, 116, 104 P.2d 1024; People v. Zimmerman, 11 Cal.App. 115, 104 P. 590; People v. Richards, 74 Cal. App.2d 279, 291, 168 P.2d 435; People v. Willard, 92 Cal. 482, 28 P. 585, and cases heretofore cited on the subject. See, also, 8 Cal.Jur. p. 60, sec. 168; 8 Cal.Jur. pp. 65–66, sec. 170.

[10] Certain general instructions offered by defendant were properly refused as covered by other general instructions given. No prejudicial error appears in this respect.

[11–13] The same questions here presented were presented to the trial court on a motion for new trial, and were considered by it, together with the evidence produced. It is apparent that it felt that grounds for a new trial were not indicated. The record supports this conclusion. In passing on a motion for new trial the judge has very broad discretion and is not bound by conflicts in evidence. Reviewing courts are reluctant to interfere with the decision of the trial court in denying or granting such a motion unless there is a clear showing of an abuse of discretion. People v. Robarge, 41 Cal.2d 628, 262 P.2d 14.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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123 Cal.App.2d Supp. 979

CHRISTOFFER
v.
HARTFORD ACCIDENT & INDEMNITY CO. et al.

No. 17.

Appellate Department, Superior Court,
Fresno County, California.
March 1, 1954.

Action to recover on medical payments provisions of automobile insurance policy. The Municipal Court, Fresno Judicial District, County of Fresno, Frederick E. Butler, Acting Judge, entered judgment from which defendant appealed. The Superior Court in and for the County of Fresno, Appellate Department, Kellas, J., held that under medical payments provision of automobile liability policy, whereby insurer undertook to pay medical expenses arising out of injury, caused by accident, while in or upon, entering or alighting from the automobile when used with permission of named insured, person injured when struck by automobile when apparently changing wheel on automobile covered by policy was "upon" the automobile within contemplation of the policy, in that such person's hands were upon the wheel of the automobile and thus in position of contact against the automobile as the supporting surface, as the term is usually understood.

Judgment affirmed.

1. Insurance ⟹452

The word "upon" as used in medical payments provision of automobile liability policy, whereby insurer undertook to pay specified medical expenses of person sustaining bodily injury, caused by accident, while in or upon, entering or alighting, from automobile when being used with permission of insured, was to be given the meaning ordinarily accepted in everyday speech and was not to be interpreted against the insurer on theory that an ambiguity existed. Civ.Code §§ 1636, 1638, 1643, 1644.

2. Insurance ⟹146(1)

Although, if any ambiguity exists in terms of an insurance policy, it is to be interpreted against the insurer and in favor of the assured, where the provisions of the policy are definite and certain, there is no room for interpretation and the courts will not indulge in a forced construction in order to cast liability upon the insurer.

3. Insurance ⟹452

Under medical payments provision of automobile liability policy, whereby insurer undertook to pay medical expenses arising out of injury, caused by accident, while in or upon, entering or alighting from the automobile when used with permission of named insured, person injured when struck by automobile when apparently changing wheel on automobile covered by policy was "upon" the automobile within contemplation of the policy, in that such person's hands were upon the wheel of the automobile and thus in position of contact against the automobile as the supporting surface, as the term is usually understood. Civ.Code §§ 1636, 1638, 1643, 1644.

See publication Words and Phrases, for other judicial constructions and definitions of "Upon".

Ray W. Hays and James N. Hays, Fresno, for appellants.

John Said, Fresno, for respondent.

KELLAS, Judge.

The facts are agreed to by all parties. On the 20th day of December, 1951, appellants issued an automobile insurance policy to one Nora Lee Haskins, as the owner of a 1949 Crosley Station Wagon. Such policy contained the following insuring agreement:

> "Coverage C—Medical Payments
>
> "To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the Named Insured or with his permission."

On the 9th day of July, 1952, respondent, brother of the assured, obtained her permission for the use of the car on the following day, purposing to go to Tracy. He departed on the trip as planned, but en route suffered an accident from which resulted his injuries. Respondent has no recollection of events transpiring between a point some distance beyond Merced, California, at which point he had stopped at a service station, and the time when he regained consciousness in the hospital. However, an eyewitness to the accident established the following facts: That at a point one and one-half to two miles east of Livingston on Highway 99, said highway at such point being a divided highway with two westbound lanes, and having a six or eight foot asphalt shoulder, respondent was seen "in a bent kneed position on his haunches near the left rear wheel" of the Crosley, which was parked about six inches off the northerly shoulder. "Respondent had his hands on the wheel, apparently either taking it off or putting it on." (Appellant's Opening Brief, Page 2, Lines 22 and 23.) At this time respondent and the Crosley were struck by an automobile approaching from the rear, which swerved to the right side of the road to accomplish contact. Claim was regularly made upon the appellants under the above-quoted provision of the insurance policy, which was rejected. Action was then filed and judgment rendered in favor of respondent for $2,000 the maximum coverage therefor, it appearing that the medical expenses incurred by him as a result of personal injuries suffered exceeded that amount.

Appellants contend that the facts, as presented to the trial court, do not place the respondent "upon" the automobile as that word is employed in Coverage "C". Respondent contends to the contrary. In seeking the answer to the question posed, the general rules governing the interpretation of contracts should be kept in mind. Pertinent sections are as follows:

> Sec. 1636, C.C.: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."
>
> Sec. 1638, C.C.: "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."
>
> Sec. 1643, C.C.: "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."
>
> Sec. 1644, C.C.: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

Since the respondent could not in any view be said to be "in", "entering, or alighting" from the Crosley, we are then concerned only with the meaning of the word "upon" as used in the context of Coverage "C" governed by the above principles. Appellants state that " 'upon the automobile', as used here can only mean just what it says, that coverage existed when the injured person was above or on top of and being supported by the automobile." (Line 23, Page 6, Op. Bf.)

[1] We agree with appellant that there is no ambiguity in the term "upon" as it is here employed and that it should be given the meaning ordinarily accepted in everyday speech and, this being true, respondent is not entitled to the benefit of the rule which gives the assured the benefit of an interpretation against the insurer where an ambiguity exists. We believe the proper rule is set forth in the case of New Amsterdam Casualty Co. v. Fromer, D.C.Mun.App., 75 A.2d 645 at page 646, 19 A.L.R.2d 509:

> "Viewed in their context and applied to the instant facts we think the words 'while in or upon, entering or alighting' are plain and unambiguous, and that the trial court erred in holding otherwise. Hence the case must be tested and decided according to the ordinary meaning that common speech imports, and not by resort to the rule of liberal construction." See also Ross v. Protective Ind. Co., 135 Conn. 150, 62 A.2d 340; Katz v. Ocean Acc. & Guarantee Corp., 202 Misc. 745, 112 N.Y.S.2d 737 at page 739.

[2] The general rule is set forth in the case of National Automobile Ins. Co. v. Industrial Acc. Com., 11 Cal.2d 689, at page 691, 81 P.2d 926, 927, as follows:

> "A contract of insurance, like any other contract, is to be construed so as to effectuate the intention of the parties. Of course, if any ambiguity exists in its terms it is to be interpreted against the insurer and in favor of the assured. But where, as here, the provisions of the policy are definite and certain there is no room for interpretation and the courts will not indulge in a forced construction in order to cast a liability upon the insurer which it has not assumed." See also Perkins v. Fireman's Fund Indem. Co., 44 Cal. App.2d 427, 112 P.2d 670; Blackburn v. Home Life Insurance Co., 19 Cal.2d 226, 120 P.2d 31; Baine v. Continental Assurance Company, 21 Cal.2d 1, at page 5, 129 P.2d 396, 142 A.L.R. 1253.

The word "upon" is defined in part by Webster's New International Dictionary, Second Edition, Unabridged, 1948, as follows:

> "Upon—on:—in all its senses see on."

And turning to the word "on", one finds the following definition:

> "On—The primary signification of *on* is position of contact with or against a supporting surface, or motion into or toward such position.
>
> "1. Indicating position over and in contact with that which supports from beneath; as, the book lies *on* the table; * * * to swear (with hands) *on* the Bible; to ride *on* a train (where British usage has *in*); passage *on* an ocean liner (where nautical usage has *in*); also, specif., at, in, or along the surface of; over the projecting edge or point of; in or about the clothing of; as not a mark *on* it; hung *on* a nail; a pistol was found *on* him.
>
> "2. Indicating contiguity or independence: (a) Contact and support from elsewhere than beneath; as, a fly *on* the ceiling; hanging *on* the wall. (b) Contiguity or juxtaposition; as, a town situated *on* the river; to live *on* Walnut Street (where British usage often has *in*); * * *."

[3] It is obvious from the above definition that the hands of respondent were "upon the wheel" of the automobile, and hence "Upon the automobile" just as the hands of the engineer are said to be "upon the throttle" or a driver's hands "upon the brake", or as the farmer's hand is "upon the plow", and this would be true whether the tire was grasped by him from above, from below, or from the sides thereof. The determinative point in this case, therefore, is whether the respondent himself can be said to be upon the automobile. Since there are no exceptions, exclusions, restrictions, or qualifications contained within the policy as to how or in what manner the assured was to be upon the automobile (such as standing upon, sitting upon, kneeling upon, pushing upon, pulling upon, riding upon, resting upon, etc.), we conclude that respondent was "upon the automobile" as the term is employed in the policy, just as a fly is said to be "upon the wall" or "upon the ceiling", or a painter is said to be "upon the wall", a person to be "upon a raft" although only supported by the hand, or as a baseball player (the runner) is said to be "upon the base" if any portion of his body is in contact with the bag. Everyday speech refutes the statement that the word "upon" is confined to the meaning of "on top of". The dog is "upon the leash"; the man is "upon the rope". It is this meaning of the word "upon" which we believe the parties had in mind in the preparation of Coverage "C" of the contract. It is the meaning set forth by Webster's wherein the position of contact is against the supporting surface rather than above it, or position of contiguity wherein contact and support is from elsewhere than beneath.

Excluding those positions wherein one can be said to be "in", "entering", or "alighting from" the automobile, the word "upon" would become meaningless to restrict it to the meaning assigned it by appellants. We must assume that it was the intention of the parties to the contract to include a class of persons within the meaning of the word "upon" not necessarily included in the words "in", "entering", or "alighting from". As pointed out by the Court in the case of Goodwin v. Lumbermen's Mut. Cas. Co., 199 Md. 121, 85 A.2d 759, 763, "the terms are not synonymous, although sometimes two of them may cover the same situation." One would not expect to find a person wholly above the top, the fenders, the hood, or the bumpers if the car were being lawfully used. Where, then, would one expect to find him to give the word "upon" meaning, adopting the meaning thereof as taken from Webster's and everyday speech? To give it the restricted meaning of "on top" is a strained interpretation and tends to take from the agreement the force and coverage intended. We do not believe it should be a restricted meaning, neither do we hold that it should be given the loose meaning suggested by respondent wherein it connotes being adjacent or near, e. g., "on the rail" (horse racing), "on 'B' Street" (a house); nor should we read something into the contract which, in fact, is not there. For this reason the cases of Lokos v. New Amsterdam Casualty Co., 197 Misc. 40, 93 N.Y.S.2d 825, Sherman v. N. Y. Casualty Co., 78 R.I. 393, 82 A.2d 839, Madden v. Farm Bureau Mutual Auto. Ins. Co., 82 Ohio App. 111, 79 N.E.2d 586, are not in point because, as appellants have pointed out, the words in question there are tied to the word "use".

In the case of Goodwin v. Lumbermen's Mut. Cas. Co., supra, the court was construing a policy of the same language as here employed. In that case, Mrs. Blum, one of the plaintiffs, was standing on the street adjacent to the right front door of the automobile in question and, after opening the right front door with a key, leaned in the car and reached around for the purpose of releasing the tab so that the rear right-hand door could be opened. The court held that Mrs. Blum was *upon* the car as well as entering it and liability was assessed accordingly. In the case of Katz v. Ocean Acc. & Guarantee Corp., supra [202 Misc. 745, 112 N.Y.S.2d 738] another case in which the court was construing the exact phraseology we have here, the court held (and such decision was affirmed on appeal) where the plaintiff "alighted from the automobile and was in the act of locking the car with her hand upon the door, when suddenly perceiving an oncoming vehicle coming towards her, she ran from a point where she was standing adjacent to the left front door of the vehicle and towards the rear of the car" at which point she received her injuries from an on-coming car, that she was *upon* and alighting from plaintiff's vehicle. In this case, the court had placed the victim in the original position in which she was when she discovered her unfortunate plight.

The judgment should be, and is, therefore, affirmed.

SHEPARD, P. J., and CONLEY, J., concur.

HOLM et al.

v.

SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

S. F. 18781.

Supreme Court of California.

March 12, 1954.

As Modified on Denial of Rehearing

April 7, 1954.

Proceeding to obtain writ of prohibition restraining the Superior Court from enforcing its order for inspection of certain documents in possession of petitioners, who were attorneys for defendants in personal injury action arising out of allegedly negligent operation of municipal bus. The Supreme Court, Shenk, J., held that signed statement given by plaintiff-passenger to claims investigator was not subject to attorney-client privilege but that confidential communications embodied in municipal bus driver's report of accident involving personal injuries to passenger and photographs of scene of accident were protected by attorney-client privilege and not subject to discovery by passenger in her personal injury action against municipality.

Peremptory writ granted as to reports and photographs but denied as to passenger's signed statement, and alternative writ discharged.

Traynor, J., dissented in part; Carter, J., dissented.

Prior opinion, 251 P.2d 35.

1. Appeal and Error ⚿104
Prohibition ⚿3(3)

Order, in tort action, granting motion for inspection of certain documents in possession of those resisting motion was not appealable, and prohibition was proper remedy to determine validity of such order.

2. Discovery ⚿80

Code of Civil Procedure provision that court may order either party to give other an inspection and copy or permission to take a copy of entries of accounts in any book or any document or paper in his possession or under his control containing evidence relating to merits of action or defense therein is not limited to scope of the historical bill of discovery in equity. Code Civ.Proc. § 1000.

3. Discovery ⚿90

Bus passenger's signed statement, given to municipal railway claims investigator, concerning facts of accident, written reports made by bus driver to municipality setting forth his version of accident, and photographs taken at scene of accident by municipal agents were material and relevant to questions in issue in personal injury action arising out of such accident; would be admissible in evidence; and, subject to their confidential nature, were within scope of Code of Civil Procedure discovery provision. Code Civ.Proc. § 1000.

4. Discovery ⚿90

Where right to assert attorney-client privilege is clear, it should follow that bill of discovery cannot be used to defeat such privilege. Code Civ.Proc. §§ 1000, 1881, subd. 2; Business and Professions Code, § 6068(e).

5. Witnesses ⚿198(1)

Objective of making particular communication from client to attorney privileged is to encourage client to make complete disclosure to his attorney without fear that others may also be informed. Code Civ.Proc. § 1881, subd. 2.

6. Witnesses ⚿205

Privilege attaches to communication which is made in confidence pursuant to a client-attorney relationship with respect to the particular matter, and, therefore, there would seem to be no privilege for communication which is not made to or for further communication to an attorney, even though communication might have some connection with possible liability in future; nor does privilege attach to communication not intended to be of a confidential nature. Code Civ.Proc. § 1881, subd. 2.

7. Witnesses ⚿200

To make communication privileged, dominant purpose of communication must be for transmittal to an attorney in the course of professional employment. Business and Professions Code, § 6068(e); Code Civ.Proc. § 1881, subd. 2.

8. Appeal and Error 🔑992
Discovery 🔑90

In any given situation, determination of question whether attorney-client privilege exists which will make communication not subject to discovery must be made upon facts asserted as basis for the privilege, and such determination is for the trial court in the first instance. Business and Professions Code, § 6068(e); Code Civ.Proc. §§ 1000, 1881, subd. 2.

9. Appeal and Error 🔑961
Discovery 🔑90

Where communication appears to serve both purpose of transmittal to an attorney in course of professional employment and another purpose not related to first purpose, determination as to whether such communication is privileged and not subject to discovery requires decision by trial court as to which purpose predominates; and on appeal question becomes whether trial court's conclusion in such regard upon the facts was correct or resulted in an abuse of discretion.

10. Discovery 🔑90

Municipal bus passenger's giving of signed statement to municipal claims investigator concerning injury received by passenger on bus did give rise to attorney-client relationship and was not privileged, since it was not made, or intended to be made, in confidence, and, therefore, statement could be reached by discovery. Code Civ.Proc. §§ 1000, 1881, subd. 2.

11. Witnesses 🔑204(2)

Where communication between corporate employees is embodied in reports or photographic evidence for purpose of redelivery to corporate attorney, attorney-client privilege attaches if reports and photographs were created as means of communicating confidential information to such attorney. Code Civ.Proc. § 1881, subd. 2.

12. Witnesses 🔑204(2)

For purpose of existence of attorney-client privilege, there is not any valid basis for distinction between communication created for transmittal to an attorney to prepare for threatened litigation following particular accidents and a communication prepared for an identical purpose under standing rules which are to pertain in cases of any accident involving personal or property injury. Code Civ.Proc. § 1881, subd. 2.

13. Witnesses 🔑204(2)

Fact that scope of operation of municipal railway was such that communications such as bus driver's report of accident involving personal injuries to passenger and photographs taken by municipal agents of scene of accident were to be made as a routine matter would not prevent attorney-client privilege from attaching to such report and photographs. Code Civ.Proc. § 1881, subd. 2.

14. Witnesses 🔑204(2)

Where right to attorney-client privilege is clearly established, it should not be cast aside, and fact that information contained in documentary communications to attorney might also be used for incidental purposes not entitled to such privilege is unimportant. Code Civ.Proc. § 1881, subd. 2.

15. Discovery 🔑90

Confidential communications embodied in municipal bus driver's report of accident involving personal injuries to passenger and photographs of scene of accident were protected by attorney-client privilege and not subject to discovery by passenger in her personal injury action against municipality, even though prepared in ordinary course of business. Code Civ.Proc. §§ 1000, 1881, subd. 2.

Dion R. Holm, City Atty., and Donald J. Kropp, Deputy City Atty., San Francisco, for petitioners.

Bronson, Bronson & McKinnon, and Roy Bronson, San Francisco, amici curiae on behalf of petitioners.

No appearance for respondent.

Shirley, Saroyan, Calvert & Barbagelata and J. Francis Shirley, San Francisco, for real party in interest.

SHENK, Justice.

The petitioners seek a writ of prohibition to restrain the respondent court from enforcing its order for the inspection of certain documents in their possession. An alternative writ was issued.

The order was made in an action in which Wynona Bell, referred to as the plaintiff, seeks to recover damages from the petitioners Raymond Gnecco and the City and County of San Francisco for personal injuries alleged to have been suffered by her due to the alleged negligent operation by Gnecco, an employee of the city's Municipal Railway, of a bus on which she was a passenger. The petitioners Dion R. Holm and Donald J. Kropp are attorneys at law who at all times involved represented the city and county. They are also the legal representatives of Gnecco as an employee of the city and county in the action for damages. Before trial in that action the plaintiff moved under Section 1000 of the Code of Civil Procedure for an order permitting her to inspect, among other things, (1) a document containing a signed statement made by her to a claims investigator of the Municipal Railway concerning the facts of the accident; (2) written reports by Gnecco to the city setting forth his version of the accident, and (3) photographs taken at the scene of and following the accident by agents of the city.

The pertinent parts of Section 1000 provide: "Any court in which an action is pending, or a judge or justice thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. * * *"

In support of the motion for the order of inspection it was stated in affidavits on behalf of the plaintiff that she had signed a written statement setting forth factual information material to the controversy, the contents of which she could not remember and a copy of which had not been furnished her. It was stated in an affidavit of the plaintiff's counsel that the documents involved were recorded and preserved in the "regular course of business of defendants in the operation of the Municipal Railway." It is claimed that a deposition of the petitioner Gnecco, not made a part of the record here, also contains evidence that the reports were filed in the regular course of business. There is no further reference to the purpose of the documents in the complaint, the notice of motion, other supporting affidavits or in any other documents which are a part of the plaintiff's record. The deputy city attorney and the general claims agent for the Municipal Railway, in affidavits filed on behalf of the petitioners, stated that the questioned documents had been kept in confidence in the possession or control of one of them since they were made; that they were in the possession of the attorney at the time of the demand for their production; that they were secured and kept in confidence for use by the attorneys for information and aid in defending in any litigation arising out of the accident, and that the documents are protected by the attorney-client privilege.

The foregoing was the only evidence before the court. The motion was granted as to the documents involved, and the court ordered the petitioners to produce them. Thereafter a motion to vacate the order was denied. The petitioners refused to comply with the order asserting that the court lacked jurisdiction to make it. The court threatens to enforce its order by contempt proceedings and the petitioners seek to restrain its enforcement by this application for the writ of prohibition.

[1] The order is not appealable and prohibition is the proper remedy. City and County of San Francisco v. Superior Court, 38 Cal.2d 156, 238 P.2d 581; Franchise Tax Board v. Superior Court, 36 Cal.2d 538, 225 P.2d 905.

[2] The petitioners' main contentions are that the attorney-client privilege, Code Civil Procedure, Section 1881(2), bars inspection of the papers; that Section 1000 of the Code of Civil Procedure is no broader than the historical bill of discovery in equity, and that by reason of the limitations of the latter, the documents may not be inspected.

In regard to the latter contention it is true that there formerly was no right in equity to inspect an adversary's documentary evidence. 6 Wigmore, Evidence, 3d Ed., 1940, Sec. 1857, p. 443. However, while the cases hold that Section 1000 is based upon the bill of discovery in chancery courts, Union Trust Co. v. Superior Court, 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259; Wright v. Superior Court, 139 Cal. 469, 73 P. 145, they do not hold that the equitable rule establishes a limitation on the scope of our code section. Where the use of the statutory bill of discovery is denied by our courts it usually is because the information sought to be obtained is not relevant or material to any of the issues in the case. Union Collection Co. v. Superior Court, 149 Cal. 790, 87 P. 1035; Ex parte Clarke, 126 Cal. 235, 58 P. 546, 46 L.R.A. 835. It has been said that the documents also must be properly identified and admissible in evidence at the ensuing trial. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944. But none of the cases hold that Section 1000 is to be construed as narrowly as the petitioners contend. On the contrary, in Union Trust Co. v. Superior Court, supra, 11 Cal.2d 449, at page 462, 81 P.2d 150, at page 157, this court stated: "That the trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings, of which the inspection of documents is one method * * *." It further quoted from Corpus Juris, volume 18, page 16, to the effect that provisions such as Section 1000 are "'remedial in their nature and should be liberally construed.'" See, also, 27 C.J.S., Discovery, § 69; Austin v. Turrentine, 30 Cal.App.2d 750, 87 P.2d 72, 88 P.2d 178. Section 1000 provides in part that when an adversary refuses to comply with an order of inspection, the court "may exclude the entries of accounts of the book, or the document, or paper from being given in evidence * * *." It is apparent that this could apply only to documents in support of the adversary's own case. It has been said, without discussion of the point here involved, that inspection was proper in a case where account books bore evidence of the adversary's own case. Avery v. Wiltsee, 177 Cal. 484, 488, 171 P. 95; see also Superior Ins. Co. v. Superior Court, 37 Cal.2d 749, 235 P.2d 833; Demaree v. Superior Court, 10 Cal.2d 99, 73 P.2d 605.

[3] There is no question but what the documents here sought to be inspected are material and relevant to questions in issue, would be admissible in evidence, and are within the scope of Section 1000 of the Code of Civil Procedure, subject to their confidential nature.

[4] The right to maintain the security of a confidential communication under the attorney-client privilege is set forth in Section 1881 of the Code of Civil Procedure which states in part: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases * * * 2. *Attorney and client.* An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment * * *." See also Business & Professions Code, § 6068(e). Where the right to assert the privilege is clear it should follow that the bill of discovery cannot be used to defeat it.

[5–7] The objective of making a particular communication privileged is to encourage a client to make a complete disclosure to his attorney without fear that others may also be informed. City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 235, 231 P.2d 26, 25 A.L.R.2d 1418; 8 Wigmore, Evidence, supra, Sec. 2380a, p. 813. The privilege attaches where the communication is made in confidence pursuant to a client-attorney relationship with respect to the particular matter. McKnew v. Superior Court, 23 Cal.2d 58, 65–66, 142 P.2d 1. Thus there would seem to be no privilege in a communication which is not made to or for further communication to an attorney, although the communication might have some connection with possible liability in the future, such as reports submitted in the regular course of business for study in accident prevention. Nor does the privilege attach to a communication not intended to be of a confidential nature. City and County of San Francisco v. Superior Court, supra, 37 Cal.2d 227, 234–235, 231 P.2d 26; McKnew v. Superior Court, supra, 23 Cal.2d 58, 66, 142 P.2d 1.

To make the communication privileged the dominant purpose must be for transmittal to an attorney "in the course of professional employment". Code of Civil Procedure, § 1881(2); City and County of San Francisco v. Superior Court, supra, 37 Cal.2d 227, 235, 231 P.2d 26.

[8, 9] In any given situation it is necessary that a determination be made concerning the facts asserted as a basis for the privilege. This determination is for the trial court in the first instance. Where it is clear that the communication has but a single purpose, there is little difficulty in concluding that the privilege should be applied or withheld accordingly. If it appears that the communication is to serve a dual purpose, one for transmittal to an attorney "in the course of professional employment" and one not related to that purpose, the question presented to the trial court is as to which purpose predominates. The question then is whether the conclusion of the trial court on the facts is correct or has resulted in an abuse of discretion.

[10] In the present case the plaintiff's statement to the city's claims investigator was recorded as she made it. After being transcribed she signed her name to the document. Her assertions that she was not given a copy of the statement and that she does not remember what she said are not disputed. She does not seek to have disclosed any communication from her adversaries to their attorneys. She merely seeks the record of a communication which she herself made in an "arm's length" conversation and which was transmitted to her adversaries' attorneys. Clearly as to the document embodying this communication there is no attorney-client relationship, the communication was not made nor intended to be in confidence, and the privilege did not attach. Accordingly the document can properly be reached under the statutory provisions.

[11] As to the reports and photographs it is clear that from their character and content they fall within the privilege. Both originated with agents of the city and it is undisputed that they were forwarded in confidence to the defendants' attorneys for use in possible litigation. It is stated in City and County of San Francisco v. Superior Court, supra, 37 Cal.2d 227, at page 235, 231 P.2d 26, at page 30: "The privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney." And at pages 236–237 of 37 Cal.2d, at page 31 of 231 P.2d: "It is no less the client's communication to the attorney when it is given by the client to an agent for transmission to the attorney, and it is immaterial whether the agent is the agent of the attorney, the client, or both. '(T)he client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, *by any form of agency* employed or set in motion by the client is within the privilege. * * * 8 Wigmore, supra, § 2317, pp. 616–617. * * *" It follows that where the communication is between corporate employees and is embodied in reports or photographic evidence for the purpose of redelivery to a corporate attorney the privilege attaches if the reports and photographs were created as a means of communicating confidential information to the attorney.

[12, 13] The present proceeding calls for the determination of the dominant purpose for which the reports and photographs were created. As previously stated, the affidavits of the petitioners in the trial court revealed that the documents were prepared as confidential communications to the city attorney in threat of litigation and that the documents had at all times been treated as such. These affidavits were uncontradicted as to the purpose of the documents. In this connection the plaintiff asserts only that they were prepared in the regular course of business. But there is no valid basis for a distinction between a communication created for transmittal to an attorney to prepare for threatened litigation following particular accidents, and a communication prepared for an identical purpose under standing rules in the case

of all accidents involving personal or property injury. Because the scope of the operations of the defendant city's Municipal Railway is such as to require communications of this nature as a routine matter, it cannot be said that the attorney-client privilege did not attach.

In any action for damages such as the pending one it is of considerable importance to obtain all information available at the scene of the accident in order to safeguard the rights of the party likely to be charged with negligence. It is because of this fact that diligence is required in behalf of such party to avoid or prepare for litigation. In view of the imminent possibility that the city would be faced with a claim involving substantial liability for personal injuries far exceeding financial considerations in any other respect, it is unreasonable and unrealistic to say that the communication of the documentary information to the attorneys for use in their professional capacity was not foremost and predominantly in the minds of those securing and transmitting the same.

[14] The court did not make specific findings of fact upon which its order for the production of the documents was based. However, in view of the undisputed evidence both as to the intended purpose and the actual practice followed any determination which would not accord greater importance to the purpose of communications to the attorneys in their professional capacities than to any other purpose would be an abuse of discretion. The attorney-client privilege is an important element in the effectiveness with which the counselor-at-law is to advise his client and safeguard the latter's interests. Where, as here, the right to the privilege is clearly established it should not be cast aside. The fact that the information contained in the communications might also be used for incidental purposes not entitled to the privilege is unimportant.

The question of the application of Section 1000 of the Code of Civil Procedure as affecting the attorney-client privilege appears not to have been decided by any California court. However, in an analogous situation in New York Casualty Co., v. Superior Court, 30 Cal.App.2d 130, 85 P.2d 965, it was sought to perpetuate evidence under Sections 2083–2086 of the Code of Civil Procedure. The court held that confidential reports of an accident procured for the use of an insurance company's attorney were protected by the attorney-client privilege. Section 1000 was not referred to but the court cited with approval two Ohio decisions that dealt with discovery procedures. In re Klemann, 132 Ohio St. 187, 5 N.E.2d 492, 108 A.L.R. 505; Ex parte Schoepf, 74 Ohio St. 1, 77 N.E. 276, 6 L.R.A.,N.S., 325. Those cases dealt with an effort to obtain by *subpoena duces tecum* reports of an accident prepared by an insured for its insurer and insurer's attorneys. The Ohio court held the communications to the insurer to be privileged.

Numerous decisions in other states have held that where confidential reports were submitted by agents of a corporation for transmittal to the corporate attorney, the privilege attached as against proceedings for discovery. See cases compiled in 146 A.L.R. at 988. In many of the cases it was emphasized that the crucial question is the purpose for which the communication originated. In Cully v. Northern Pac. R. Co., 35 Wash. 241, 77 P. 202, 203, the court held that routine correspondence, reports and documents relating to the accidental injury of the plaintiff were privileged, the court stating: "We can conceive of no reason why a different rule should apply in this case than prevails in the case of privileged communications generally."

[15] It is concluded that the confidential communications embodied in the reports and photographs are protected by the attorney-client privilege. As to those documents the peremptory writ is granted; as to the document containing the signed

statement of the plaintiff to the defendant's investigator, the writ is denied. The alternative writ is discharged.

GIBSON, C. J., and EDMONDS, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, Justice (concurring and dissenting).

The primary object of the attorney-client privilege is to encourage the client to make a full disclosure of all the facts to his attorney. To achieve this object it is proper that the client should be allowed to employ whatever means of communication are necessary accurately to inform his attorney of the facts. City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 235–237, 231 P.2d 26, 25 A.L.R.2d 1418, and cases and authorities cited. Accordingly, the privilege is not lost if the client casts his communication in the form of reports compiled by him or his agents for that purpose. Moreover, in this respect there is no logical difference between an oral or written report of what the client or his agent saw and a photograph taken for the purpose of communicating the scene to the attorney. On the other hand, a document, report, or photograph that would otherwise be admissible in evidence does not become privileged merely because the client delivers it to his attorney. Unless a report or photograph is created for the purpose of communicating information to the attorney, it cannot have the character of a privileged communication when it comes into existence and accordingly cannot become privileged if it is later delivered to the attorney. See 8 Wigmore on Evidence, 3d Ed., § 2307, p. 594.

No problem is presented if it is clear that the only purpose of preparing a report is to communicate it to the attorney. In many situations, however, reports will be made for other purposes as well. The question arises, therefore, whether the existence of purposes for preparing reports in addition to that of communicating with the attorney will defeat the privilege. This question may only be answered by evaluating the relative importance of the purposes present in the light of the object of the privilege, bearing in mind that it "is strictly construed, since it suppresses relevant facts that may be necessary for a just decision." City and County of San Francisco v. Superior Court, supra, 37 Cal.2d 227, 234, 231 P.2d 26, 30.

If the purposes other than that of communicating facts to the attorney are so minor that the client would not create reports if no communication were contemplated, the existence of such purposes should not defeat the privilege. In such cases to encourage full disclosure it is necessary to encourage the creation of the reports, and accordingly, the object of the privilege is served by making them privileged. If, on the other hand, reasons unrelated to the seeking of legal advice or service would cause the client to create reports, they should not be privileged. In such cases the reports would be created in any event, and accordingly, whether or not they were privileged would not affect their being created. It follows, therefore, that in any case where reports are made, not only for the purpose of communicating to the attorney, but for other purposes as well, the object of the privilege is subserved only by making those reports privileged that would not be created but for the purpose of communication.

In the present case it is true that one reason the municipal railway secures accident reports from its employees and takes photographs is to communicate facts to its attorney. The controlling question, however, is whether it would secure the reports and take the photographs in any event. The municipal railway is in the business of transportation and is required to exercise "the utmost care and diligence" toward its customers. Civ.Code, § 2100. It is under a duty to employ careful drivers and acquire and maintain safe equipment. When an accident occurs it must make an investigation of the facts, not only for the purposes of litigation that may arise therefrom, but also to enable it to eliminate careless drivers, maintenance men, and dangerous and defective equipment. It would be subject to a charge of continuing negligence in the operation of its system if it did not do so. Under these circumstances the trial court was justified in concluding that the accident reports and photographs would be made regardless of the purpose of communicating facts to the railway's attorney, and accordingly, they should not be privileged.

I concur in the conclusion of Mr. Justice SHENK that plaintiff's statement was not privileged.

I would deny the writ in its entirety.

CARTER, Justice.

I dissent.

The decision of the majority in this case is another step backward in the administration of justice—the denial of the power of a trial judge to force the adverse party to produce competent, material evidence germane to the issues in the case notwithstanding a showing that the evidence had been prepared in the ordinary course of defendant's business and was then available.

There can be no doubt that upon the facts stated in the affidavits before the superior court it could conclude either that the papers sought to be inspected were prepared for the purpose of litigation and transmittal to the attorney for Gnecco and the city, and hence privileged, or that they were not; that they were prepared in the regular course of business of efficiently operating the transportation system and hence not privileged. It chose to believe those supporting the latter view. I agree that the papers were properly inspectable under section 1000 of the Code of Civil Procedure but that they could have been privileged if they were prepared for the purpose of transmittal to the attorney in connection with pending or threatened litigation.

As stated by the District Court of Appeal when this case was decided by that court by unanimous decision, 251 P.2d 35, 36:

"While a party is to be protected from unnecessary disclosure to others of the contents of his private books, papers and records, as is said in McKinley v. Southern Pac. Co., 80 Cal.App.2d 301, 315, 181 P.2d 899, 908, 'no party has a right to refuse to produce any report or document which may have a bearing upon the facts of the pending litigation.'

"Nor can it be said that any of the documents are privileged as petitioner contends. The photographs have simply recorded what any eyewitness could have seen. The statement of facts by the plaintiff was made to the defendant's agent. Certainly, the relationship of client and attorney did not exist between Wynona Bell and the City Attorney. They were dealing at arm's length. Although the report of Gnecco, the driver, originated with him, it does not appear to have been directed to any attorney. In fact the record does not disclose that Gnecco had any attorney at the time the report was made up. The report appears to be more of a statement of facts for study in the prevention of accidents than a communication from a client to his attorney. As is stated in Wigmore on Evidence, section 2318, Second Edition, it is only those documents which the party has created as a communicating client, that are privileged.

"In Construction Products Corp. v. Superior Court, 103 Cal.App.2d 403, 404, 229 P.2d 399, 400, it is said that 'In determining the propriety of an order under section 1000, Code of Civil Procedure, it must be borne in mind that the trial court's action thereunder is discretionary and that all intendments are in favor of the validity of such order. Accordingly, such action will not be annulled unless a clear abuse of that discretion appears. Milton Kauffman, Inc., v. Superior Court, 94 Cal.App.2d 8, 16, 210 P.2d 88.' The order here made does not appear to violate any fundamental right of the petitioner."

There was a clear conflict in the affidavits on the question of the purpose for which the papers were prepared. This is apparent on their face. The affidavits of the claimants of the privilege (the city and Gnecco) stated that the papers were for transmittal to their attorney for use in the pending litigation. On the other hand, plaintiff's affidavits opposing the privilege stated that they were made in the regular course of business of the city in operating its transportation system and are known as "defect cards" and "defect reports," that is, reports of unusual conditions or defects with respect to the busses. The trial court resolved this conflict against the existence of a factual basis for the privilege and this court should not, as does the majority, reweigh the affidavits and arrive at a contrary conclusion.

It is a settled rule that the one claiming the privilege has the burden of establishing the facts as a basis for its application, McKnew v. Superior Court, 23 Cal.2d 58, 142 P.2d 1; Carroll v. Sprague, 59 Cal. 655; Sharon v. Sharon, 79 Cal. 633, 22 P. 26, 131; Collette v. Sarrasin, 184 Cal. 283, 193 P. 571. Whether the privilege is properly available is a *factual* issue to be disposed of according to the principles applicable to such questions. As said in Hager v. Shindler, 29 Cal. 47, 64:

"* * * whether a communication by a client to his attorney was made in confidence, is a question of fact, to be disposed of on principles applicable universally to questions of that character.

"We must assume that the Court below passed upon the point as involving a matter of fact, and found that Mastick's knowledge of the voluntary character of the deed was not confidential; and we consider the finding to be well sustained by the evidence."

In Stewart v. Douglass, 9 Cal.App. 712, 714, 100 P. 711, 712, it is said: "The first assignment of error argued by plaintiff relates to the ruling of the court admitting evidence of certain statements made by him to an attorney at law over the objection that they were privileged. When this objection was made, and before passing upon it, the court took the testimony of witnesses to determine whether or not these statements were made in the course of professional employment. This was the proper procedure. The court found that the statements were not so made. *It being within the province of the trial court to pass upon this, like any other question of fact, and the evidence being conflicting, the conclusion of the trial court will stand as final.*" (Emphasis added.) In Dwelly v. McReynolds, 6 Cal.2d 128, at page 131, 56 P.2d 1232, at page 1234, this court said: "The question of privilege was a matter for the trial court's determination and its decision, upon conflicting evidence, is conclusive." Those principles are in accord with the general rule that where there is a conflict in affidavits on a factual issue before the trial court that court's resolution thereof is binding on an appellate court. Voeltz v. Bakery, etc., Union, 40 Cal.2d 382, 254 P.2d 553; Hale v. Bohannon, 38 Cal.2d 458, 241 P.2d 4; Lohman v. Lohman, 29 Cal.2d 144, 173 P.2d 657; Gordon v. Perkins, 203 Cal. 183, 263 P. 231; Doak v. Bruson, 152 Cal. 17, 91 P. 1001; Brainard v. Brainard, 82 Cal.App.2d 478, 186 P.2d 990.

In the face of these well established principles the majority holds that while regular course of business was one of the purposes, the dominant or primary purpose was that the papers were prepared and transmitted to the attorney to be used in litigation. In this connection the majority opinion states: "As to the reports and photographs it is clear that from their character and content they fall within the privilege. Both originated with agents of the city and it is undisputed that they were forwarded in confidence to the defendants' attorneys for use in possible litigation." This holding disregards the settled rule that the burden of establishing the right to the privilege rests upon the claimants and it is the function of the trial court to determine what the dominant purpose was. The trial court could have rejected the claimants' conclusionary statements in their affidavits that the papers were for transmittal to the attorneys for the purpose of litigation. In reaching its result the majority states: "These affidavits were uncontradicted as to the purpose of the documents. In this connection the plaintiff asserts only that they were prepared in the regular course of business. But there is no valid basis for a distinction between a communication created for transmittal to an attorney to prepare for threatened litigation following particular accidents, and a communication prepared for an identical purpose under standing rules in the case of all accidents involving personal or property injury. Because the scope of the operations of the defendant city's Municipal Railway is such as to require communications of this nature as a routine matter, it cannot be said that the attorney-client privilege did not attach." The claimant's affidavits were contradicted because it appears from plaintiff's affidavits that Gnecco's statement and the photographs were prepared as a defect report in the regular course of business and not for use in litigation, and, therefore, not within the privilege. If it was "routine" and usual business to have such papers, the fact that they might be used in connection with litigation would not make them privileged. The majority holding ignores the probability that the papers were for the purpose of more efficiently operating the transportation system—to check on the skill of the drivers and condition of the equipment in order that appropriate steps could be taken to cure any deficiencies. The trial court could, as it did, choose that purpose as the dominant one believing that the possibility of litigation was merely incidental and which might not even mature into an existing fact. In holding to the contrary the majority again usurps the function of the trial court by determining an issue of fact on conflicting evidence. The majority does this by arbitrarily disregarding the conflicting statements in the affidavits of the respective parties and holding that the trial court abused its discretion in determining what the dominant purpose was for the preparation of Gnecco's report of the accident and the taking of photographs. The majority holding in this respect is in line with the current trend of recent decisions of this court to determine the facts contrary to the trial court even though there is a substantial conflict in the evidence.[1] By its holding, *as a matter of law*, that reports, even though made as a routine business matter, are nevertheless privileged if later transmitted to an attorney for threatened litigation, the majority adopts a rule clearly out of line with the great weight of authority elsewhere. It is stated with ample and correct citation of authority "* * the great weight of authority favors the view that such a statement or report made in the *ordinary course of duty* and before litigation has been commenced or threatened is not a privileged communication." Emphasis added; 146 A.L.R. 977, 980.

It has been held repeatedly that section 1000 should be liberally construed in favor of inspection, see Union Trust Co. v. Superior Court, 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259; Austin v. Turrentine, 30 Cal.App.2d 750, 87 P.2d 72, 88 P.2d 178; Milton Kauffman, Inc., v. Superior Court, 94 Cal.App.2d 8, 210 P.2d 88; Parker v. Shell Oil Co., 55 Cal.App.2d 48, 130 P.2d 158; McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944, the same as the statutes relating to depositions, including that of the adverse party and his agents, Code Civ.Proc. § 2055. Pollak v. Superior Court, 197 Cal. 389, 240 P. 1006; Moran v. Superior Court, 38 Cal.App.2d 328, 100 P.2d 1096; Zellerbach v. Superior Court, 3 Cal.App.2d 49, 39 P.2d 252. As stated in Union Trust Co. v. Superior Court, supra, 11 Cal.2d 449, 462, 81 P.2d 150, 157:

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[1] Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324, 29 A.L.R.2d 1185; Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335; Cary v. Wentzel, 39 Cal.2d 491, 247 P.2d 341; Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910; Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663; Hawaiian Pineapple Co. v. Industrial Accident Comm., 40 Cal.2d 656, 255 P.2d 431; Better Food Markets v. American District Telegraph Co., 40 Cal.2d 179, 253 P.2d 10; Atkinson v. Pacific Fire Extinguisher Co., 40 Cal.2d 192, 253 P.2d 18; Sutter Butte Canal Co. v. Industrial Accident Comm., 40 Cal.2d 139, 251 P.2d 975; Mercer-Fraser Co. v. Industrial Accident Comm., 40 Cal.2d 102, 251 P.2d 955; Gill v. Hearst Publishing Co., 40 Cal.2d 224, 253 P.2d 441; Goodman v. Harris, 40 Cal.2d 254, 253 P.2d 447; Pirkle v. Oakdale Union, etc., School Dist., 40 Cal.2d 207, 253 P.2d 1; Burtis v. Universal Pictures Co., Inc., 40 Cal.2d 823, 256 P.2d 933; Kurlan v. Columbia Broadcasting System, 40 Cal.2d 799, 256 P.2d 962; Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947; Turner v. Mellon, 41 Cal.2d 45, 257 P.2d 15; Barrett v. City of Claremont, 41 Cal.2d 70, 256 P.2d 977; In re Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990; Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834.

"* * * the enactment of statutes relative to the remedy of obtaining evidence by inspection was had with a view to provide a more speedy and less expensive remedy than by the proceedings in chancery; that they 'are remedial in their nature and should be liberally construed'.

"That the *trend of judicial decisions* is to *relax* the rules which relate to the taking of evidence by ancillary proceedings, of which the inspection of documents is one method, to the end that the trial of actions may be expedited and justice be more efficaciously and speedily administered, is reflected in many modern decisions, some of which are here noted." (Emphasis added.)

It has been held thereunder, Code Civ. Proc. § 1000, that the papers sought to be inspected must be material and admissible in evidence at the ensuing trial of the action, and they must be properly identified; the applicant for the order of inspection must show those things to justify an order. McClatchy Newspapers v. Superior Court, supra, 26 Cal.2d 386, 159 P.2d 944; Milton Kauffman, Inc., v. Superior Court, supra, 94 Cal.App.2d 8, 210 P.2d 88; Kullman, Salz & Co. v. Superior Court, 15 Cal.App. 276, 114 P. 589. But "Section 1000 is remedial in character and is to be liberally construed. The modern tendency in the administration of justice is to relax the rules which relate to the inspection of writings to the end that the trial of actions may be expedited and justice be more efficaciously and speedily administered. The statute was designed to assist a party to an action to discover material facts even though the writings evidencing such facts are in the possession of the adverse party. It is a wholesome aid to the proper administration of justice. *The obtaining of inspection of writings in a case where it appears that the rights of a party may depend upon its proper exercise, should not be regarded 'as a game' having fixed rules 'that must be literally and punctiliously observed.'* Refusal to comply with an order of inspection based on technical objections does violence to the spirit and intent of the statute." Milton Kauffman, Inc., v. Superior Court, supra, 94 Cal.App.2d 8, 15, 210 P.2d 88, 93; emphasis added. Those elements may be shown by the pleadings in the action as well as affidavits offered by the applicant for the order. See Union Trust Co. v. Superior Court, supra, 11 Cal. 2d 449, 81 P.2d 150; Milton Kauffman, Inc., v. Superior Court, supra, 94 Cal.App.2d 8, 210 P.2d 88.

As above mentioned the complaint in plaintiff's action charged that the negligent operation of the bus by Gnecco, the city's driver, caused her injuries. The city and Gnecco answered denying the material allegations and pleaded contributory negligence on the part of plaintiff. The affidavits show that Gnecco made a written report to city officials of the accident, the basis of the action, as shown by his deposition which was taken; that the photographs of the bus and plaintiff were taken by the city shortly after the accident; that eleven days after the accident an agent of the city questioned plaintiff regarding the events that transpired at the accident; and her statements were written by the agent and she signed this statement; that she does not remember what she said because of her emotional and physical condition at the time the statement was taken. While there are conclusionary statements in the affidavits with reference to the materiality of these papers, their relevancy is sufficiently shown. The report of Gnecco of the accident would necessarily include his version of the facts concerning it, the precise matters in issue in the action. It may well be admissible, if it contains admissions against him, to prove negligence, or even for the same purpose against the city if within the scope of his employment. Also, it may be admissible to impeach his testimony at the trial if there is a variance. Plainly the photographs of the bus and the scene of the accident are relevant and commonly used. See 10 Cal. Jur. 860, 896; Code Civ.Proc. § 1954. Plaintiff's statement could be used to refresh her memory or to impeach her if there is a variance between it and her testimony at the trial.

It is urged, however, that under the equity bill of discovery rules, an inspection before trial cannot be had by a party (plaintiff here) to ascertain the documentary evidence which his opponent (petitioners here) has to support his own case. The general rule at common law was that a party was not entitled to ascertain before trial the tenor of his adversary's evidence. Wigmore on Evidence, 3d Ed., § 1845. In equity and by a bill of discovery in equity for assistance in the law court, there was an exception authorizing the inspection before trial of documents in the adversary's possession, Ibid., §§ 1846, 1857. The limitation on that right of inspection "was that it should include only those documents which contained *the evidence of the applicant,* and not those which contained the adversary's own evidence. If, for example, A sued B to enforce a contract, and the instrument was in B's possession, A could obtain inspection of that instrument, but not of a release which B might also possess. It is true that A might sometimes be unaware of the precise contents or even of the existence of documents evidencing his own case but possessed by B, and to this extent the discovery and inspection would relieve him from the risk of unfair surprise and would thus in spirit be an exception to the general rule and a decided improvement over his situation under common-law procedure. But this would be merely an accidental result in a given case; in theory of law he was inspecting merely that which was in a sense already his own. The strict and invariable rule, already briefly noted, ante, § 1846, in harmony with the rule already examined for witnesses, ante, § 1856*b*, was that no inspection in advance could be demanded of those documents which were to serve merely as the adversary's own evidence.

"In short, there was in chancery no exception to the broad principle of the common law that a *party is not entitled to ascertain before trial* the tenor of the documentary evidence which the *adversary possesses to support his own case.*" Ibid., § 1857.

To simplify the matter, most states adopted statutes authorizing law courts to order pre-trial inspection of documents. Ibid., § 1859. This state has had such a statute since its inception, California Practice Act, Stats.1851, p. 51, § 446. It was placed in the original Code of Civil Procedure as section 1000 (as it is now) and has at all times read substantially the same. Particular provision is made with respect to inspection of accounts, Code Civ.Proc. § 454, written instruments in actions on them, Code Civ.Proc. § 449, notice to produce a writing, Code Civ.Proc. §§ 1938–1939, and using the subpoena duces tecum, Code Civ. Proc. § 1985.

With the thought in mind that section 1000 must be liberally construed, I do not think the Legislature intended to incorporate the aforementioned bill of discovery limitation. There is nothing in the language of the section which indicates such a limitation. Indeed it is to the contrary. It authorizes inspection by *either* party of *any* papers in the adversary's possession or control containing evidence relating to the *"merits"* of the action *or* a *"defense"* therein. In speaking of the penalties suffered if the inspection is refused, the court may exclude the paper from being given in evidence, which could apply *only to papers in support of the adversary's own case.* It then goes on to state the result where the paper of which inspection is refused is wanted by the applicant for his own case, thus further indicating that the inspectable papers are not confined to the applicant's own case. I agree with Professor Wigmore when he states in connection with a summary of the inspection statutes of the various states that "This legislation was plainly animated by a conviction that the existing principles were defective, and that, for the reasons already examined, ante, § 1847, a determined inroad should be made on the sportsman's theory that the adversary is entitled to keep his own evidence to himself until the trial." Wigmore on Evidence, 3d Ed., supra, § 1859. It has been held in other states with statutes which do not contain the phrases last above discussed, having only the first sentence like section 1000, that pre-trial inspection may be had of papers relevant for use by applicant even though they were the adversary's

own documentary evidence. See Looney v. Saltonstall, 212 Mass. 69, 98 N.E. 698; Fox v. Derrickson, 7 Boyce 129, 30 Del. 129, 104 A. 155; LaCoss v. Town of Lebanon, 78 N.H. 413, 101 A. 364; see cases contra collected Wigmore on Evidence, 3d Ed., § 1856b.

In this state, the cases have not indicated that the limitation in the bill of discovery existed under section 1000. Some cases speak of the statutory law as springing from the bill of discovery or as being based on that principle. Wright v. Superior Court, 139 Cal. 469, 73 P. 145; Union Trust Co. v. Superior Court, supra, 11 Cal.2d 449, 81 P.2d 150; Parker v. Shell Oil Co., 55 Cal.App.2d 48, 130 P.2d 158. But none of them holds that the limitation here discussed is present. They do speak of the necessity of liberality in allowing inspection. Union Collection Co. v. Superior Court, 149 Cal. 790, 87 P. 1035 and Favorite v. Superior Court, 52 Cal.App. 316, 198 P. 1004, merely hold that a person cannot by a bill of discovery obtain evidence on a collateral matter that is not relevant to any of the issues in the case. In Reed v. Union Copper Mining Co., 1 Cal.Unrep. Cas. 587, it was merely said that a bill of discovery was not proper because defendant could be required to answer under oath or called as a witness. Ex parte Clarke, 126 Cal. 235, 58 P. 546, 46 L.R.A. 835, holds only that books cannot be required to be produced unless shown to be material to some issue. People v. Nields, 70 Cal.App. 191, 232 P. 985, and Barrington v. Pacific Electric Ry. Co., 83 Cal.App. 100, 256 P. 567, dealt with a lack of showing of materiality. It has been said, without discussion of the point here involved, that inspection was proper although the documents bore evidence of the adversary's own case. Avery v. Wiltsee, 177 Cal. 484, 171 P. 95, defendant wanted plaintiff's books in action by plaintiff for attorney's fees and money expended by plaintiff for defendant. In Demaree v. Superior Court, supra, 10 Cal.2d 99, 73 P.2d 605, it was held that by subpoena duces tecum on deposition to perpetuate testimony (which of course was before trial), in a pending personal injury action against defendant, an alleged insured, plaintiff, could obtain the production of any insurance policy covering him because it could be material in an action against the insurer, if and when such action was brought, after and if he obtained judgment against defendant. To the same effect is Superior Ins. Co. v. Superior Court, 37 Cal.2d 749, 235 P.2d 833.

I conclude, therefore, that the materiality of the papers included in the inspection order clearly appears and that they are such that they come under the provisions of section 1000 of the Code of Civil Procedure.

I would therefore deny the writ as to all documents.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

For dissenting opinion of CARTER, J., see 268 P.2d 722.

42 Cal.2d 874

CARROLL

v.

SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

S. F. 18771.

Supreme Court of California.
In Bank.
March 12, 1954.

Proceeding by bus company's attorney for writ of prohibition to restrain the Superior Court from enforcing its order allowing inspection of certain photographs of scene of accident and of bus involved in accident by bus passenger in connection with passenger's action against bus company for injuries sustained in accident. The Supreme Court, Shenk, J., held that, where facts before trial court required determination that transmittal of such photographs to bus company's attorneys was for purposes of litigation and that such was dominant, if not sole, purpose, trial court's denial of attorney-client privilege and ordering production of such photographs for inspection of passenger, who had brought personal injury action arising out of such accident, constituted an abuse of discretion.

Peremptory writ issued and alternative writ discharged.

Carter, J., dissented.

Discovery ⚩90

Where facts before trial court required determination that transmittal of photographs of scene of accident and of bus which was involved in accident to bus company's attorneys was for purposes of litigation and that such was dominant, if not sole, purpose, trial court's denial of attorney-client privilege and ordering production of such photographs for inspection of passenger, who had brought personal injury action against bus company, constituted an abuse of discretion. Code Civ.Proc. § 1000.

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Landels & Weigel and Stanley A. Weigel, San Francisco, for petitioner.

No appearance for respondent.

Dan L. Garrett, Jr., San Francisco, for real party in interest.

SHENK, Justice.

The petitioner seeks a writ of prohibition to restrain the respondent court from enforcing its order for the inspection of certain photographs in his possession. An alternative writ was issued.

The order was made in an action entitled Presley v. Pacific Greyhound Lines, now pending in the respondent court. The plaintiff therein seeks to recover damages allegedly suffered by him from injuries received while riding on the defendant's bus and caused by defendant's alleged negligence in operating the bus. Before trial in that action the plaintiff moved under Section 1000 of the Code of Civil Procedure for an order permitting him to inspect and copy photographs in the possession and control of defendant and its attorney, Francis Carroll, the present petitioner.

Affidavits were filed in behalf of the respective parties. The affidavit on behalf of the plaintiff was made by his counsel. It avers that the defendant and its attorneys have possession of photographs of the scene of the accident depicting the "condition of the said Greyhound Bus following the said accident, skid marks, debris, the condition of the highway following said accident and other material and relevant evidence as to the occurrence of said accident." An affidavit in opposition to the motion was also filed. It states that the photographs were taken by the agents of defendant for the purpose of delivering them to its attorneys and were in fact taken and delivered to the attorneys to enable them to prepare a defense to the action. It is insisted that the privilege of attorney and client attaches to the information contained in the photographic evidence.

The court granted the motion and ordered the inspection. The defendant and the petitioner have refused to comply with the order and are threatened with punishment for contempt. The petitioner seeks to restrain the trial court from proceeding with the enforcement of its order by this application for the writ of prohibition.

The questions presented in this case are substantially the same as those involved in the companion case of Holm v. Superior Court, Cal.Sup., 267 P.2d 1025. It was there held that where the right to assert the privilege is clear the bill of discovery cannot be used to defeat it; that where a communication is between corporate employees and is embodied in photographic evidence for redelivery to a corporate attorney, the privilege attaches if the photographs were created as a means of communicating information to the attorney, and that where the dominant purpose is the transmission of information to an attorney in his professional capacity it is immaterial that there are other incidental purposes not entitled to the privilege.

In the present case there is no conflict with the petitioner's affidavit showing that the photographs were taken for the express purpose of being transmitted to the defendant's attorneys to be used in the threatened litigation. The petition for the writ of prohibition reasserts such a purpose and neither the respondent court nor the real parties in interest have answered it. The facts before the trial court required a determination that the transmittal of the photographs to the attorneys was for the purposes of the litigation and that this was the dominant if not the sole purpose. To deny the privilege in such circumstances was an abuse of discretion.

Let the peremptory writ issue as prayed. The alternative writ is discharged.

GIBSON, C. J., and EDMONDS, SCHAUER, and SPENCE, JJ., concur.

TRAYNOR, Justice.

I concur in the judgment on the ground that petitioner's allegation that the photographs were taken for the express purpose of transmitting them to him is not disputed by either the respondent court or the real parties in interest.

CARTER, Justice.

I dissent.

I agree that the photographs would be privileged if taken for the purpose of transmittal to defendant's counsel for use in litigation, but as I pointed out in my dissent in Holm v. Superior Court, Cal.Sup., 267 P.2d 1025, the burden of proof on that issue rested upon defendant, the claimant of the privilege. The trial court was justified in concluding, as it did, that that burden had not been sustained because it could disbelieve the affidavits supplied by defendant even though uncontradicted. "A trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it, and this rule applies to an affidavit." Lohman v. Lohman, 29 Cal.2d 144, 149, 173 P.2d 657, 660; see, also, other cases cited in Holm v. Superior Court, supra. The rule is especially applicable in this case since the affidavit is by one of defendant's attorneys, hardly in a position to be unbiased. The majority opinion, however, determines the credibility of the affidavit contrary to the trial court, thus usurping its power.

I would therefore deny the writ.

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42 Cal.2d 524

PEOPLE v. MILLUM.

Cr. 5554.

Supreme Court of California.
In Bank.
March 16, 1954.

Prosecution for unlawful possession of marijuana, wherein defendant waived jury trial. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and imposed sentence. Defendant appealed from judgment and from sentence. The Supreme Court, Spence, J., held that where evidence of attendant circumstances and methods of procurement of confession did not disclose conduct which would make use of confession a denial of due process, it could not be first urged on appeal that confession was involuntary and therefore inadmissible as evidence.

Judgment affirmed, appeal from sentence dismissed.

Prior opinion 262 P.2d 342.

1. Criminal Law ⚷1023(10)

An appeal would not lie from sentence.

2. Criminal Law ⚷1036(1)

Where conviction is based upon involuntary confession obtained by brutality or inherently coercive methods such as to constitute violation of due process, due process clause proscribes state procedure and guarantees that question of involuntariness of confession may be asserted on appeal though no timely objection to its admission had been made. U.S.C.A.Const. Amend. 14.

3. Constitutional Law ⚷262

The mere questioning of a suspect in the custody of officers is not a denial of due process. U.S.C.A.Const. Amend. 14.

4. Criminal Law ⚷1036(1), 1044

Where defendant's confession was obtained after sporadic questioning over a three or four hour period in presence of officers and two friends of defendant, evidence of attendant circumstances and methods of procurement of confession did not disclose conduct which would make use of confession a denial of due process, and any error in admitting testimony as to confession was waived by failure of defendant to object or move to strike such testimony from record.

5. Criminal Law ⚿1036(1)

Any error in admitting testimony that narcotic agents had stated to defendant that they had information that he was selling marijuana and kept some at home was waived by failure to object to admission at trial and such error could not be urged for first time on appeal. Health and Safety Code, § 11500.

6. Poisons ⚿9

In prosecution for unlawful possession of marijuana, wherein testimony indicated presence of marijuana in defendant's room, in his shirt, and among his personal papers, and defendant admitted at time of arrest that marijuana was his, evidence sustained finding that defendant knowingly possessed marijuana. Health and Safety Code, § 11500.

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Gladys Towles Root and Herbert Grossman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

[1] Defendant was charged with violation of section 11500 of the Health and Safety Code, in that, on December 16, 1952, he unlawfully had marijuana in his possession. He pleaded not guilty. He was also charged with two prior felony convictions, which he admitted. He waived jury trial, was tried by the court and found guilty. He appeals from the judgment of conviction and also from the sentence. Since an appeal from the sentence is not authorized, the purported appeal therefrom will be dismissed. People v. Abrams, 108 Cal.App.2d 584, 585, 239 P.2d 75; People v. Smith, 22 Cal.App.2d 209, 211, 70 P.2d 677.

About 5:30 p. m., on December 16, 1952, two government narcotic agents were admitted into an apartment by a young lady. Defendant was in the bedroom making a telephone call. When he had finished, one of the agents stated that they had information that defendant was selling marijuana and was keeping some in his home. Defendant denied this. The agents then searched the premises. In the bedroom closet they found a man's shirt, in the pocket of which was a cigarette; and they found a suitcase which contained, among other things, a green, leafy substance and a number of defendant's papers. Later analysis identified the leafy substance as marijuana, and disclosed that the cigarette contained marijuana. Under questioning in the apartment, defendant admitted that the shirt was his but denied knowledge of the contraband. Despite the agents' questioning as to his "source" and "connections," defendant persisted in his denial. Finally, defendant was told that they "were going to book [him] and the young lady," whereupon defendant stated with reference to the marijuana "that it was all his and she had no knowledge of the marijuana being there."

[2] Defendant first contends that the evidence was insufficient to justify conviction because his purported confession was involuntary and therefore inadmissible as evidence. This contention has no merit.* Defendant failed to make a timely objection in the trial court. People v. Hurst, 36 Cal.App.2d 63, 64, 96 P.2d 1003. However, defendant cites certain cases in support of his claim that the question of the involuntariness of the confession may always be raised on appeal. Brown v. State of Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; People v. Rodriguez, 58 Cal.App.2d 415, 136 P.2d 626; accord, Lee v. State of Mississippi, 332 U.S. 742, 68 S.Ct. 300, 92 L.Ed 330. These cases do not sustain the broad proposition for which they are cited. Their rationale is that a confession may not be the basis of a conviction if the confession was obtained by brutality, Brown v. State of Mississippi, supra, 297 U.S. 278, 56 S.Ct. 461, or by sustained pressure through unrelenting interrogation which either in fact broke defendant's resistance so that he answered against his will, Stein v. People of State of New York, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522; Chambers v.

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* Counsel appearing on appeal were not counsel for appellant in the trial court.

State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, or may be assumed to have broken defendant's resistance so that he answered against his will because the questioning was carried on under circumstances which may be called "inherently coercive." Ashcraft v. State of Tennessee, 322 U.S. 143, 154, 64 S.Ct. 921, 88 L.Ed. 1192. A conviction so premised and allowed by state procedure is said to constitute a violation of due process under the Fourteenth Amendment. The "wrong [is] so fundamental that it [makes] the whole proceeding a mere pretense of a trial and [renders] the conviction and sentence wholly void." Brown v. State of Mississippi, supra, 297 U.S. at page 286, 56 S.Ct. at page 465. This being so, it follows that the state cannot then rise above the defect and erase the unconstitutional result of its trial procedure by utilizing still another of its procedural rules to prevent the defendant from raising the question on appeal. Lee v. State of Mississippi, supra, 332 U.S. 742, 68 S.Ct. 300; Brown v. State of Mississippi, supra, 297 U.S. 278, 56 S.Ct. 461; People v. Rodriguez, supra, 58 Cal.App.2d 415, 136 P.2d 626. To hold that the defendant could never assert the involuntariness of a confession on appeal where a timely objection had not been made would, under such circumstances, constitute state sanction of the denial of due process which took place in the trial court. The due process clause proscribes state procedure at this point and guarantees that the question may be asserted on appeal. To the extent that the broad language in People v. Costa, 81 Cal. App. 309, 312, 253 P. 940, may appear to support a contrary view, it is disapproved.

[3, 4] However, where the evidence of attendant circumstances and methods of procurement of the confession does not disclose conduct which would make the use of the confession a denial of due process, there is no constitutional proscription of state procedure and state procedure prevails. Only that evidence which is uncontradicted by the state in its version of the attendant circumstances is considered on appeal in determining whether there has been such a denial of due process. Stein v. People of State of New York, supra, 346 U.S. 156, 183–184, 73 S.Ct. 1077; Gallegos v. State of Nebraska, 342 U.S. 55, 61–63, 72 S.Ct. 141, 96 L.Ed. 86; Harris v. State of South Carolina, 338 U.S. 68, 69, 69 S.Ct. 1354, 93 L.Ed. 1815; Turner v. Commonwealth of Pennsylvania, 338 U.S. 62, 63, 69 S.Ct. 1352, 93 L.Ed. 1810; Watts v. State of Indiana, 338 U.S. 49, 51–52, 69 S.Ct. 1347, 93 L.Ed. 1801; Haley v. State of Ohio, 332 U.S. 596, 597–598, 68 S.Ct. 302, 92 L.Ed. 224; Malinski v. People of State of New York, 324 U.S. 401, 404, 65 S.Ct. 781, 89 L. Ed. 1029; Lyons v. State of Oklahoma, 322 U.S. 596, 602, 64 S.Ct. 1208, 88 L.Ed. 1481; Ashcraft v. State of Tennessee, supra, 322 U.S. 143, 152–153, 64 S.Ct. 921; Ward v. State of Texas, 316 U.S. 547, 550, 552, 555, 62 S.Ct. 1139, 86 L.Ed. 1663; Lisenba v. People of State of California, 314 U.S. 219, 238, 62 S.Ct. 280, 86 L.Ed. 166; Chambers v. State of Florida, supra, 309 U.S. 227, 60 S.Ct. 472.

The undisputed evidence here discloses that the officers were present in the apartment with the defendant but three or four hours, during which time the confession was made; that the closet was searched for about twenty-five minutes out of the above period, during which time defendant was asked but a few questions; that the questioning was sporadic, being at various times between and after searches for the marijuana; that defendant's girl friend and another person, a boy who also lived in the house, were present during the entire time, neither of whom was called upon to testify; that defendant and his friends were allowed to eat during the above period when they became hungry; and that the longest period of questioning was about thirty minutes, and during the course of even this short period there were interruptions, and no other officer in relay took up the inquiry during such interruptions. Therefore, the most that can be said of this evidence is that defendant was questioned in the presence of officers; and the mere questioning of a suspect in the custody of officers is not a denial of due process. Stein v. People of State of New York, supra, 346 U.S. 156, 184–185, 73 S.Ct. 1077;

Lyons v. State of Oklahoma, supra, 322 U.S. 596, 601, 64 S.Ct. 1208; Lisenba v. People of State of California, supra, 314 U.S. 219, 239–241, 62 S.Ct. 280. None of the circumstances which appeared in such cases as Watts v. State of Indiana, supra, 338 U.S. 49, 69 S.Ct. 1347; Haley v. State of Ohio, supra, 332 U.S. 596, 68 S.Ct. 302; Ashcraft v. State of Tennessee, supra, 322 U.S. 143, 64 S.Ct. 921, appear in the present case. There was no sustained questioning by relays for long hours, without rest, when no friends, relatives or counsel were present. It is therefore apparent that state procedure here prevails. Thus the rule stated in People v. Hurst, supra, 36 Cal.App.2d 63, 96 P.2d 1003, fully answers defendant's contention. It was there claimed that a confession induced by holding out more lenient treatment was inadmissible, and therefore the evidence was insufficient to support the conviction. The court stated that such inducement of a confession was improper and would have been sufficient to render the confession inadmissible if timely objection had been made in the trial court; but "As the confession of the particular crime was admitted in the trial court without objection, the objection raised by defendant on this appeal comes too late." 36 Cal.App.2d at page 65, 96 P.2d at page 1004.

[5] For the same reason, defendant may not now assert that error occurred through the introduction of certain accusatory statements which were made by one of the narcotic agents to the defendant. As was said in People v. Stepp, 82 Cal.App.2d 49, at page 51, 185 P.2d 417 at page 418: "Section 1870, subd. 3, of the Code of Civil Procedure authorizes the admission of such testimony, and when it is admitted without objection there is no error on the part of the trial court which may be urged on appeal." People v. Simmons, 28 Cal.2d 699, 723, 172 P.2d 18; People v. King, 114 Cal.App.2d 95, 104, 249 P.2d 563.

[6] Defendant finally contends that the evidence was insufficient to show his knowledge of the contraband, and therefore is insufficient to justify his conviction. Defendant cites the fact that two other persons were also living in the apartment at the time of its search and his arrest. However, the marijuana cigarette was found in the pocket of defendant's shirt; and marijuana was found, with papers belonging to defendant, in a suitcase. Both the shirt and suitcase were in the closet of the bedroom which defendant admittedly occupied. While defendant's knowledge of the presence of marijuana must be shown, People v. Gory, 28 Cal.2d 450, 456–457, 170 P.2d 433, the presence of the marijuana in his room, in his shirt, and among his personal papers is sufficient evidence of possession of it by him, and justified an inference that he had knowledge that it was there. People v. Hoff, 84 Cal.App.2d 398, 400, 190 P.2d 616; cf. People v. Van Valkenburg, 111 Cal.App.2d 337, 340, 244 P.2d 750. In addition, defendant's admission at the time of his arrest in conjunction with the above evidence amply supports the trial court's finding that defendant knowingly possessed the marijuana. People v. Martinez, 117 Cal.App.2d 701, 707, 256 P.2d 1028.

The purported appeal from the sentence is dismissed. The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

THOMPSON CRANE & TRUCKING CO. et al.

v.

EYMAN et al.

Civ. 4653.

District Court of Appeal, Fourth District, California.

March 17, 1954.

Rehearing Denied April 12, 1954.

Hearing Denied May 6, 1954.

Action, commenced as one in interpleader, involving issue as to right of assignor of note to proceeds thereof, as against assignee who claimed proceeds pursuant to a contingent fee contract, to secure payment of which, assignee claimed, the note was assigned. The Superior Court, Fresno County, Arthur C. Shepard, J., entered judgment favorable to assignor, and assignee appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that evidence sustained finding that the contingent fee contract had been obtained by assignee through economic duress or compulsion, as well as the implied finding that assignor had acted as a reasonably prudent person in yielding to the coercion.

Judgment affirmed.

1. Contracts ⚿93, 259

A consent to a contract not freely given is not necessarily void, but may be rescinded under rules prescribed for a rescission. Civ.Code, § 1566.

2. Interpleader ⚿31

Where claim of assignor of note to proceeds thereof as against assignee, which raised question as to whether a contingent fee contract, which assignee claimed was secured by assignment of note, was obtained by assignee through duress, was presented in response to a complaint in interpleader by maker of note, action was not one for rescission, and technical requirements of rescission were not necessarily controlling. Civ.Code, § 1566.

3. Interpleader ⚿31

In action involving issue as to right of assignor of note to proceeds thereof, as against assignee who claimed proceeds pursuant to a contingent fee contract, to secure payment of which, assignee claimed, the note was assigned, finding that contingent fee contract was obtained under duress was not fatally inconsistent with finding of lack of compulsion in later assignment of note, in view of further finding that assignee performed services for assignor under another agreement, and that note was assigned only for purpose of securing payment for any further sums due for such services, the amount being then undetermined.

4. Contracts ⚿99(3)

In action involving issue as to right of assignor of note to proceeds thereof, as against assignee who claimed proceeds pursuant to a contingent fee contract, to secure payment of which, assignee claimed, the note was assigned, evidence sustained finding that the contingent fee contract had been obtained by assignee through economic duress, as well as the implied finding that assignor had acted as a reasonably prudent person in yielding to the coercion.

5. Fraud ⚿35

Where a party is placed in a position where rescission would not afford an adequate remedy, he may complete the contract without waiving his right to assert his claim for the fraud.

* * *

Adams, Duque, Davis & Hazeltine, Los Angeles, Docker & Docker, Fresno, James S. Cline, Lawrence T. Lydick, Los Angeles, for appellant.

Thompson & Thompson, Harold V. Thompson, Fresno, for respondents.

BARNARD, Presiding Justice.

This action was commenced as one in interpleader. The plaintiff alleged that the defendants Eyman and Weller claimed adverse interests in the proceeds of a note given by plaintiff to Weller, and assigned by him to Eyman. By appropriate pleadings Weller and Eyman each claimed the money, Eyman relying on an assignment of the note and a claimed breach of contract and Weller claiming that the contract had been obtained through compulsion and duress. The money due on the note was deposited in court, it was stipulated that the plaintiff should have its judgment of interpleader, and the action was tried on the issues as to the respective rights of Weller and Eyman to the funds deposited.

Weller, who was in business in Coalinga, filed income tax returns for 1943, 1944 and 1945 upon a cash basis. In 1945, nearly all of his records were destroyed by fire. In 1946, he employed Eyman, a certified public accountant, to install a system of bookkeeping and to prepare his income tax return for 1946. While doing this Eyman examined Weller's returns for 1943 to 1945, and then filed the 1946 return upon an accrual basis without obtaining permission to change the basis of reporting. On Eyman's recommendation Weller also filed amended returns for 1943 to 1945, claiming a refund of $4,800. Eyman was paid for his work up to that time.

As a result of filing this claim of refund a large additional assessment against Weller was proposed by the treasury department. In 1948, Weller conferred with Eyman about handling this matter since he was familiar with the basis of the amended returns and claim of refund. Eyman told Weller the proposed assessment was asinine, and it was a simple matter to wind up. On April 14, 1949, they entered into an oral agreement by which Eyman agreed to handle the matter and Weller agreed to pay him a retainer of $1,000, and paid $250 on account thereof. Nothing was said in that conversation about a contingent fee, and Eyman later wrote Weller a series of letters repeatedly mentioning the $1,000 retainer but saying nothing of any contingency.

In July, 1950, the treasury department sent Weller formal notice of additional assessments amounting to about $118,000. These notices were delivered to Eyman who applied for a 60-day extension in which to file a protest, saying he had only eight days which was not sufficient. His request for 60 days was refused but he was given 30 days, extending the time to Monday, September 18. On September 15, Weller received a telegram from the treasury department stating that September 18 was the deadline. Eyman prepared the protest, completing it on Saturday morning, September 16. On the afternoon of September 16, in response to Eyman's request, Weller went to Eyman's office in Los Angeles to sign the protest. Eyman told Weller that he had completed the protest and that it would have to be mailed that night in order to be received in San Francisco by Monday, which was the deadline. He then produced a written contract, which he had prepared the day before, providing that Weller was to pay him 7½% of any and all relief secured, in addition to the $1,000 retainer, and demanded that Weller sign it. When Weller refused to sign it, Eyman told him that if he did not sign it the protest would not be filed, and he would be liable for the assessment. It had taken Eyman more than a month to prepare the protest and after a couple of hours' discussion Weller signed the contingent fee contract, believing that if he did not do so he would be subject to this assessment which would result in his financial ruin.

Eyman mailed the protests on Sunday, September 17, 1950, and later attended five conferences in connection with this assessment matter, one of which was on February 19, 1951. On February 16, 1951, upon Eyman's insistence that he have some security, Weller assigned the note in question to Eyman for the purpose of securing the payment to him of any money due him for his services in this tax matter. On April 13, 1951, Eyman succeeded in having the claimed assessments reduced to about $2,500.

This action was brought in September, 1951. The court found that the plaintiff had deposited $9,212.79 with the clerk, and that it was entitled to have the note satisfied and to a reconveyance under the trust deed given to secure the note. With respect to the issues between the two cross-complainants, the court found most of the facts above stated and found, among other things, that Eyman had, without any request therefor, advised Weller to file amended returns for 1943 to 1945; that

Weller did so upon Eyman's representation that he was experienced and learned in tax matters; that Eyman knew that most of Weller's records had been destroyed by fire, that he would have no adequate records to support his position, and that the filing of the amended returns would start an investigation of Weller's entire account; and that after preliminary discussions Weller and Eyman entered into an agreement on April 14, 1949, by which Eyman agreed to handle the tax matter and Weller agreed to pay him a retainer of $1,000.

In connection with the written contract for a contingent fee it was found that when Weller went to Eyman's office to sign the protests on the afternoon of Saturday, September 16, 1950, he was for the first time confronted with Eyman's demand for a contingent fee; that Eyman then refused to file the protest unless this contract was signed, and stated that a large assessment would be made against Weller unless the protest was filed; that the following Monday was the last day in which the protest could be filed in San Francisco; that most attorneys' and accountants' offices were then closed; that Eyman had taken considerable more than a month to prepare the protest, and Weller believed that an extension of time could not be secured to permit him to find another accountant or prepare new protests; that Weller was mentally "in extremis" and convinced that unless he complied with Eyman's demand a judgment would be taken against him which would destroy him financially; that he signed the contract under this belief and to prevent said assessment; that Weller was taken by surprise and had had no warning of a possible demand for contingent fees prior to that date; that he believed that Eyman would abandon his case if he did not sign the contract; that he would not have signed it if Eyman had not stated that he would not file the protests and that the assessment would be made if he did not sign; that it was impossible at that late hour for Weller to secure the necessary assistance to prepare and file a protest before the deadline; that Eyman told Weller that if he did not sign the contract he would become liable for the total amount of the tax assessments; and that under these circumstances Weller signed the contingent fee agreement under business compulsion and duress.

It was further found that the services performed by Eyman in connection with this matter were performed under the agreement of April 14, 1949, and not under the contingent fee contract signed on September 16, 1950; that the reasonable value of Eyman's services in the matter is $2,700, in addition to the retainer already paid; that the assignment of the note to Eyman on February 16, was not made under duress or business compulsion, but was made to secure the payment of any money to become due Eyman for his services in this matter; that on that date the retainer had been paid, but any further amount to become due to Eyman had not been determined; that on that date Eyman demanded that this note be assigned to him as security for any further sums to become due him for his services; and that Weller assigned said note to him for that purpose.

Judgment was entered providing for the cancellation and return to the plaintiff of the note and security given in connection therewith; for the payment to Eyman of $2,700 (plus some interest and an additional amount not here in question) out of the fund deposited in court; and for the payment to Weller of the balance remaining in the possession of the clerk. From this judgment Eyman has appealed.

The appellant contends that the findings are not sufficient to support the conclusions and judgment. It is argued that a contract, even if obtained by duress, is merely voidable and subject to the rules governing a rescission; that the respondent was here seeking a rescission and the court failed to find that he rescinded promptly, which finding was essential to a judgment of rescission; that the findings are fatally inconsistent and conflicting since it was found that the contingent fee agreement was obtained under compulsion, but also found that the respondent had voluntarily assigned the note to secure the payment to appellant of any money coming due to him "under the contingent fee agreement"; and that the findings are deficient in that the court did not specifically find that the respondent acted reasonably in submitting to the alleged compulsion.

[1-3] While a consent not freely given is not necessarily void and "may be rescinded" under the rules prescribed for a rescission, Civil Code, § 1566, this was not an action for a rescission, the claims of the respective parties being presented in response to the complaint in intervention, and the technical requirements of rescission are not necessarily controlling here. The finding of compulsion in obtaining the contingent fee agreement is not fatally inconsistent with the finding of lack of compulsion in the later assignment of the note, since it was found that the services were performed under the oral agreement of April 14, 1949, and that the note was assigned only for the purpose of securing payment for any further sums due for said services, this amount being then undetermined. There is nothing in the record to indicate that the assignment of the note mentioned the contingent fee agreement, and the court did not find that it was made to secure any payment coming due under that agreement. A finding that the respondent acted reasonably in submitting to duress and compulsion is necessarily implied from the other facts found.

[4] It is further contended that the evidence is insufficient to support the finding of economic duress or compulsion since it does not meet the test that to be sufficient for that purpose the evidence must show some wrongful act, that no other adequate means were available to the other party to prevent the threatened loss, and that the other party acted as a reasonable person in submitting to the alleged coercion. It is argued that there is no evidentiary support for the finding that these parties made an oral agreement on April 14, 1949, providing that Eyman was to handle this matter and that Weller was to pay him a retainer of $1,000; that there is no evidence of any wrongful act on the part of the appellant, but only of a mere breach of contract which is not sufficient to support a conclusion of illegal compulsion; that there is no evidence that the respondent did not have other adequate means to prevent a threatened loss since he had two days in which to file a protest, and since other proceedings would have been necessary before any judgment against him would have become final; that there is no evidence that the respondent acted as a reasonably prudent person in submitting to the alleged coercion; that there is no evidence that he rescinded promptly; and that the evidence conclusively shows that he affirmed the contingent fee agreement, and waived the right to rescind, by later paying the remainder of the $1,000 retainer and assigning the note to the appellant.

The facts are the best answer to most of these contentions. Both parties testified that an oral agreement was made on April 14, 1949, providing that Eyman would handle this matter and that Weller would pay him $1,000. Weller testified that nothing was said about a contingent fee, and that he thought this $1,000 was to be the full charge. Eyman testified that the $1,000 was specified as a retainer, that there was also an indefinite agreement that he was to be paid somewhere from 10 to 15% of any savings effected, and that about a week later he wrote Weller a letter "confirming the $1,000 retainer", but not mentioning any other terms of the agreement. The court accepted a part only of the testimony of each party, and the evidence supports the finding as to the agreement thus made.

There is ample evidence of a wrongful act on the part of the appellant, and something more than a mere passive threat to breach a previous oral contract. Eyman not only refused to complete his service under the original contract, which would have required his attendance at future hearings on the protest, but he refused to allow Weller to file the protest already prepared and used the impossible position thus created to enforce his demand, and thereby secure a new contract on different terms. A very real compulsion appears, which is no less real because an incidental breach of contract was also involved.

The evidence supports the conclusion that other adequate means to prevent the threatened loss were not available to Weller. He had only two days before the protest must be filed in San Francisco, although Eyman had obtained an extension on the ground that eight days was not sufficient and had then taken about 40 days to prepare it. It was Saturday afternoon, and other assistance would naturally not be available. A failure to file the protest on time would have seriously affected the later proceedings and, in addition to other considerations, it cannot reasonably be said that any means which might become available in the course of subsequent proceedings, were adequate or would have appeared so to a reasonable person.

The evidence rather conclusively shows that Weller did not act freely and voluntarily, and appellant's contention that the trial judge erroneously applied the subjective test as to what Weller believed, rather than the objective test as to what a reasonably prudent person would have believed, is without merit. Whether he acted as a reasonably prudent person was a factual question for the court, and the evidence amply supports the implied finding that he did, which is sufficiently disclosed by the facts specifically found including the finding that the contingent fee contract was signed under duress. Young v. Hoagland, 212 Cal. 426, 298 P. 996, 75 A.L.R. 654; Steffen v. Refrigeration Discount Corp., 91 Cal.App.2d 494, 205 P.2d 727. This was not a case where Weller acted on his own suggestion. See Campbell v. Rainey, 127 Cal.App. 747, 16 P.2d 310. Eyman told Weller that he would be liable for the proposed assessment if he did not sign the agreement, and any reasonably prudent layman would naturally rely on such statements by a tax expert in such a situation. The findings as a whole indicate an intention to find that Weller was justified in believing the statements made, and sufficiently disclose an implied finding, which necessarily and logically follows from the other facts established, that Weller acted as a reasonably prudent person in yielding to this coercion.

[5] It does not necessarily follow that the respondent is barred from any relief because he did not rescind promptly, or because a waiver of his rights conclusively appears. This was not an action for a rescission, and the respondent could not restore what he had received, as required by section 1691 of the Civil Code. His position was similar to that involved in the recognized rule that where a party is placed in a position where rescission would not afford an adequate remedy, he may complete the contract without waiving his right to assert his claim for the fraud. Rothstein v. Janss Inv. Corp., 45 Cal.App.2d 64, 113 P.2d 465; Hines v. Brode, 168 Cal. 507, 143 P. 729; Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935. No issues of affirmance and waiver were directly raised by the pleadings, although they were incidentally involved in the trial. Both parties came into court as a result of the complaint in intervention, both claiming the funds deposited by the plaintiff. This was only a few months after appellant's services were completed, no prior legal step to enforce the alleged contract had been taken, no prejudice appears from the delay, and no such issue was raised by his answer and cross-complaint. The note was assigned as security for whatever amount the respondent actually owed, and it was not given, specifically or otherwise, as security for the payments called for by the contract of September 16, and the court did not so find. Under the facts proved and found, it cannot be held, as a matter of law, that Weller waived his right to defend against Eyman's claim to a percentage fee. In view of the manner in which Eyman secured the contract for a contingent fee, we are not impressed by his argument that the equities of the case are in his favor.

Because the evidence was conflicting, and because they could not be controlling, several other points incidentally raised by the appellant need not be considered.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

124 Cal.App.2d 19

PEOPLE v. CORENEVSKY.

Cr. 5078.

District Court of Appeal, Second District,
Division 2, California.
March 19, 1954.

Hearing Denied April 14, 1954.

Defendant was convicted in the Superior Court of Los Angeles County, George Francis, J., of grand theft, and he appealed. The District Court of Appeal, McComb, J., held that evidence would have warranted finding of guilty of embezzlement or larceny by trick and device, and thus it sustained conviction for grand theft.

Judgment affirmed.

1. Larceny 🔑2

Statute defining offense of grand theft is constitutional. Pen.Code, § 484.

2. Embezzlement 🔑26

Indictment charging grand theft by fraudulent appropriation of property entrusted to defendant is not defective because of failure to allege that the property was taken feloniously and with intent to steal. Pen.Code, §§ 484, 952.

3. Embezzlement 🔑1
False Pretenses 🔑1
Larceny 🔑1

The crime of grand theft is complete when a man takes property not his own with intent to take it, and he may be convicted of such offense upon proof of facts establishing embezzlement, larceny, or obtaining property under false pretenses.

4. Criminal Law 🔑1159(1)

Where criminal acts may constitute one of two or three forms of theft, depending upon how the jury views the evidence, and the facts so warrant, the verdict of conviction can be sustained on either theory.

5. Embezzlement 🔑11(1)

A defendant who received possession of property lawfully but thereafter violated his trust and fraudulently converted the property to his own use was guilty of embezzlement, and thus of grand theft. Pen.Code § 503.

6. Embezzlement 🔑44(1)
Larceny 🔑65

Evidence warranted finding that defendant was guilty of either embezzlement or larceny by trick and device, and thus sustained conviction for grand theft. Pen. Code, § 503.

7. Criminal Law 🔑1144(14)

Where none of the instructions given or refused by trial court were part of the record on appeal, the reviewing court would assume that correct instructions were given to the jury.

8. Criminal Law 🔑1023(8)

No appeal lies from an order overruling a demurrer in a criminal case.

◆

Lowell Lyons, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodward, Dep. Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of grand theft after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial, and a purported appeal from the order overruling his demurrer to the information.

Facts:[1] Jeanne Greenlin was working as a cocktail waitress at the Crow's Nest in Long Beach in January, 1953. She was the owner of a 1949 Hudson automobile. On the 13th of that month she met defendant who told her he was Rock Hudson, the movie actor. He asked her to call him Bob since he did not want anyone to know who he was. He stated he was on his way to New York and had come to Long Beach to hire a Japanese boy to drive his Cadillac for him. She overheard defendant tell the boy to take his girl friend out in the

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[1] The evidence is considered in the light most favorable to the prosecution, pursuant to the rules announced in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

Cadillac after going over to the Villa Riviera and obtaining $250, $200 of which was to be given to the boy's mother.

Defendant said he was paying this boy $75 per week to drive him to New York, and that he was doing it because he was a good friend of the boy's parents. The fact was that defendant had met the boy, Takahashi Kumisawa, in jail. Defendant asked Mrs. Greenlin if she would join him for a few drinks. She said she had to meet her girl friend at the Roseroom, but that she would meet him later.

When Mrs. Greenlin left her work at 6:00 p. m. being unable to start her car, she called defendant who came over in a Cadillac. After her car was started they went to a bar where they spent approximately three-quarters of an hour before proceeding to the Roseroom where they met Bonnie Riegle and her gentleman friend. The quartet had a few drinks and subsequently went to the Villa Riviera where defendant asked at the desk if there had been any calls or messages for Rock Hudson. Thereafter they had dinner at the Continental restaurant. Each time Mrs. Greenlin's car was used it was necessary to push it in order to start it. After dinner she drove defendant to the Villa Riviera, and returned to her home.

At about 9:00 a. m. the next day defendant called her and said he would help her get her car started. After starting the car they drove into a garage where defendant told the attendant, "Well, I think I will take it to my mechanic, but I have my Cadillac, could you service it. I am going to New York." They went then to Mrs. Greenlin's place of employment where defendant stated, "Let me take your car and this man will fix it for you. I know him very well." Mrs. Greenlin suggested that it might be the battery which was causing the trouble and asked defendant if he would take it to Sears and have a new battery put in. Defendant agreed to do so and said that it would take between an hour and an hour and a half, and that she was to call him at the Villa Riviera. She told him not to keep the car later than 2:00 p. m. because she needed it to go back and forth to the store, whereupon she gave defendant the keys and he drove off.

Thereafter Mrs. Greenlin called the Villa Riviera several times but could not reach defendant. When she learned he was no longer registered there she reported the theft of her car to the police department. She obtained defendant's true name from the Japanese boy, who was in fact the son of a gardener next door.

Mrs. Greenlin did not at any time give defendant permission to take her car out of the city and county.

On January 14, 1953, the Chief of Police of Holtville, California, saw defendant in the Blue Bonnet Cafe in Holtville and questioned him with reference to the gray Hudson sedan registered to Mrs. Greenlin. When asked where he was going defendant did not say, but said that he was driving around. Since the Chief of Police was not satisfied with defendant's answers he questioned him further, whereupon defendant made a collect call to Mrs. Greenlin, asking that he be permitted to drive her car back home. During this telephone conversation defendant said to her, "I'll explain everything. I am all mixed up. I don't know why I took it. I will explain everything. Please tell these men that I didn't steal the car." She talked with the authorities in Holtville and agreed with them that the car should be impounded. Defendant was booked by the Holtville authorities and later the present indictment was filed.

Questions: First: *Did the trial court err in overruling defendant's demurrer to the indictment on the ground that the statute under which he had been indicted was unconstitutional?*

[1] *No.* All the strictures which defendant levels against the statute, Penal Code, section 484, have been answered contrary to his contentions in People v. Robinson, 107 Cal.App. 211, 217, et seq., 290 P. 470 (hearing denied by the Supreme Court). The constitutionality of the section is now beyond question. (See People v. Ilderton, 14 Cal.App.2d 647, 649, 58 P.2d 986 (hearing denied by the Supreme Court).)

[2] There is likewise no merit in defendant's contention that the information was defective because it did not allege an element of intent. Section 952, Penal Code, reads thus: "[Manner of charging commission of offense: Charging theft.] In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

In construing section 952 it has been held that an information charging grand theft in that at a certain time and place defendant unlawfully took property having a stated value is sufficient without charging that the property was taken feloniously and with intent to steal. (People v. Plum, 97 Cal.App. 253, 255[1], 275 P. 518. See also People v. Torp, 40 Cal.App.2d 187, 191, 104 P.2d 542.)

The foregoing rule is here applicable.

Second: *Was the evidence sufficient to support a judgment of guilty of grand theft since defendant came into possession of the automobile originally with the consent of the owner?*

[3] *Yes.* The crime of grand theft is complete when a man takes property not his own with the intent to take it, and a defendant may be convicted of grand theft upon proof of facts establishing (a) embezzlement, (b) larceny or (c) obtaining property under false pretenses. (People v. Frazier, 88 Cal.App.2d 99, 102, 198 P.2d 325.)

[4] It is likewise established that where criminal acts may constitute one of two or three forms of theft, depending upon how the jury views the evidence, and the facts so warrant, the verdict of conviction can be sustained on either theory. (People v. Von Badenthal, 8 Cal.App.2d 404, 408, 48 P.2d 82; People v. Chamberlain, 96 Cal. App.2d 178, 182 et seq., 214 P.2d 600.)

In the present case the facts were sufficient to support the jury's implied finding that defendant was guilty of embezzlement. Section 503 of the Penal Code provides: "Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted."

[5] In the present case defendant received possession of the property lawfully but thereafter violated his trust and fraudulently converted the property to his own use. He was therefore guilty of embezzlement. (People v. Cannon, 77 Cal.App.2d 678, 689, 176 P.2d 409.)

[6] The evidence also warrants the implied finding of the jury that defendant was guilty of larceny by trick and device, since the jury could have inferred from the evidence that defendant's intent to appropriate the vehicle for his own use existed prior to the time he was given possession of it. (People v. Raschke, 73 Cal. 378, 381 et seq., 15 P. 13; People v. Tomlinson, 102 Cal. 19, 23, 36 P. 506.)

In the instant case the evidence discloses that defendant stated to Mrs. Greenlin, "Let me take your car and this man will fix it for you. I know him very well." After assuring her that he would take the car to Sears for a new battery and that it would take between an hour and an hour and a half, defendant proceeded to drive from Long Beach to Holtville before being apprehended.

Since the evidence is sufficient to support either a theory of embezzlement or larceny by trick and device, the trial court did not err in refusing to advise the jury to acquit defendant pursuant to the provisions of Penal Code, section 1118.[2]

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[2] Section 1118, Penal Code, reads: "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice."

Third: *Was defendant deprived of the benefit of the doctrine of reasonable doubt and the presumption of innocence?*

[7] *No.* None of the instructions given or refused is a part of the record herein. Therefore an appellate court will assume that correct instructions were given to the jury. (People v. Frye, 117 Cal.App.2d 101, 108[10], 255 P.2d 105; People v. Brickman, 119 Cal.App.2d 253, 264[9], 259 P.2d 917.)

[8] No appeal lies from an order overruling a demurrer. (People v. Miller, 95 Cal.App.2d 631, 634[2], 213 P.2d 534.) Therefore the purported appeal from the order overruling defendant's demurrer is dismissed.

The judgment and order denying the motion for a new trial are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

123 Cal.App.2d 894

GILES v. HAPPELY et al.

Civ. 19700.

District Court of Appeal, Second District,
Division 2, California.
March 17, 1954.

Rehearing Denied March 30, 1954.
Hearing Denied May 6, 1954.

Pedestrian brought action for injuries sustained in contact with motorist's automobile while pedestrian was attempting to cross street at intersection. The Superior Court of Los Angeles County, Henry M. Willis, J., rendered judgment for motorist and pedestrian appealed. The District Court of Appeal, McComb, J., held that evidence was sufficient to support findings that motorist was not negligent in respect to lookout or yielding right of way.

Judgment affirmed.

1. Appeal and Error 🔑930(1)

Reviewing court would view evidence in light most favorable to respondents.

2. Automobiles 🔑160(4)

Statutory rule that driver of a vehicle shall yield right of way to pedestrian crossing within crosswalk applies only under circumstances when the different courses of the vehicle and the pedestrian render it dangerous for both to proceed on their respective ways without delay. Vehicle Code, § 560.

3. Automobiles 🔑160(4)

A driver, after having allowed a pedestrian in a crosswalk to proceed in front of him and reach a place of safety out of the way of his automobile, with no apparent further danger of conflict between them, may then proceed to drive across and through said crosswalk and he need not wait until the pedestrian has cleared the entire roadway nor anticipate that pedestrian will reverse his course, in absence of circumstances reasonably suggesting such a course. Vehicle Code, § 560.

4. Automobiles 🔑226(1)

When pedestrian on crosswalk who has crossed in front of motorist reverses his course so suddenly as to make it impossible for motorist to avoid collision, motorist will not be liable for pedestrian's injuries, absent other negligence on motorist's part proximately causing collision. Vehicle Code, § 560.

5. Trial 🔑194(16)

Instruction concerning pedestrians' right of way at crosswalk was not subject to claimed infirmity of usurping province of jury and stating as a matter of fact that pedestrian had reversed his course and backed into defendant's automobile. Vehicle Code, § 560.

6. Trial 🔑285, 295(1)

Instructions are to be considered as a whole and the words used therein considered in their ordinary meanings.

7. Automobiles 🔑11

Questions of right of way arise between two users of the highway only where there is danger of a collision between them if they proceed on their respective ways without delay.

8. Automobiles ⚿245(6)

Motorist was not negligent, as a matter of law, in driving into intersection while pedestrian was still in crosswalk. Vehicle Code, § 560.

9. Automobiles ⚿244(6)

In pedestrian's action for injuries sustained from contact with motorist's automobile while pedestrian was attempting to cross at intersection, evidence was sufficient to support findings that motorist was not negligent in respect to lookout or yielding right of way. Vehicle Code, § 560.

10. Automobiles ⚿160(3)

That motorist was watching automobile in front of him did not establish that he was negligent in failing to keep proper lookout for approach of persons who might be about to step into path of his automobile or negligent as to pedestrian who came into contact with his automobile while attempting to cross at intersection. Vehicle Code, § 560.

11. Automobiles ⚿244(6)

In pedestrian's action for injuries sustained from contact with motorist's automobile while pedestrian was attempting to cross at intersection, evidence supported finding that motorist was not negligent in following too closely the automobile in front of him. Vehicle Code, §§ 531(a), 560.

12. Automobiles ⚿245(72)

In pedestrian's action for injuries sustained from contact with motorist's automobile while pedestrian was attempting to cross at intersection, evidence on question of whether or not pedestrian reversed his course suddenly and backed into motorist's automobile was sufficient to present jury question as to pedestrian's contributory negligence. Vehicle Code, § 560.

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Harry Aides, Los Angeles, for appellant.

James V. Brewer, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before a jury in an action to recover damages for alleged negligence resulting from an automobile accident, plaintiff appeals.

Facts:[1] [1] April 8, 1951, at about 8:07 p. m. plaintiff was walking on the south side of Ventura Boulevard approaching the intersection of Berry Drive and said boulevard. At the intersection where there were painted crosswalks, plaintiff stopped and started to cross to the north side of Ventura Boulevard within the crosswalk. He reached the center of the street where he stopped. Traffic was fairly heavy in both an easterly and westerly direction on Ventura.

Defendant Happely was driving his car east on Ventura Boulevard about three feet south of the center line of the intersection. After the front of his car had passed plaintiff, he saw plaintiff's elbow hit the rear view mirror on the left side of his car, the mirror being knocked off by the impact. Defendant had a radio aerial on the left front fender which was not damaged.

Plaintiff's right shoulder was injured as was his left ankle. Otherwise there were no injuries to plaintiff's left side excepting some abrasions on the left leg between the knee and ankle. There were no scuff marks found on the front of the car between the front and where the rear view mirror was attached; there was a scuff mark in back of where the rear view mirror was attached and there was an indentation toward the rear of the car. At the instant of the accident defendant applied his brakes. As a result of having hit defendants' car, plaintiff was seriously injured.

Plaintiff relies for reversal of the judgment on these propositions:

First: *The trial court committed prejudicial error in instructing the jury as follows:*

"You are instructed that Section 560 of

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[1] The evidence is, pursuant to the established rule, viewed in the light most favorable to defendants (respondents). See In re Estate of Isenberg, 63 Cal. App.2d 214, 216(2), 146 P.2d 424.

the California Vehicle Code in force at the time of the accident provided as follows:

" 'Pedestrians Right of Way at Crosswalks. (a) The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter.'

[2] "The rule established by this section applies only under circumstances when the different courses of the vehicle and the pedestrian render it dangerous for both to proceed on their respective ways without delay.

"You are instructed that when a pedestrian crossing a roadway in a crosswalk is proceeding beyond the path of the approaching vehicle so that no interference between them is reasonably to be expected, the driver need not wait and yield the right of way.

[3] "You are further instructed that if a driver, after having allowed a pedestrian in a crosswalk to proceed in front of him and reach a place of safety out of the way of his automobile, with no apparent further danger of conflict between them, may then proceed to drive across and through said crosswalk and he need not wait until the pedestrian has cleared the entire roadway.

[4] "Under the same circumstances the said automobile driver need not anticipate that the pedestrian may change his mind and reverse his course of travel in the absence of circumstances suggesting such a course. If the pedestrian reverses his course and places himself in a position of peril in such close proximity to the driver's automobile so that the driver would not have time to stop or change his course to avoid a collision, such driver would not be liable in the absence of other negligence on his part which was the sole proximate cause of the collision."

This contention is untenable. In People v. McLachlan, 36 Cal.App.Supp.2d 754, 93 P.2d 280, questions relative to the proper construction and meaning of section 560 of the Vehicle Code were exhaustively discussed by the court and such case is authority for the giving of the questioned instruction.

[5] There is no merit in plaintiff's contention that in the instruction the trial judge usurped the province of the jury and instructed it as a matter of fact that plaintiff after having reached the center double line in the center of Ventura Boulevard reversed his course and backed into defendant's car. Such construction is tortious and distorts the language in the instruction which is clear, unambiguous and an abstract statement of correct principles of law. See People v. McLachlan, supra.

[6] The rule is settled that instructions are to be considered as a whole and the words used therein considered in their ordinary meanings. As thus applied there is nothing in the questioned instruction which invades the province of the jury.

Clarke v. Volpa Bros., 51 Cal.App.2d 173, 124 P.2d 377; Vulicevich v. Skinner, 77 Cal. 239, 19 P. 424, and other cases cited by plaintiff, were correctly decided but the facts in each of the cases are different from those in the instant case and are not here applicable.

Second: *Defendant was guilty of negligence as a matter of law in driving into the intersection at any time while plaintiff was still in the crosswalk.*

This proposition is not sound. The correct rule is accurately stated in People v. McLachlan, supra, by Mr. Presiding Judge Shaw, 36 Cal.App.Supp.2d at page 757, 93 P.2d at page 282, as follows:

[7, 8] "Questions of right of way arise between two users of the highway only when there is danger of a collision between them if both proceed on their respective ways without delay. Mitrovitch v. Graves, 1938, 25 Cal.App.2d 649, 654, 655, 78 P.2d 227; Cowan v. Market St. Ry. Co., 1935, 8 Cal.App.2d 642, 646, 647, 47 P.2d 752; Switzer v. Baker, 1916, 178 Iowa 1063, 160 N.W. 372, 375. The case of Mitrovitch v. Graves, supra, involved the provision of section 562 of the Vehicle Code which requires a pedestrian crossing a roadway at a point not within a crosswalk to 'yield the right of way to all vehicles upon the road-

way,' and the court said that it 'merely means that when the course of an automobile along a highway meets with that of a person who seeks to walk across the street or roadway at a point other than along a marked crosswalk, under circumstances which render a collision likely, the pedestrian must stop and permit the vehicle to pass ahead of him. * * * The rule applies only under circumstances when the opposite courses of the vehicle and the pedestrian render it dangerous for both to proceed on their respective ways without delay. Under such circumstances the pedestrian must stop to permit the vehicle to precede him.' In Switzer v. Baker, supra, the court had under consideration a city ordinance providing that 'pedestrians are given the right of way over the crossings at street intersection,' and said that such legislative regulations of the right of way mean 'that, when two or more persons moving in different directions approach a crossing at the same time or in such manner that if both or all continue their respective courses there is danger of collision, then the one having the preference is entitled to the first use of such crossing, and it is the duty of others to give him reasonable opportunity to do so.'"

Third: *The evidence is insufficient as a matter of fact to support the judgment in favor of defendants.*

[9] This proposition is likewise untenable. From the evidence it was the province of the trier of fact (in this case the jury) to determine the facts in the case. The evidence supports the facts set forth above, which facts support the implied findings of fact of the jury that plaintiff started to cross Ventura Boulevard in a northerly direction within a marked crosswalk while fairly heavy traffic was traveling in an easterly and westerly direction on the boulevard; that plaintiff reached the center of the boulevard and stopped on the double white line; that at the same time defendant Happely, driving in an easterly direction on Ventura Boulevard at about 25 miles per hour, with the left side of his car approximately three feet south of the center line and traveling about eighteen feet to the rear of the car in front of him while watching the car in front of him passed plaintiff who was standing in the center of the street; that after the front of defendants' car had passed plaintiff, plaintiff turned back and with his right elbow struck the rear view mirror on the left side of defendants' car with the result that plaintiff received serious personal injuries.

Clearly under these findings of fact, which were supported by the evidence, plaintiff failed to sustain his burden of proof in establishing that any negligent act or acts of defendant Happely caused the unfortunate accident.

Fourth: *Defendant was guilty of negligence as a matter of law in not maintaining a reasonable outlook for pedestrians within the marked crosswalk.*

This proposition is devoid of merit. Plaintiff contends that since defendant Happely testified as to the forementioned facts such defendant violated the provisions of section 560 of the Vehicle Code.

[10] The mere fact that defendant was watching the car ahead of him does not change the fact that his vision was approximately 150 degrees to the right and left as well as straight in front of him and thus he was keeping a proper lookout for the approach of persons who might be about to step into the path his car was traveling. Whether he did so or not was a question of fact for the jury to determine from all the evidence, which they did in this case, impliedly finding that said defendant had kept a proper lookout.

Fifth: *Defendant was negligent as a matter of law in violating section 531(a) of the Vehicle Code which reads thus: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the conditions of, the roadway."*

[11] Clearly this proposition is not meritorious. It was a question of fact from the evidence for the jury to determine whether or not defendant Happely was

following unreasonably close to the car in front of him, and we cannot say that eighteen feet, which Mrs. Happely testified was the distance their car was from the car in front of them, was not under the circumstances a reasonable interval to allow between the cars.

Sixth: *The trial court committed prejudicial error in submitting the question of contributory negligence to the jury.*

[12] Clearly under the foregoing facts the trial court properly submitted to the jury the question of whether plaintiff was contributorily negligent. From the facts set forth above it is evident that the jury found plaintiff stepped back into the side of defendants' car. Thus the question presented to the jury, "Was the plaintiff contributorily negligent in his conduct?" pertained to this issue.

Affirmed.

MOORE, P. J., and FOX, J., concur.

123 Cal.App.2d 876

JETTY v. CRACO.

Civ. 19843.

District Court of Appeal, Second District,
Division 3, California.
March 16, 1954.

Action by lender against borrower to recover money loaned. The Superior Court, Los Angeles County, Charles J. Griffin, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that the judgment was just, and the appeal frivolous.

Judgment affirmed with $300 additional as damages for frivolous appeal.

1. Trial ⚷396(3)

Allegations of complaint to effect that within two years last past defendant became indebted to plaintiff for money loaned in sum of $4,125, which defendant promised to repay, and that credit was given for $225 paid on account, were not at variance with findings that plaintiff loaned defendant such sum, that the money was repayable by defendant within a reasonable time after defendant's return from a trip to the Orient, that defendant returned from the Orient on or about February 7, 1950, and such sum became due after March 8, 1950, that defendant was entitled to credit of $225, and that interest should be allowed in total amount of $874.36.

2. Money Lent ⚷7(3), 8

In action to recover money loaned more than two years previously, finding that defendant became indebted to plaintiff within two years last past was required to be read with finding that money was to be repaid within a reasonable time after defendant returned from the Orient, which was within two years prior to commencement of action, and, as so read, was supported by evidence.

3. Money Lent ⚷8

In action to recover money loaned, specific findings as to amounts and dates of loans and when they were to be repaid were sufficient to support judgment for plaintiff.

4. Money Lent ⚷6

Where complaint of plaintiff, who sought to recover money loaned to defendant, merely alleged the loan, which was denied by answer in which there was no allegation of partnership between plaintiff and defendant or that the money had been received at all by defendant, defendant's claim of partnership, and receipt of money as a contribution to partnership was new matter which, not having been pleaded, was not available as defense, and testimony concerning partnership was properly stricken. Code Civ.Proc. § 437.

5. Pleading ⚷132, 382(1)

Anything which shows that plaintiff has not the right of recovery at all, or to extent he claims, on case as he makes it, may be given in evidence upon an issue joined by an allegation in complaint and its denial in answer, but where something is relied on by defendant which is not put in issue by plaintiff, defendant must set up such new matter. Code Civ.Proc. § 437.

6. Pleading ⚷132

Facts which constitute no part of plaintiff's cause of action come clearly within definition of "new matter" within statute requiring that an answer contain a statement of any new matter constituting a defense or counterclaim. Code Civ.Proc. § 437.

See publication Words and Phrases, for other judicial constructions and definitions of "New Matter".

7. Pleading ⚷87

A plaintiff, who comes to court prepared to prove his case and to meet affirmative defenses pleaded in answer, cannot be expected to meet special defenses which are not pleaded, and plaintiff has right to be protected against them. Code Civ.Proc. § 437.

8. Appeal and Error ⚷1041(3)

Denial of defendant's application to amend by properly pleading the statute of limitations was not prejudicial error, where action, in any event, was timely brought, and statute, if properly pleaded, would not have furnished a good defense. Code Civ. Proc. § 339, and subds. 1, 2, § 458.

9. Interest ⚷7, 44

Borrower's promise that lender would be amply repaid for use of money loaned gave rise to a proper inference of a promise to pay interest on the money, and allowance of interest from dates when money was loaned, rather than from date the debt fell due, was proper.

10. Costs ⚷260(4)

Where judgment appealed from was a just one, and appeal was frivolous, judgment would be affirmed with $300 additional as damages for a frivolous appeal.

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Nathan Newby, Jr., Los Angeles, for appellant.

Weyl & Weyl, John A. Weyl, Bertin A. Weyl, Hollywood, for respondent.

SHINN, Presiding Justice.

The first cause of action of the complaint alleged that within two years last past defendant became indebted to plaintiff for money loaned in the sum of $4,125, which defendant promised to repay, and credit was given for $225 paid on account. In a second cause of action it was alleged that the loans were obtained by means of fraudulent representations and pretenses of the defendant. The representations, in brief, were that defendant had fallen in love with plaintiff and wished to marry her after he had freed himself from an existing marriage; that he needed the money to finance a trip to the Orient for the purchase of merchandise; that he would sell the same and "more than repay the plaintiff for the monies advanced." It was alleged that defendant had no intention of performing his promises and that plaintiff was deceived by the same to her damage in the sum of $3,900 and interest. Defendant filed an answer denying all the material allegations of Count I of the complaint and he pleaded that the cause of action "* * * is barred by the provisions of section 339 of the Code of Civil Procedure of the State of California." The answer did not plead the statute of limitations as a defense to the second cause of action.

The court found that plaintiff loaned defendant $4,125 and "that said money was repayable by defendant to plaintiff within a reasonable time after his return from a trip to the Orient; that said defendant returned from the Orient on or about February 7, 1950, and that such sum became due after March 8, 1950." It was found that defendant was entitled to a credit of $225 and that interest should be allowed on $3,500 from August 23, 1949 and on $400 from February 7, 1950 in the total amount of $874.36. It was further found that defendant represented that when the merchandise, purchased in the Orient, was returned to the United States the same would be sold and plaintiff amply repaid for the monies advanced by her. It was found that defendant made other representations as alleged by plaintiff but that they were not fraudulently made "* * * at a time when said defendant had no intention of repaying the money paid by plaintiff." Judgment on the first cause of action was in accordance with the findings and in favor of defendant on the second cause of action.

In the findings referred to there is an implied finding that a reasonable time for a repayment of the money after defendant returned would be not less than 29 days, namely, February 7th to March 8, 1950 and also an implied finding that a reasonable time for payment elapsed after March 8, 1950 and prior to March 7, 1952, when the action was filed.

[1] The first point of appellant is stated as follows: "Findings on first cause of action are in variance with allegations of first cause of action in complaint." There is no variance.

[2, 3] The second point is that the finding that defendant became indebted to plaintiff within two years last past is not supported by the evidence for the reason that all the money was received by defendant more than two years prior to the institution of the action. This finding is to be read with the finding that the money was to be repaid within a reasonable time after defendant returned from the Orient which, as the court found, was within two years prior to the commencement of the action. The findings were specific as to the amounts and dates of the loans and when they were to be repaid, and they are sufficient to support the judgment on the first cause of action.

The next point is stated as follows: "It is also true that where there is an express contract the implied contract of assumpsit may not be relied upon." It is said that plaintiff proved that she would be amply repaid out of proceeds from the sale of merchandise and that having proved a special contract she could not recover in assumpsit. No transcript reference is given for any such testimony. The complaint alleged that defendant promised to sell the merchandise and pay the loans but it was not alleged that the loans were payable only out of the proceeds of sales.

[4] Several times in his testimony as to his conversations with plaintiff when he was promoting the loans, defendant mentioned that he held out to plaintiff promises of a partnership interest in his business, when it materialized. Upon plaintiff's motion this testimony concerning a proposed partnership was stricken upon the ground that the answer did not allege the existence of a partnership in the enterprise. This ruling was not in error. By denying paragraphs III and IV of the first cause of action defendant denied the making of the loans and also the payment of $225 on account. By denying the allegations of paragraph III of the second cause of action defendant denied that plaintiff "furnished" to him $4,125 and denied that he had repaid any part of the amount. There was no allegation in the answer of a partnership or that the money had been received at all by defendant. The claim that defendant received the money, not for himself, but for a partnership consisting of plaintiff and himself was one of which plaintiff had been given no warning by the answer and which she would have had no reason to anticipate. The answer was not sufficient to permit proof of a partnership.

Section 437 of the Code of Civil Procedure reads in part: "The answer of the defendant shall contain: 1. A general or specific denial of the material allegations of the complaint controverted by the defendant. 2. A statement of any new matter constituting a defense or counterclaim." The complaint merely alleged the loan of money, which the answer denied. In order to prove her case plaintiff was not required to prove more than the making of the loan. Defendant under his denials could prove that he did not borrow the money. But the pleadings did not create an issue whether there was some special contract or relationship between the parties that would have constituted a defense to the action. The claim of a partnership and the receipt of the money as a contribution to the partnership was new matter, which, not having been pleaded was not available as a defense to the action. If this were not true a defendant, under mere denials in an action for money loaned, could come up with all manner of claims of special agreements to defeat the action. Our system of pleading would not permit this. Matter which would not be brought into evidence in making proof of the loan alleged in the complaint was new matter. The claim that the money was contributed to a partnership of plaintiff and defendant was precisely the sort of "new matter constituting a defense" which the code differentiates from mere denials and which, if relied upon, must be pleaded.

[5, 6] The rule of pleading we have to apply was stated in the early case of Bridges v. Paige, 10 Cal. 640, 641, as follows: "Anything which shows that the plaintiff has not the right of recovery at all, or to the extent he claims, *on the case as he makes it,* may be given in evidence upon an issue joined by an allegation in the complaint, and its denial in the answer. Where, however, something is relied on by the defendant which is *not put in issue by the plaintiff,* then the defendant must set it up. That is new matter—that is, the defendant seeks to introduce into the case, a defense which is not disclosed by the pleadings." (Italics added.) As of the present day this is good law. It was said in Bank of Paso Robles v. Blackburn, 2 Cal.App. 146, 83 P. 262, that facts which constitute no part of the plaintiff's cause of action come clearly within the definition of "new matter". And again in Shropshire v. Pickwick Stages, 85 Cal.App. 216, 258 P. 1107, "new matter" was said to be something relied on by a defendant which is *not put* in issue by plaintiff.

[7] Reason and fairness forbid a different rule. A plaintiff comes to court prepared to prove his case and to meet affirmative defenses pleaded in the answer. He could not be expected to meet special defenses which are not pleaded and has a right to be protected against them. Moreover, defendant was not hurt by the ruling. He was allowed to testify without objection that plaintiff was to receive half of the profits from his trip. And from a reading of his narration of the glib and expansive sales talks he gave plaintiff it is quite clear that his promises of a partnership, like his protestations of love, were merely part of an act put on by a Lothario in the course of separating a confiding woman from her hard earned savings.

[8] While defendant pleaded that the first cause of action was barred by the provisions of section 339, Code of Civil Procedure, he did not specify either subdivision 1 or 2 as required by section 458, Code of Civil Procedure. His application to amend by pleading subdivision 1 was denied. Plaintiff says the ruling was not an abuse of discretion citing Wolters v. Thomas, 3 Cal. Unrep. 843, 32 P. 565; Overton v. White, 18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99; Hart v. Slayman, 30 Cal.App.2d 556, 86 P.2d 861 and Davenport v. Stratton, 24 Cal.2d 232, 149 P.2d 4. Defendant cites the able and arresting opinion prepared by Mr. Justice pro tem. Patrosso in Hopkins v. Hopkins, 116 Cal.App.2d 174, 253 P.2d 723.

In view of the finding that the action was brought within two years after the debt became due, the statute, if properly pleaded, would not have furnished a good defense.

[9] Defendant complains of the allowance of interest from the dates when the money was loaned, rather than from the date the debt fell due. There is no merit in the point. A promise to pay interest on the money was properly inferred from defendant's promise that plaintiff would be amply repaid for the use of her money.

Defendant was given a fair trial. His own testimony shows the imposition practiced upon plaintiff. The judgment is a just one and the appeal is frivolous.

[10] The judgment is affirmed with $300 additional as damages for a frivolous appeal.

WOOD and VALLÉE, JJ., concur.

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42 Cal.2d 530

CALIFORNIA MFRS. ASS'N
v.
PUBLIC UTILITIES COMMISSION.

S. F. 18796.

Supreme Court of California.
In Bank.
March 19, 1954.
Rehearing Denied April 14, 1954.

Writ of review was brought challenging a decision of the Public Utilities Commission fixing rates for carrying general commodities by truck, on ground that commission failed to comply with section of Public Utilities Code providing that in any rate proceeding where more than one type or class of carrier is involved, commission shall consider all such types or classes of carriers, and fix as minimum rates applicable to all such types or classes of carriers the lowest of the lawful rates so determined for any such type or class of carrier. The Supreme Court, Traynor, J., held that commission complied with such section if commission could and did determine directly from all evidence before it that for a given service particular rate was necessarily the lowest it could lawfully determine for any of the types or classes of carriers involved, and that commission did not need to determine any additional lawful rates for each type or class.

Order affirmed.

Edmonds, Schauer and Spence, JJ., dissented.

1. Carriers 🔑12(1)

Under section of Public Utilities Code providing that in any rate proceeding where more than one type or class of carrier is involved, Public Utilities Commission shall consider all such types or classes of carriers, and fix as minimum rates applicable to all such types or classes of carriers the lowest of lawful rates so determined for any such type or class of carrier, and product of rate determination is not separate lawful rates for each type of carrier, but a single schedule of lowest lawful rates that is to apply to all types. Public Utilities Code, § 726.

2. Carriers 🔑12(11)

Section of Public Utilities Code providing that in any rate proceeding where more than one type or class of carrier is involved, Public Utilities Commission shall consider all such types or classes of carriers, and fix as minimum rates applicable to all such types or classes of carriers the lowest of lawful rates so determined for any such type or class of carrier, is complied with if commission determines directly from all evidence before it that for given service particular rate is necessarily the lowest it can lawfully determine for any of the types or classes of carriers involved, and commission is not required to determine any additional lawful rates for each type or class. Public Utilities Code, § 726.

3. Carriers 🔑12(11)

In rate making, Public Utilities Commission need not accept cost figures that are unjustifiably high because of inefficient methods of operation by carriers. Public Utilities Code, § 726.

4. Carriers 🔑12(11)

In fixing lawful rate for any type of service by any type of carrier, Public Utilities Commission is entitled to consider cost of providing service efficiently. Public Utilities Code, § 726.

5. Carriers 🔑12(11)

Once Public Utilities Commission has determined cost and value data applicable to performing of service most efficiently, commission may consider that cost and value data alone in fixing lawful rate for any type of carrier that may legally adopt most efficient method of providing particular service involved. Public Utilities Code, § 726.

Jesse H. Steinhart, John J. Goldberg, Charles E. Hanger, San Francisco, for petitioner.

Everett C. McKeage, Boris H. Lakusta, San Francisco, for respondent.

Arlo D. Poe, Los Angeles, amicus curiae on behalf of respondent.

TRAYNOR, Justice.

By writ of review, California Manufacturers Association is challenging a decision of the Public Utilities Commission fixing rates for carrying general commodities by truck on the ground that the commission failed to comply with section 726 of the Public Utilities Code. That section provides that "In any rate proceeding where more than one type or class of carrier * * * is involved, the commission shall consider all such types or classes of carriers, and * * * fix as minimum rates applicable to all such types or classes of carriers the lowest of the lawful rates so determined for any such type or class of carrier." The commission found that certain specified rate adjustments "will provide the lowest of the lawful rates for any or all types and classes of for-hire carriers involved" and revised Highway Carriers' Tariff No. 2 accordingly. The rates prescribed are not attacked as unjust, excessive, or discriminatory. It is not alleged that any party to the proceeding has been injured. It is not alleged that the commission acted arbitrarily or that its findings are not supported by substantial evidence. The validity of the decision is challenged solely on the ground that the commission failed to follow certain procedural steps allegedly required by section 726.

Petitioner contends that the commission did not comply with that section since, as between highway common carriers, radial common carriers, and contract carriers, it did not (1) first determine lawful rates for each class of carrier separately and (2) then select from among such lawful rates the lowest thereof as the applicable minimum rates. The commission concedes that it did not determine separate lawful rates for each class of carrier and then select the lowest thereof, but it contends that the procedure it followed resulted in a determination of the same lowest of the lawful rates as would have been determined had it adopted the procedure advocated by petitioner. Accordingly, it contends that it complied with the statute.

[1, 2] It bears emphasis that the end product of rate determination under section 726 is not separate lawful rates for each type of carrier, but a single schedule of lowest lawful rates that is to apply to all types. The basic question presented therefore is whether or not the commission could and did determine the lowest lawful rates applicable to any type of carrier without fixing lawful rates for each type of carrier. If it achieved this end product without segregating the cost and other data according to the legal categories of carriers involved, no purpose would be served by requiring it to develop three separate schedules of lawful rates and then to choose the lowest of these. In other words, if, in the light of the applicable standards of rate making, the commission could and did determine directly from all of the evidence before it that for a given service a particular rate was necessarily the lowest it could lawfully determine for any of the types or classes of carriers involved, it complied with the statute and did not need to determine any additional lawful rates for each type or class.

Before 1935 the commission had no authority to regulate the rates of truckers who did not operate between fixed termini or over regular routes as highway common carriers. In 1935 the Highway Carriers' Act, Stats.1935, c. 223, was enacted and the Public Utilities Act amended, Stats.1935, cc. 664, 700, 702, to provide for rate regulation of other land carriers for hire. Section 10 of the Highway Carriers' Act (now Public Utilities Code, §§ 3662–3665) authorized the commission to fix maximum or minimum or maximum and minimum rates for permitted carriers, that is, radial common carriers and contract carriers, and provided that such minimum rates should not be higher than the current rates of common carriers subject to the Public Utilities Act, that is, railroads and highway common carriers. In addition, the latter carriers were prohibited without commission authority from filing lower rates than maximum reasonable rates for the purpose of meeting competitive charges of permitted carriers if such rates should be lower than the charges of the permitted carriers, and the commission was authorized to prescribe such rates for railroads and highway common carriers as would provide an equality of transportation rates for the transportation of property between all competing agencies of transportation. Public Utilities Act, §§ 13½, 32½, Stats.1935, c. 700, now Public Utilities Code, §§ 452, 731. In 1937, section 726 was enacted as section 32d of the Public Utilities Act, Stats.1937, c. 721, providing for the determination of lowest lawful rates that should be applicable to all carriers for the stated purpose of promoting "the freedom of movement by carriers of agricultural commodities, including live stock, at the lowest lawful rates compatible with the maintenance of adequate transportation service." When these provisions are considered together it is clear that the Legislature established a pattern of rate regulation guaranteeing to all carriers the right to compete with each other on equal terms but subject to minimum rates developed for the type or class of carrier best suited economically to perform a particular service. Other than providing in section 10 of the Highway Carriers' Act (now Public Utilities Code, § 3662) that the commission should consider the cost of the service performed, the value of the commodity transported, and the value of the facility reasonably necessary to perform the transportation service, the Legislature did not specify any particular procedure to govern the commission in determining the lowest of the lawful rates.

The present proceeding is the latest of many supplemental proceedings that have been undertaken to adjust the minimum rates first established in 1938. Decision 31606, 41 C.R.C. 671. In determining minimum rates the commission has never followed the procedure advocated by petitioner. It has always sought directly to determine the lowest lawful rate applicable to any class or type of carrier. "We limit ourselves to the task contemplated by the Highway Carriers' Act, i. e., the fixation of a bottom level for rates so as to end destructive rate cutting practice, and, where necessary, the fixation of a ceiling so as to prevent excessive rates, thus generally leaving to the carriers a bargaining zone within which they can adjust particular rates to meet their own transportation conditions, as well as the commercial needs of the shippers whom they serve.

"There is before us here adequate evidence from which to determine the rate level below which no carrier should under ordinary circumstances be permitted to go in competing with other carriers." 41 C.R.C. at 686.

Its procedure in determining lowest lawful rates was fully articulated by the commission in a supplemental opinion filed on March 27, 1952. Decision 46912, 51 Cal. P.U.C. 586. In fixing the lowest lawful rate for any given service the commission determines the most efficient way of rendering such service that is used by any of the various types of highway carriers involved. It then considers the cost of providing such service and the value of the equipment required to determine the lowest lawful rate. It does not, however, determine separately the costs and value of equipment of highway common carriers, radial common carriers, and contract carriers.[1] The commission's experience has demonstrated that ordinarily some types of carriers are more efficient in rendering certain services and other types are more efficient in rendering other services. Thus, a contract carrier that limits its business to a few selected customers that ship in regular truckload lots can provide service for such customers more economically than a common carrier that must accept all business offered. On the other hand, common carriers that provide regular service between fixed termini will ordinarily be better equipped than contract carriers to handle small and irregular shipments from many shippers. Whether or not, however, a given carrier can provide a specified service efficiently and economically will not necessarily depend upon the type of permit or certificate that it holds, but on whether it has the plant and equipment to do the job efficiently and can secure the business necessary to enable it to make the best use of its property. Thus, to determine what is the most efficient method of providing a given service and the cost thereof, the commission does not segregate the evidence according to classes of carriers, but determines instead what carriers of all classes are providing the service most efficiently and economically. In this manner it is able to determine the lowest justifiable costs for performing the service by any of the different classes of carriers.

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[1] The third factor mentioned in section 10 of the Highway Carriers' Act is the value of the commodity transported. Since the rates determined under section 726 are applicable to all types of carriers providing the same services, and since the value of the commodity is independent of the legal character of the carrier, it is clear that the value of the commodity transported is a factor that would enter equally into the lawful rates of all types of carriers.

[3, 4] Section 726 does not prohibit the commission from considering the cost and value data provided by all types of carriers in determining the proper cost of, and the value of the equipment reasonably necessary for, any given service. It expressly requires the commission to "consider all * * * types or classes of carriers" in fixing the lowest lawful rate. In rate making it is settled that the commission need not accept cost figures that are unjustifiably high because of inefficient methods of operation. Pacific Tel. & Tel. Co. v. Public Utilities Comm., 34 Cal.2d 822, 826, 215 P.2d 441, and cases cited. Accordingly, in fixing the lawful rate for any type of service by any type of carrier, the commission is entitled to consider the cost of providing the service efficiently, and section 726 expressly authorizes it to consider the available data from all types of carriers to determine what the cost of the most efficient service is.

[5] Once it has determined cost and value data applicable to the performing of the service most efficiently, the commission may consider that cost and value data alone in fixing the lawful rate for any type of carrier that may legally adopt the most efficient method of providing the particular service involved. Pacific Tel. & Tel. Co. v. Public Utilities Comm., supra. For example, the efficient handling of small shipments between fixed termini might require the carrier to solicit and accept all the business of that type that it could get. A radial common carrier or a contract carrier could not solicit and accept all such business without illegally entering the highway common carrier field. Accordingly, to compete for such business such carriers would have to restrict their operations in such a way as to make it impossible for them to render the most economical service. In such a case, if the commission looked to their costs alone, the lawful rates it would determine would necessarily be higher than the lawful rates for highway common carriers. In determining the lowest lawful rate, no purpose would be served by determining a rate other than the lawful rate for the type of carrier that could legally provide the most economical service. The commission could properly consider, however, the cost and other data of the radial common carriers and contract carriers to determine whether their operations indicated economies that highway common carriers might legally put into effect. On the other hand, the efficient handling of truckload shipments by regular shippers might require the carrier to restrict its operations to providing service for a limited number of selected customers. The carrier could legally so restrict its operations only if it were a contract and not a common carrier. In determining the lowest lawful rate for such service no purpose would be served by determining separate lawful rates for carriers that could not legally conduct their business in the most efficient manner. The commission could properly consider, however, the cost data of the common carriers to determine whether their operations indicated economies that contract carriers might legally put into effect.

The commission's procedure for determining the lowest lawful rate on the basis of the most efficient method of providing the service necessarily results in a determination of the lowest rate that might be found in any given case for any of the legal categories of carriers. From all of the data before it the commission determines the relevant cost and value data appropriate to providing the most efficient and economical service. It may legally consider these data in fixing the lawful rate for any carrier that may legally operate in the most efficient manner. One or more of the types or classes of carriers will be able legally to operate in the most efficient manner. Their lawful rates will necessarily be lower than those of types or classes who cannot legally operate with maximum efficiency. Accordingly, the commission has correctly concluded that lowest lawful rates based on the most efficient method of operation will be the lowest of the lawful rates for any and all types and classes of carriers involved within the meaning of section 726.

To require the commission to segregate the cost and other data, fix a lawful rate for each category, and then select the lowest of such rates would not affect the rates ultimately determined. It would, however, complicate the already difficult task of the commission. Following such a procedure, the commission would find a tentative lawful rate for each type of carrier based on the cost and other data provided by the carriers of that type alone. It would then consider in the light of all of the evidence whether the carriers of each type were operating as efficiently as they legally might. It would then adjust the tentative lawful rates to reflect the costs of the service by the three types of carriers operating in the most efficient manner possible. It would then be in a position to select the lowest of the lawful rates. Before it could proceed in the foregoing manner, however, it would have to determine in each case in what capacity the carrier offering data with respect to a given service was operating. Many carriers operate part of their business as highway common carriers and parts as radial common carriers or contract carriers. Others have permits to operate both as radial common carriers and contract carriers. The dividing lines between these various categories are difficult to determine, see, Samuelson v. Public Utilities Comm., 36 Cal.2d 722, 227 P.2d 256; Souza v. Public Utilities Comm., 37 Cal.2d 539, 233 P.2d 537; Nolan v. Public Utilities Comm., 41 Cal.2d 392, 260 P.2d 790, and the carriers themselves may not have segregated their business in a manner to permit clear determinations of the capacities in which they operate the various segments thereof. See, Alves v. Public Utilities Comm., 41 Cal.2d 344, 260 P.2d 785. Even if the commission followed this complex procedure it would be led to conclude that certain carriers operating legally were providing or could provide given services in the most efficient and economical way. The actual or justifiable costs of these carriers would be used to determine the lawful rates of the group or groups to which they belonged. Since they would be, or could become, the most efficient, their lawful rates would be the lowest lawful rates, and all of the findings and determinations with respect to the lawful rates of less efficient types of carriers would be purposeless. Except for errors, however, that might arise from following the more cumbersome procedure, the commission would reach the same results that it has in this proceeding in which it determined the lowest lawful rates directly from all of the evidence on the basis of the cost and value data properly attributable to providing the service in the most efficient and economical way. Section 726 does not require it to do more.

The order is affirmed.

GIBSON, C. J., and SHENK and CARTER, J., concur.

EDMONDS, Presiding Justice (dissenting).

By section 726 of the Public Utilities Code, the Public Utilities Commission is required to "consider all * * * types or classes of carriers, and * * * fix as minimum rates applicable to all such types or classes of carriers the lowest of the lawful rates *so determined for any such type* *or class* of carrier." (Emphasis added.) Three of the commissioners signed the order fixing minimum charges upon evidence in which the cost factors were not segregated according to the type or class of carrier. Instead, in the words of the order, "[t]he nature of the traffic rather than the operating authority held by the carrier has governed the cost determinations."

Two of the commissioners dissented from the order for the reasons stated by them in a dissent to an earlier decision, involving the same code section. There they said: "Section 726 of the Public Utilities Code is specific in stating that in any rate proceeding where more than one type or class of carrier, 'as defined in this part or in the Highway Carriers' Act, is involved,' the Commission shall consider all such types or classes of carriers. Having done this, the Commission is to 'fix as minimum rates applicable to all such types or classes of carriers the lowest of the lawful rates so determined for any type or class of carrier.' The majority opinion herein sets forth at length the procedure that has been followed. It seems clear that what consideration has been given to types or classes of carriers dealt with them according to the services rendered or commodities transported, rather than according to their legal classifications as prescribed by section 726 of the Public Utilities Code. While this may have produced results equally desirable, it is not in accord with the express mandate of the statute." Dec. 46912, 51 Cal.P.U.R. 586, 602.

In the present proceeding, the majority of the Commission based their conclusion upon a decision rendered 15 years ago, in which it was held that the method now employed would prove to be more satisfactory than the procedure fixed by section 726 of the Public Utilities Code. 41 C.R.C. 671. Many of the reasons stated there are included in the opinion of Justice Traynor. Essentially, they purport to show that the results of the two methods would be the same, but the Commission's way is more satisfactory in reducing costs, time, and the possibility of error which would be encountered if the procedure fixed by the Legislature were followed.

Although these arguments well might be addressed to the Legislature in urging a repeal or modification of the section, in my opinion they furnish no legal basis for disregarding its terms. I see no escape from the conclusion that the Commission has not made a determination of rates according to the "type or class of carrier" as it is required to do by the section. And I can find no justification, upon any ground of expediency, for a judicial refusal to enforce the requirement of the statute.

I would annul the order.

SCHAUER and SPENCE, JJ., concur.

Rehearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.

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42 Cal.2d 540

PEOPLE v. JACKSON.

Cr. 5542.

Supreme Court of California.
In Bank.
March 19, 1954.

In prosecution for offering to bribe police officers to afford police protection of gambling activities, wherein defendant contended that offer was fictitious and made for purpose of determining honesty of officers before enlisting their aid in apprehending certain persons, believed to be engaged in such activities, pursuant to defendant's altruistic purpose of civic betterment. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment of conviction, and defendant appealed. The Supreme Court, Shenk, P. J., held, inter alia, that in view of fact that jury, in absence of instruction defining entrapment, might have applied, to evidence of co-operation and encouragement on part of the officers, a layman's conception of what constituted entrapment, giving of instruction on entrapment was proper.

Affirmed.

Prior opinion 260 P.2d 1023.

1. Criminal Law ⚷813

It is error to charge jury in criminal case on abstract principles of law not pertinent to issues in the case. Pen.Code, §§ 1093, subd. 6, 1127.

2. Criminal Law ⚷824(1)

Where evidence in criminal prosecution discloses facts pertinent to the case and affecting substantial rights of a party, the court must instruct jury with reference to applicable law when requested by either party and may do so even though no request has been made. Pen.Code, §§ 1093, subd. 6, 1127.

3. Criminal Law ⚷37

Under doctrine of entrapment, it is necessary to show that intent to commit criminal acts was generated in minds of enforcement officers, not in mind of defendant.

4. Criminal Law ⚷772(6)

Instruction on entrapment was a correct statement of the law.

5. Criminal Law ⚷1172(7)

Defendant could not complain of instruction that was more favorable to him than evidence justified.

6. Criminal Law ⚷772(6)

In prosecution for offering to bribe police officers to afford police protection of gambling activities, wherein defendant contended that offer was fictitious and made for purpose of determining honesty of officers before enlisting their aid in apprehending certain persons, believed to be engaged in such activities, pursuant to defendant's altruistic purpose of civic betterment, in view of fact that jury, in absence of instruction defining entrapment, might have applied, to evidence of co-operation and encouragement on part of the officers, a layman's conception of what constituted entrapment, giving of instruction on entrapment was proper.

7. Criminal Law ⚷37

When law enforcement officers are informed that person intends to commit crime, officers may lend apparent co-operation to such person for purpose of detecting the offender and if such person himself, originally and independently of the officers, intends to commit the criminal acts, and if in pursuit of such intent he personally does every act necessary to constitute crime on his part, fact that officer is present at time of criminal act and provides opportunity therefor, or aids or encourages commission of the offense, does not constitute "entrapment."

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

8. Criminal Law ⚷569

Evidence supported jury's implied finding, on question of entrapment, that intention to commit crime originated in mind of defendant and that conduct of police officers was within rule of apparent co-operation which law permits in the detection and prosecution of crime.

9. Criminal Law ⚷829(13)

In prosecution for offering to bribe police officers to afford police protection of gambling activities, wherein defendant contended that offer was made for purpose of determining honesty of officers before enlisting their aid in apprehending certain persons believed to be engaged in such activities, admonishment of jury during trial that defendant's testimony, concerning reports and statements brought to his attention as to existence of bookmaking and protection pay-off in the police department, was admitted for limited purpose of showing defendant's belief and that it was immaterial whether such reports were true if he believed them, sufficiently covered subject matter of defendant's requested instruction on such matter as furnishing reason for his proposals to police officers, and refusal of such instruction was not error.

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Jerome Weber, Hy Ginsberg, Theodore Flier and Jess Whitehill, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., and Robert Wheeler, Deputy Dist. Atty., Los Angeles, for respondent.

SHENK, Presiding Justice.

This is an appeal from a judgment convicting the defendant of offering to bribe two police officers contrary to the provisions of section 67 of the Penal Code, and from an order denying a motion for a new trial. The bases for the appeal are alleged errors in giving two instructions offered by the prosecution and in refusing an instruction tendered by the defendant.

The defendant had been a member of the Pasadena Police Department for seven years when he resigned in September, 1951, to become a liquor salesman. During the four years prior to his resignation he had been in the Detective Division in the Pawnshop Detail and had frequently worked special details with Officer Bornhoft of the Check and Forgery Detail. A close personal friendship existed between these men and their families. Also in the Detective Division was Officer Thomas, a personal friend of Bornhoft but whom the defendant knew only slightly. None of these men had served on the Vice Squad of the Pasadena Police Department. On December 6, 1951, Thomas was appointed head of the Vice Squad. The former members resigned or were shifted to other assignments.

On the evening of December 6, 1951, defendant contacted Bornhoft, who was then on vacation, at his home and asked him how Thomas would take his new job. Bornhoft replied he didn't know as Thomas was a peculiar person to figure out. Defendant then stated that he knew that neither of them believed in the more violent types of crime, such as burglary, robbery and homicide, but they both knew that gambling and bookmaking existed and would continue to exist in the community; that he had learned a lot about it he hadn't known while he was in the department; and that either Thomas would allow these things to go on or he would not remain in charge of the Vice Squad very long. He told Bornhoft that because of the latter's close friendship with Thomas he (defendant) and other people thought that Bornhoft would be the logical person to contact Thomas and see how he felt about allowing these things to continue. He intimated that if a meeting could be arranged there might be anywhere from $25 to $100 a week in it for Bornhoft. He suggested the following Tuesday night for such a meeting. Bornhoft advised Thomas of this conversation the following day, Sunday, and on Monday when he returned to work he reported the conversation to his superior officer and to the chief of police. He and Thomas were advised by them to go along with the defendant's proposal, to find out who were behind the whole thing.

On December 11th they met as suggested by defendant, had dinner, and then, again at defendant's suggestion, they drove in his car to a cafe in Eagle Rock. Bornhoft opened the conversation by stating that Thomas knew why they were there and to get on with the business. Defendant remarked that he knew how they all felt about the more violent type of crimes, but that there had been payoffs to the police department in the past with regard to gambling and bookmaking activities and there were some in the department at that time who felt the same way. He would not answer Thomas' query as to who these men were. He stated that he represented a group of people who wanted to get action (a movement of money in gambling) started, and that Thomas, as head of the Vice Squad, could make from $100 to $1000 a week by "doing nothing." When Thomas asked what his duties would be he said that if any complaints came in about telephone places or spots (a place where bets are received by a bookmaking agent) Thomas was to call a certain phone number; that a place would have to operate 6 to 8 weeks in order to pay; and that thereafter if any complaints were received a raid could be arranged with "fall guys" (not the real operators) set up to stand arrest and undergo prosecution. Thomas would not give him a definite answer, saying that he had to know more of the details about the risks and reward involved and would have to know everyone who was in on the arrangements. He asked defendant what he knew about the Foothill Charter Club at 10 East Colorado Boulevard, and when defendant countered with the inquiry "what did Thomas know", Thomas replied that he probably knew more about it than the defendant realized. Thomas testified at the trial that he told defendant how that place was set up and that the reward he would require for allowing such a place to operate would, in view of the risks involved, be $62,500. This sum he arrived at by calculating the amount his salary would bring him for the next 10 years, at the end of which time he expected to retire.

On December 17th defendant saw Bornhoft and inquired as to Thomas' reaction. Bornhoft advised he didn't know and that the defendant would have to ask Thomas. At defendant's request a meeting was arranged for the following night, December 17th. Thomas insisted that Bornhoft also be present and informed defendant that before he would negotiate any further he would have to be sure that everybody involved was at the meeting. Defendant told him that his proposition was tied into the opening of Santa Anita, which was coming off shortly; that it concerned the opening of 5 or 6 phone spots at various places around the city, for which operation Thomas would receive $300 a week, and if these paid well or other operations were opened up, he would receive more. No further duties were required of Bornhoft but he was to receive a weekly sum for his share in arranging the meetings with Thomas. Defendant told Thomas that he didn't know if he could get all the persons involved together for a meeting as Thomas had demanded, but he would try. No further contact was made by defendant with either Bornhoft or Thomas. Several months later an information was filed against the defendant charging him with offering a bribe to officers Bornhoft and Thomas with the corrupt intent to influence them as police officers. He was subsequently tried before a jury and convicted. A motion for new trial was denied. The defendant was sentenced to state prison for the term prescribed by law, but execution of sentence was suspended and he was granted probation on condition that he serve nine months of the probationary period in the county jail.

At the trial defendant admitted that he had initiated the meetings with Bornhoft and Thomas and had proposed the payoff scheme to them, but he denied that he had any corrupt intent in so doing. His defense was that the proposal was a fictitious one, designed to test the honesty of the officers involved as a part of his plan to apprehend one Wiseman, a bookmaker in Pasadena who he believed was the head of the bookmaking ring there. Wiseman had been a member of the Vice Squad when one Clint Wright was in charge of it, prior to Thomas' appointment. Defendant testified that he believed that certain members of the Vice Squad had been accepting payoffs for protecting gambling and bookmaking in Pasadena and that he had determined that if he could prove to himself that the new head of the Vice Squad, Thomas, was honest he would enlist his aid in apprehending Wiseman and the members of the police department who he believed had been accepting payoffs. He contended that there was no one behind him, that he was not representing any persons or interests, and that the fictitious proposal was entirely his own idea, made for the altruistic purpose of civic betterment.

The defendant attempted to show at the trial that his state of mind in this matter was influenced by various considerations,—including conversations overheard by him while visiting bars in his occupation as liquor salesman, both with regard to bookmaking and payoffs, and particularly with regard to Wiseman's activities; his observations of persons ostensibly making and receiving bets, and his conversations with Wiseman himself. He also attempted to show, as further grounds for his belief that some members of the police department could not be trusted: that valuable properties were owned by certain members of the department which were out of proportion to their monthly salaries; that reports had been made to the Vice Squad concerning gambling with apparently no official action taken; that the sheriff's office was called in to participate in raids on gambling establishments within the city limits; and that soon after certain raids had taken place the former members of the Vice Squad had been shifted and Thomas had been appointed as head of the new Vice Squad. This evidence was admitted by the court for the limited purpose of showing the intent of the defendant and the reasons for his asserted activities.

The court admonished the jury as follows: "Now, ladies and gentlemen of the jury, I should explain this to you: that in admitting evidence of this character, it only goes to the question of the state of mind or the intent of the defendant, and goes to his reasons for his state of mind or his intent at that time. It doesn't establish the truth or falsity of the conversations which he will relate, and it is not necessary, either, for him to prove their truth nor for the People to prove the untruthfulness of them." And, "Now, I should state to the jury that a person may testify directly as to his intention. In other words, as to why he did a certain thing, and that is direct evidence. Witnesses may also testify as to the basis upon which they formed their intention and upon which the witness acted. It does not prove —the testimony of the reason, or relating to the reason that the witness gives for the forming of his intention, or why he acted, does not prove either the truth or falsity of the reasons which he gives, and you must weigh those matters in the light of the testimony that you hear from this stand."

The defendant especially complains of two instructions given at the request of the prosecution on the subject of entrapment and asserts that they relate to rules of law not applicable to the case. He contends that these instructions tended to confuse the minds of the jurors as to the issues and the evidence, and that they resulted in prejudicial error.

The instructions are as follows:

"No. 851. The law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement; and where a crime is committed as a consequence of such entrapment, no conviction may be had of the person so entrapped as his acts do not constitute a crime.

"If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose, but the crime was suggested by another person acting with the purpose of entrapping and causing the arrest of the defendant, then the defendant is not criminally liable for the acts so committed."

"No. 852. When law enforcement officers are informed that a person intends to commit a crime, the law, in the interests of law enforcement and the suppression of crime, permits the officers to afford opportunity for the commission of the offense, and to lend the apparent cooperation of themselves or of a third person for the purpose of detecting the offender. When such a practice is followed by peace officers, if the suspect himself, originally and independently of the officers, intends to commit the acts constituting a crime, and if in pursuit of such intent he personally does every act necessary to constitute a crime on his part, his guilt of the crime thus committed by him is not affected by, and he has no defense in, the fact that when the acts are done by him an officer or other person engaged in detecting crime is present and provides the opportunity, or aids or encourages the commission of the offense."

[1, 2] Under the provisions of section 1093(6) of the Penal Code the duty is laid on the judge to charge the jury "on any points of law pertinent to the issue, if requested by either party;" and section 1127 of the same code, as amended in 1935, provides that "In charging the jury the court may instruct the jury regarding the law applicable to the facts of the case * * *." It has long been the law that it is error to charge the jury on abstract principles of law not pertinent to the issues in the case. People v. Roe, 1922, 189 Cal. 548, 558, 209 P. 560. The reason for the rule is obvious. Such an instruction tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence shows are not involved. But if the evidence discloses facts pertinent to the case and affecting the substantial rights of a party

the court, as above indicated, must instruct the jury with reference to the applicable law when requested by either party and may do so even though no request has been made.

The question then is: Was there evidence in the case which would justify the court in giving the instructions complained of?

Under the doctrine of entrapment, the overt acts essential to the commission of the offense charged are assumed to have been committed by the defendant. But the criminal intent, as here also essential to the completion of the crime, is not assumed to have been established. It is assumed to be lacking when it did not originate in the mind of the defendant but was conceived in the minds of the enforcement officers for the unlawful purpose of inducing him to commit a crime. Here the evidence as to the overt acts committed by the defendant is undisputed. In fact he admitted the commission of them. He also admitted an intention to perform them but sought to avoid any criminal responsibility flowing therefrom by claiming that his intention was to test the honesty and integrity of the incoming head of the vice squad by submitting to him a plan for police protection and discover whether he would or would not agree to it. The question of criminal intention was the only issue at the trial.

[3] The record discloses a factual situation which the attorney-general in his brief calls a "coloration of entrapment." Without an instruction on the subject the jury might have applied to the evidence of co-operation and encouragement on the part of the officers a layman's conception of what constitutes entrapment. With this condition of the evidence the prosecution and the trial court deemed it advisable to instruct the jury on the essentials of entrapment which when shown to be present would absolve the defendant of any criminal responsibility; but under the law that co-operation and encouragement on the part of the officers were not enough. It was also necessary to show that the intent to commit the acts which might lead to a criminal prosecution was generated in the minds of the enforcement officers and not in the mind of the defendant.

[4–6] Instruction No. 851 on entrapment is a correct statement of the law on the subject. It was no doubt given on the theory that under the admitted facts the jury might mistakenly consider the conduct of the officers as entrapment even though the criminal intent originated in the mind of the defendant. Viewed in that light the instruction was more favorable to the defendant than he was entitled to. If the jury had returned a verdict of not guilty on the theory of that instruction the prosecution could have no cause to complain for the reason that it had itself offered the instruction. And being more favorable to the defendant than the evidence justified he has no just cause for complaint. James v. E. G. Lyons Co., 147 Cal. 69, 76, 81 P. 275; People v. Lanzit, 70 Cal.App. 498, 513, 233 P. 816. Thus instruction No. 851 cannot be said to have misled the jury as to the main issue in the case, namely, whether the defendant had first conceived the intent to commit bribery; nor to have constituted an instruction that the jury was to assume that the original intent was first generated in the mind of the defendant. See People v. Chessman, 38 Cal.2d 166, 182–183, 238 P.2d 1001.

[7, 8] Instruction No. 852 is also a correct pronouncement of the law and its application fits precisely into the facts of this case. There can be no question but that the evidence is sufficient to support the implied finding of the jury that the intention to commit the crime originated in the mind of the defendant and that the conduct of the police officers was within the rule of apparent cooperation which the law permits in the detection and prosecution of crime. The jury was not required to accept as true the defendant's alleged altruistic attitude and rather fantastic claim that his motive in thus planning police protection for gambling operations was to test the integrity of the incoming head of the vice squad of the police department. There was no error in giving either and both of these instructions.

[9] The defendant also complains of the refusal of the court to give an instruction tendered by him as to his beliefs concerning

payoffs in the police department as furnishing reasons for his proposals to the police officers. As above stated, the jury was admonished during the trial that the defendant's testimony concerning reports and statements brought to his attention as to the existence of bookmaking and protection payoffs in the police department were admitted for the limited purpose of showing his belief and that it was immaterial whether such reports were true or false if he believed them to be true. These admonitions sufficiently covered the subject matter of the refused instruction. A review of the instructions as a whole demonstrates that the jury was fairly and fully advised as to the necessity of proof beyond a reasonable doubt that the defendant in the first instance had a specific intent wilfully, knowingly and corruptly to influence the officers in question in the performance of their official duties. He was ably represented by counsel and had a full and fair trial free from error.

The judgment and order are affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the conclusion that the judgment and order denying defendant a new trial must be affirmed. I do not agree, however, that there is *any* evidence in the record which would support an instruction on entrapment. In the majority opinion it is admitted that "[t]he question of criminal intention was the only issue at the trial."

The jury was adequately instructed on the intent necessary to constitute the crime, and under the facts presented it is to be presumed that it found that defendant did possess that intent.

While I feel that there was no evidence to support the instructions given on entrapment, I do not feel that under the evidence presented the instructions could have confused the jury so as to result in any prejudice to defendant. For that reason, I concur in the judgment.

SCHAUER, J., concurs.

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124 Cal.App.2d 71

HENSLER v. CITY OF LOS ANGELES.

Civ. 19810.

District Court of Appeal. Second District.
Division 2, California.
March 23, 1954.

Action by contractor against city for breach of contract calling for construction of runways and taxiways at city airport and for reimbursement of expenditures incidental to work suspension ordered by city. The Superior Court of Los Angeles County, Joseph W. Vickers, J., entered judgment for contractor, and city appealed. The District Court of Appeal, Fox, J., held that evidence, which revealed that contractor had neither been advised of reason for order nor given any opportunity to alleviate the difficulty, was sufficient to sustain trial court's finding that five day stop order was not reasonably necessary.

Judgment affirmed.

1. Municipal Corporations ⚿358(1)

Construction contract provision reserving to city engineer right to increase or decrease quantities of work, provided alterations did not change total cost of project by more than 25 percent, did not authorize change order, which reduced work by about 20 percent but which left gap between existing runways and taxiways and work done under the contract which called for extension of such runways and taxiways.

2. Contracts ⚿147(1)

In construing contract, primary object is to ascertain and give effect to parties' intention. Civ.Code, § 1636.

3. Contracts ⚿147(2)

Parties intention must, in first instance, be derived from language of contract. Civ. Code, § 1636.

4. Contracts ⚿169

Words, phrases, and sentences employed in contract are to be construed in light of expressed objectives and fundamental purposes of parties. Civ.Code, § 1636.

5. Municipal Corporations ⚿250

Contract entered into by governmental body and an individual is governed by rules applicable to construction of contracts between private persons. Civ.Code, § 1636.

6. Municipal Corporations 🔑360(3)

Under provisions of contract between contractor and city calling for construction of runways and taxiways at city airport, city's right to order changes in plans and specifications could be exercised only for purpose of completing project as a whole in a more satisfactory manner or to eliminate non-major items found unnecessary to project. Civ.Code, § 1641.

7. Municipal Corporations 🔑360(1)

Under construction contract provisions pertaining to city engineer's right to make changes in quantities of work and contractor's duty to perform additional work, contractor was bound to deliver completed work required of him, and city was bound to permit contractor to consummate work he had undertaken subject to city's limited right to make changes in order to complete project more satisfactorily.

8. Municipal Corporations 🔑358(1)

Under contract between contractor and city for construction of runways and taxiways at city airport, power vested in city engineer under contract to effect changes in quantities of work was not so extensive that engineer was able to abrogate or change contract which parties had executed nor could city employ such right to defeat object of contract. Civ.Code, §§ 1636, 1641.

9. Municipal Corporations 🔑360(1)

Under change in work provisions of contract calling for construction of runways and taxiways at city airport, changes which could be ordered would have to be clearly directed either to achievement of more satisfactory improvement or elimination of work not integrally necessary to project. Civ.Code, §§ 1636, 1641.

10. Contracts 🔑236

Purpose, in construction contracts, of including provision for making changes in work is to maintain degree of flexibility in adapting conditions to end sought.

11. Municipal Corporations 🔑360(1)

Whole scheme of contract calling for construction of runways and taxiways at city airport repelled idea that city was to have right, under contract provisions providing for changes in work, to delete work necessary to project and leave project in an unusable and incomplete state and still insulate city from liability to contractor under contract.

12. Contracts 🔑236

Construction contract provisions allowing changes in work to be ordered by owner confer a circumscribed right, which may be properly invoked when it appears necessary and desirable to do so in interests of completing more satisfactorily project envisaged by the contract.

13. Municipal Corporations 🔑360(6)

Under contract between contractor and city for construction of runways and taxiways at city airport, provision pertaining to formula by which permissible alterations in contract could be compensated for was to be read in connection with provision pertaining to changes in quantities of work but was not to supplement such provision. Civ. Code, §§ 1636, 1641.

14. Municipal Corporations 🔑360(3)

Under contract between contractor and city calling for construction of runways and taxiways at city airport, provision that deviation from plans required by exigencies of construction would be determined by city engineer, city would not be authorized to make deletions leaving substantial part of project unfinished and necessitating subsequent letting of new contract to another contractor simply because city could not furnish job site required by contract. Civ. Code, §§ 1636, 1641.

15. Contracts 🔑168

Every construction contract contains implied covenant that owner will furnish selected site of operations to contractor in order to enable him to adequately carry on construction and complete work agreed upon.

16. Municipal Corporations 🔑352

Rule that every construction contract contains implied covenant that owner will furnish selected site of operations applies to construction contracts entered into by a municipality.

17. Contracts 🔑322(1)

Burden of proving defense of impossibility of performance of contract rests upon party asserting it.

18. Municipal Corporations 🔑374(4)

In action by contractor against city for breach of contract calling for construction of runways and taxiways at city airport and for reimbursements for expenditures incidental to work suspension ordered by city, evidence was not sufficient to sustain burden upon city of establishing defense of impossibility of performance of contract based on unavailability of job site.

19. Contracts 🔑309(1)

In order for impossibility of performance to constitute excuse for nonperformance of contract, impossibility must attach to nature of thing to be done and not to inability of obligor to do it.

20. Contracts 🔑303(4)

One who binds himself to a contract, which cannot be performed without consent or cooperation of third person, is not relieved of liability because of his inability to secure the required consent or cooperation.

21. Contracts 🔑303(1)

If performance of contract is not inherently impossible, and there is an unconditional promise to perform, nonperformance constitutes a breach of contract if obligor becomes unable to perform even though through causes beyond his control since he might have provided against them in his contract.

22. Municipal Corporations 🔑374(5)

Where city, which had entered into contract for construction of runways and taxiways at city airport, had not, when part of job site became unavailable, invoked contract provision allowing suspension of work upon reimbursement to contractor of actual money expended on job during period of shut down, city became responsive to contractor for his damages for resulting breach of contract. Civ.Code, §§ 1636, 1641.

23. Municipal Corporations 🔑374(5)

In action by contractor against city for breach of contract calling for construction of runways and taxiways at city airport and for reimbursement for expenditures incidental to work suspension ordered by city, city could not exonerate itself by limiting damages only to amount of work which would have been necessary to create an improvement usable for the intended purpose.

24. Municipal Corporations 🔑374(4)

In action by contractor against city for breach of contract calling for construction of runways and taxiways at city airport and for reimbursement for expenditures incidental to work suspension ordered by city, evidence was sufficient to establish that removal of bituminous paving from all of certain road within area described by plans and specifications was therein provided for.

25. Contracts 🔑198(1)

Extent of work to be performed under construction contract could only be ascertained from requirements of contract.

26. Municipal Corporations 🔑374(4)

In action by contractor against city for breach of contract calling for construction of runways and taxiways at city airport and for reimbursements for expenditures incidental to work suspension ordered by city, evidence was sufficient to establish that plaintiff had shown in detail how he arrived at his computation of damages.

27. Municipal Corporations 🔑374(5)

Damages for breach of construction contract resulting when part of job site was not made available to contractor by defendant city were properly computed from computation of total work that could in any way have been required of contractor under contract rather than from estimated quantities contained in specifications.

28. Appeal and Error 🔑206(2)

Where, in action by contractor against city for breach of contract calling for construction of runways and taxiways at city airport and for reimbursement of expenditures incidental to work suspension ordered by city, no objection was made to contractor's testimony, under cross-examination, that he had paid all moneys due one of subcontractors, such objection could not be raised upon appeal.

29. Appeal and Error 🔑237(2)

Where, in action by contractor against city for breach of contract calling for construction of runways and taxiways at city airport and for reimbursement for expenditures incidental to work suspension ordered by city, no motion was made to strike contractor's testimony, under cross-examination, that he had paid all moneys due one of the subcontractors, it could not be claimed upon appeal that such evidence could not be considered in substantiation of finding of damages.

30. Municipal Corporations ⚷358(1)

City engineer who had considerable latitude in regard to stop orders under contract for construction of runways and taxiways at city airport, was not empowered to discontinue operations without reasonable necessity therefor.

31. Municipal Corporations ⚷374(4)

In action by contractor against city for breach of construction contract and for reimbursement for expenditures incidental to work suspension ordered by city, evidence, which revealed that contractor had neither been advised of reason for stop order nor given any opportunity to alleviate the difficulty, was sufficient to sustain trial court's finding that five day stop order was not reasonably necessary.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Alfred E. Rogers, Deputy City Atty., Los Angeles, for appellant.

Irvin Grant, Los Angeles, for respondent.

FOX, Justice.

Defendant appeals from a judgment awarding damages for breach of contract and reimbursing plaintiff for expenditures incident to a suspension of work ordered by defendant.

Plaintiff, a licensed general contractor, entered into a contract with the City of Los Angeles on April 12, 1951, whereby he undertook "to furnish all equipment, material and labor necessary for the construction of, and to construct Stage 1 Runways and Taxiways and appurtenant work at the Los Angeles International Airport." The total agreement between the parties embraced the following documents, which had been furnished to plaintiff in making his bid and which were incorporated by reference in the contract of April 12, 1951:

(a) Published Notice Inviting Bids; (b) Standard Specifications for Construction of Airports; (c) Special Provisions designated as Specification No. 5021; (d) the contractor's proposal; (e) bonds; and (f) Plans for the Work.

The work to be performed by plaintiff was broken down into a detailed set of items embodied in a bid schedule which was contained in the contractor's proposal, and incorporated into the contract. Each item related to an estimated quantity of work, payment for which was based upon unit prices for the various items of work.

At the time the agreement was executed, automobile traffic which ordinarily proceeded on that part of Sepulveda Boulevard which then bordered one side of the airport had been rerouted to a temporary by-pass road running along the westerly end of the then existing runways. This by-pass road traversed an area which was ultimately to be a part of the airport. The contract included the installation of runways and taxiways over the area occupied by the temporary road, removal of the by-pass, and certain appurtenant work. Both parties knew that the completion of the work would require a discontinuance of traffic over the by-pass and knew that a new by-pass road was being constructed by a different contractor further to the west, which was scheduled for completion by June 30, 1951. The Special Provisions set up two priorities for plaintiff's construction work. The first priority, to be completed by June 30, 1951, consisted substantially of the performance of all the work exclusive of the removal of the existing by-pass road and other construction work in the area occupied by that road. The entire job was to be finished by September 1, 1951.

Plaintiff commenced work and progressed with his operations until August 20, 1951, at which time defendant issued Change Order No. 8, deleting certain portions of the work to be performed under the contract. The work so deleted consisted of items relating to the removal of the Sepulveda by-pass road and the installation of appurtenant work, as well as construction work on the runways and taxiways to be installed in the area adjacent to the by-pass road. Defendant ordered these deletions when it discovered that because of the refusal of the Division of Highways of the State of California to grant its consent for the connection of the new by-pass road with existent highways, it would be unable to remove traffic from the Sepulveda by-pass road and so make available to plaintiff the job site contemplated by the contract. As a result of these deletions, the work called for by the agreement remained in an unfinished condition. The new by-pass road was placed in operation several months later, following which defendant let a contract to another contractor for the performance of substantially all of the work which had been deleted from plaintiff's contract.

The record also shows that while plaintiff was engaged in performance of the work, he was orally notified on May 31, 1951, to cease the mixing operations then taking place. A confirmatory written order was issued the following day. The stop order was released on June 5, 1951, but due to the time required for realignment of the personnel, material and equipment, work was not resumed until June 7, 1951. Plaintiff had received no prior warning that work would be halted, nor was he informed as to the reason for the stop order during the cessation of work.

Plaintiff's complaint states two causes of action. In brief, the first alleges that the defendant's deletion from the contract of the described items of work upon finding that it could not reroute traffic from the Sepulveda by-pass constituted a breach of contract by which he sustained damages. The second cause of action is based on a claim that he was entitled to be reimbursed for the actual money expended on the job during the period he ceased work pursuant to defendant's stop order.

The court gave judgment in the sum of $38,421.30 on plaintiff's first cause of action. The court found that the agreement between the parties contemplated the construction of a completed work of improvement and that the omissions contained in change order No. 8 left the work uncompleted. While the court recognized that defendant was accorded the right under the contract to make certain changes, within specified limitations, in the quantity of the work as might be considered necessary or desirable to complete fully and satisfactorily the proposed construction, it found that the deletions ordered were neither necessary nor desirable to complete the work in a satisfactory manner. The court also found that while the contract allowed defendant to omit items not of a major character deemed unnecessary to the project, the work eliminated by change order No. 8 was necessary to the project and that the effect of the ordered deletions was "to eliminate such an important part of the entire construction as to make the portion that had been constructed of little value for the use intended under the contract." Other findings relating to the first cause of action will be alluded to where pertinent in our subsequent discussion of the issues raised by defendant.

Judgment on the second cause of action was in the sum of $1,735.88. The court found that when defendant issued its stop order, plaintiff was engaged in mixing operations involving the use of an equipment train which sometimes consisted of a tractor and mixer, to which, at times, a water trailer was coupled; occasionally the equipment train comprised a tractor, mixer, water trailer and oil trailer. The tractor was tearing and loosening parts of the sub-base when the water trailer was a part of the equipment train. The court found that the only change which came about after the stop order in plaintiff's conduct of its mixing operations was the removal of the water trailer from the equipment train, which virtually eliminated the tearing of the sub-base by the tractor. The court found that defendant was aware that this remedial action was necessary at the time the stop order was issued; that under the contract, defendant's right to issue stop orders was dependent on the reasonable necessity therefor; and that since there was no reasonable necessity for the issuance of the stop order of May 31, 1951, plaintiff was entitled to compensation for his expenses incurred thereby.

Defendant attacks the determination made by the court that the contract between the parties contemplated a complete work of improvement and that defendant was liable to plaintiff for loss of profit bv virtue of the deletions made in change order No. 8. Defendant argues that the omissions it made are within the limits perscribed in, and authorized by, the agreement.

The pertinent sections of the contract as they relate to plaintiff's first cause of action are as follows:

The Notice Inviting Bids announces that "the work will consist generally of excavation and embankment, grading and bituminous paving to construct approximately 4100 linear feet of runways and approximately 10,200 linear feet of taxiways, drainage facilities and appurtenant work." Section 10–10 of the Standard Specifications for Construction of Airports provides that the contract is to include not only the documents already alluded to, but all supplemental agreements which may be executed "to complete the work in accordance with the intent of the plans and specifications, in an acceptable manner."

Section 40 of the Standard Specifications covering the scope of the work, provides in part:

"40–01 Intent of Plans and Specifications. *The intent of the plans and specifications is to prescribe a complete work or improvement* which the contractor undertakes to do in full compliance with the plans, the specifications, the special provisions, proposal and contract. The contractor shall do all work including such additional, extra, and incidental work *as may be considered necessary to complete the project in a satisfactory and acceptable manner,* as provided in the plans, proposal and contract * * *" (Italics added.)

"40–03 Changes and Increased or Decreased Quantities of Work. The engineer reserves and shall have the right to make such changes, from time to time, in the plans, the character, or quantity of the work as may be considered necessary or desirable *to complete fully and acceptably the proposed construction in a satisfactory manner* provided such alterations do not change the total cost of the project, based on the originally estimated quantities and the unit prices bid, by more than twenty-five (25) percent, and provided further that such alterations do not change the total cost of any major item, based on the originally estimated quantities and the unit price bid, by more than twenty-five (25) percent. (A major item shall be construed to be any item, the total cost of which is equal to or greater than ten (10) percent of the total contract price, computed on the basis of the proposal quantity and the contract unit price.) Should it become necessary, for the best interest of the owner, to make changes in excess of that herein specified, the same shall be covered by supplemental agreement." (Italics added.)

"Section 40–04 Omitted Items. The engineer may, in writing, order omitted from the work any item other than major items found *unnecessary to the project* and such omission shall not be a waiver of any condition of the contract nor invalidate any of the provisions thereof. Major items may be omitted by supplemental agreements." (Italics added.)

[1] The work omitted by change order No. 8 amounted to approximately 20 percent of the work. The deletion order eliminated the section of the projected extension of the runways and taxiways that immediately connected with the existing runway, thus leaving a gap in the area between the work done under the contract and the existing runways. Although the work thus deleted left unfinished the link required to effect a union between the work completed under the contract and the existing runways, and though defendant susequently let another contract to complete this connection, defendant argues that it was entitled to make these deletions under section 40–03 of the Specifications. Defendant takes the position "that this section is meaningless unless the engineer for the public body is entitled to use this section to delete at any point in the work" up to 25 percent of the work within the prescribed qualifications. This contention is falacious.

[2–5] In construing a contract, the primary object is to ascertain and give effect to the intention of the parties. Civil Code, § 1636; Hays v. Allen, 112 Cal.App.2d 676, 681, 247 P.2d 94. That intention must, in the first instance, be derived from the language of the contract. The words, phrases and sentences employed are to be construed in the light of the expressed objectives and fundamental purposes of the parties to the agreement. Perry v. Gross, 172 Cal. 468, 469, 156 P. 1031. A contract entered into by a governmental body and an individual is governed by the same rules which apply to the construction of contracts between private persons. M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 704, 235 P.2d 7; Brown v. Town of Sebastopol, 153 Cal. 704, 709, 96 P. 363, 19 L.R.A.,N.S., 178; Corporation of America v. Durham, etc., Co., 50 Cal.App. 2d 337, 340, 123 P.2d 81; 63 C.J.S., Municipal Corporations, § 1169, page 853.

[6] Considering the contract in its entirety, and giving each part a reasonably practical effect, Civ.Code, sec. 1641, it is patent that defendant's right to order changes in the plans and specifications could be exercised only for the purpose of completing the project as a whole in a more satisfactory manner, or to eliminate therefrom non-major items found unnecessary to the project. This is manifest from both the literal language of the agreement and the object contemplated by the parties. Section 40–01 declares "the intent of the plans and specifications is to prescribe a complete work or improvement" and binds the contractor to perform such extra or additional work "as may be considered necessary to complete the project in a satisfactory and acceptable manner." The right to make changes in the quantities of work reserved to the engineer by section 40–03 is not only limited to a percentage of the total cost of the project, but that section expressly relates this right to such changes "*as may be considered necessary or desirable to complete fully and acceptably the proposed construction in a satisfactory manner.*" Section 40–04 permits the engineer to delete "any item other than major items found unnecessary to the project."

[7] There is no question but that, as found by the trial court, the language of this agreement looks to a complete work of public improvement. The term "complete," used both as an adjective and a noun, recurs in the crucial clauses defining the purposes of the agreement and the rights of the parties. "Complete" is defined in Webster's Dictionary as "free from deficiency; entire, absolutely finished." Webster's New International Dictionary ascribes to "complete" such meaning as: "Filled up; with no part, item, or element lacking; * * * entire, perfect, consummate." By the terms of the agreement, plaintiff bound himself to deliver the completed work required of him. The corollary duty assumed by the City was to permit plaintiff to consummate the work he had undertaken, subject to its right to make changes, within designated limitations, in order to complete the project more satisfactorily. The deletions ordered by the engineer did not have for their purpose the satisfactory completion of that which both parties set out to accomplish; the fact is that the project was abruptly terminated in an unfinished state, thus leaving the so-called improvement unusable in connection with the existing runways. Nor were those deletions unnecessary to the project—the court found that defendant completed virtually all the work deleted from plaintiff's contract through the medium of a new contract with a different company. In this latter connection, the following language from Gallagher v. Hirsh, 45 App.Div. 467, 61 N.Y.S. 609, 613, is most appropriate: "It is evident that under the word 'omissions' were intended to be included those things which were * * * left out of the plaintiff's contract, and not such as were taken out of the plaintiff's contract, and given to another to be performed. The word 'omissions' did not mean omitted from the plaintiff's contract, but omitted from the work, * * *. The words are, 'additions or omissions from said contract,' evidently meaning additions to or omissions from the work to be done under said contract, which clearly negatives the idea that they were intended to mean that the defendant should have the right to omit the work from the plaintiff's contract, in order to give the contract to another to do the same thing." See also Shaver v. Murdock, 36 Cal. 293.

[8-11] The power vested in the engineer to effect changes in the quantities of the work is not so extensive as to enable him to abrogate or change the contract which the parties executed, Brown v. Coffee, 17 Cal.App. 381, 121 P. 309, 311; Monson v. Fischer, 118 Cal.App. 503, 5 P.2d 628, nor does it authorize defendant to employ such right to defeat the object of the contract which is reasonably deducible from its terms. The changes which may be ordered, when viewed against the background of the work described in the contract and the language used in the specifications, must clearly be directed either to the achievement of a more satisfactory improvement or the elimination of work not integrally necessary to the project. The purpose of such powers is to maintain a degree of flexibility in adapting conditions to the end sought. However, the discretion committed to the engineer must be exercised within the framework of the contract and for the purpose of implementing the work originally intended. It cannot be used in an arbitrary manner, divorced from the object and intention of the contract, for the purpose of legitimatizing the deletion of so integral a part of the work as to leave the improvement in an unfinished condition and still insulate the City from liability. Langan Const. Corp. v. State, 110 Misc. 177, 180 N.Y.S. 249, 252; Drainage Dist. No. 1 v. Rude, 8 Cir., 21 F.2d 257, 261. Such a construction would render nugatory plaintiff's fundamental rights under the contract and give to defendant an unconscionable advantage plainly not intended. As we have indicated, the whole scheme of the contract repels the idea that defendant was to have the right to delete work necessary to the project and leave the project in an unusable and incomplete state.

[12] It is conceded by both sides that there are no California cases which have considered the question presented in plaintiff's first cause of action. Nevertheless, there is a plethora of cases from other jurisdictions involving the right of a governmental body to avail itself of an analogous clause in a contract providing for alterations in or omissions from a work of public improvement. An analysis of these authorities establishes unmistakably that this type of provision confers a circumscribed right, which may be properly invoked when it appears necessary and desirable to do so in the interests of completing more satisfactorily the project envisaged by the contract; it has never been held to justify a vitiation of the clearly expressed contractual objective by omissions of an integral part of the work required to accomplish the project. Litchfield Const. Co. v. City of New York, 244 N.Y. 251, 155 N.E. 116; McMaster v. State, 108 N.Y. 542, 15 N.E. 417; Langan Const. Corp. v. State, 110 Misc. 177, 180 N.Y.S. 249; Drainage Dist. No. 1 v. Rude, 8 Cir., 21 F.2d 257; Herlihy Mid-Continent Co. v. Sanitary Dist., 390 Ill. 160, 60 N.E.2d 882; Schuehle v. City of Seattle, 199 Wash. 675, 92 P.2d 1109; Murray v. Kansas City, 47 Mo.App. 105. See Gaffey v. United Shoe Machinery Co., 202 Mass. 48, 88 N.E. 330, 331. These cases are clear authority for the proposition that a contract provision similar to the one before us may not be invoked to allow deletions from a construction contract which were not made for the purpose of a satisfactory completion of the project, but as an attempt by defendant to exculpate itself from its obligation of counter-performance.

Defendant relies on two cases. Del Balso Construction Corporation v. City of New York, 278 N.Y. 154, 15 N.E.2d 559, 561, is clearly distinguishable in that the right was reserved "'* * * to omit any portion of the work without constituting grounds for any claim by the contractor for payment or allowance for damages * * *.'" No such sweeping, unrestricted power is granted in the contract here under consideration. In fact, the court states that this broad omission clause was made a part of the standard form city contract "only after it had been held that the city could not with impunity omit certain work under the old form of contract". 15 N.E.2d at page 561. It was also stressed that the work omitted did not detract from the ultimate purpose of the contract, which was a completed subway. In Kinser Construction Co. v. State, 204 N.Y. 381, 97 N.E. 871, 874, plaintiff contracted to build a section of a canal, including a lock which was to be built at a particular point. The state reserved "the right * * * to make such additions to or deductions from such work or changes in the plans and specifications covering the work, as may be necessary * * *." It was found the condition of the soil made it impossible to construct the lock at the designated site; consequently this work was deleted from plaintiff's contract and the lock was relocated in an area where the work was being performed by another contractor. No recovery was allowed plaintiff for loss of profits caused by reason of the deletion. This situation differs vitally from the case at bar. In the Kinser case, the work was eliminated from defendant's contract because it was necessary to relocate the lock in order to complete the canal project. The deletion subserved the purpose of the contract, and came within the language and spirit of the alteration and omission clause. In the instant case, the deletions left a substantial part of the project unfinished (necessitating the subsequent letting of a new contract) and were ordered simply because defendant could not furnish the job site required by the contract.

Defendant also contends that sections 40–03 and 40–04 are modified by section 8–02, which reads in part: "Basis of Payment for changes in Quantities and Extra Work. The unit prices set forth in the proposal will govern the determination of the amount to be added to the Contract price or deducted therefrom on account of changes in the work to be performed.

"The quantities of work in any single addition or deduction, or the net total result of all additions or deductions in this Contract, shall not change the quantity of work under any item in the Proposal by more than 25% of the original quantity included in such item; provided, however, that if the item comprises less than 10% of the Contract cost, this limitation shall not apply."

[13] While defendant's claim is perfectly true, section 8–02 relates essentially to providing a formula by which permissible alterations in the contract can be compensated for or adjustments made within prescribed limitations. Thus, it is to be read in connection with section 40–03, and by no means supplants it.

[14] Likewise, defendant can derive no comfort from section 50–02, which reads:

"Finished surfaces in all cases shall conform to the lines, grades, cross-sections, and dimensions shown on the approved plans, and working drawings. Any deviation from the approved plans and working drawings which may be required by the exigencies of construction will be determinded by the engineer and authorized by him in writing."

This clause is contained in section 50 of the Specifications, headed "Control of Work and Material." The second sentence refers basically to the sentence which precedes it, and is an illustration of the extent of the engineer's control over physical and mechanical problems that might be encountered in the course of construction. When considered in the context of other sections under this heading, and in relation to the entire contract, it clearly does not purport to give the engineer the power to make the character of change hereinabove discussed. To ascribe such intention to this section would be to empower the engineer to remake the contract and vest in him a control over policy which defendant obviously did not intend to abdicate.

[15–21] Defendant next argues it should not be held liable for cancelling approximately twenty percent of the work where, to quote its brief, "the completion became impossible because of the failure of a third party, particularly where the act of the third party was within the contemplation of the parties to the contract at the time it was entered into." Defendant cites no cases [1] in support of this contention, nor does it refer to any applicable section of the contract. This deficiency may be explained by the fact that the authorities are squarely in opposition to its contention. The rule is plain that in every construction contract the law implies a covenant, where necessary, that the owner will furnish the selected site of operations to the contractor in order to enable him "to adequately carry on the construction and complete the work agreed upon." Gray v. Bekins, 186 Cal. 389, 395, 199 P. 767, 769; Bomberger v. McKelvey, 35 Cal.2d 607, 220 P.2d 729. The rule applies with equal force to construction contracts entered into by a municipality. Bates & Rogers Const. Co. v. Board of Com'rs, D.C., 274 F. 659; 63 C.J.S., Municipal Corporations, § 1185, page 894. The burden of proving the defense of impossibility is on the party asserting it. Paramount Pictures, Inc., v. Sparling, 93 Cal.App.2d 768, 775, 209 P.2d 968. Defendant failed to sustain this burden. The record merely shows that defendant could not obtain permission to divert the traffic from the old by-pass road in time to enable plaintiff to proceed with the contract. It was able to get such consent and reroute the traffic at a later time. Defendant failed even to show that it could not, by greater diligence or better planning, have arranged for such diversion to be accomplished at the date required. In order to be an excuse for nonperformance of a contract, the impossibility of performance must attach to the nature of the thing to be done and not to the inability of the obligor to do it. Potts Drug Co. v. Benedict, 156 Cal. 322, 333, 104 P. 432, 25 L.R.A.,N.S., 609; Tuohy v. Moore, 133 Cal. 516, 523, 65 P. 1107. One who binds himself to a contract which cannot be performed without the consent or cooperation of a third person is not relieved of liability because of his inability to secure the required consent or cooperation. 6 Williston on Contracts (Rev. Ed.), p. 5413. The courts hold that this is merely subjective impossibility, which does not excuse nonperformance of a contract. Klauber v. San Diego Street-Car Co., 95 Cal. 353, 358, 30 P. 555; Fast, Inc., v. Shaner, 3 Cir., 183 F.2d 504; 6 Williston on Contracts (Rev. Ed.), pp. 5411–12; Restatement of Contracts, sec. 455. As stated in the Klauber case, supra [95 Cal. 353, 30 P. 556]: "The obligor contracts that he can and will control the acts of third parties, so far as necessary to enable him to perform his contract. * * *" This court has expressed the rule applicable to the instant case as follows: "If performance is not inherently impossible, and there is an unconditional promise to perform, nonperformance is a breach where the obligator becomes unable to perform even though through causes beyond his control, since he might have provided against them in his contract (citations)." El Rio Oils v. Pacific Coast Asphalt Co., 95 Cal.App.2d 186, 197, 213 P.2d 1, 8, certiorari denied 340 U.S. 850, 71 S.Ct. 77, 95 L.Ed. 623.

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[1] Defendant relies solely on Civil Code section 1636, which reads:

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

[22] It is perhaps apropos to observe that defendant was not entirely without a way out of the dilemma facing it upon its discovery that the new by-pass would not be available by June 30. Section 70–08 of the specifications deals with adjustment for suspended works. It reads in part: "In the event the contractor is ordered by the engineer, in writing, to suspend work for some unforseen cause not provided for in the * * * contract * * * and over which the contractor has no control, the contractor may be reimbursed for actual money expended on the job during the period of shutdown. No allowance will be made for anticipated profits." Thus, when defendant was confronted with the unexpected development, it might have proceeded under section 70–08, which gave it the power to suspend work for an indefinite period. It would have been required to reimburse defendant only for actual expenses. It would not have been required to account for loss of profits. However, it was required to allow plaintiff to complete his contract when the obstacle to the progress of the work was removed. Not having done so, it becomes responsive to plaintiff for damages.

[23] Defendant urges as error the award of damages for work omitted as measured by the items called for in the plans, instead of limiting damages only to the amount of work which would have been

necessary to create an improvement usable for the intended purpose. In this connection, defendant argues that change order No. 8 was valid so far as it applied to any items deleted not necessary to fully complete the project and the court erred in refusing to receive evidence to show how much work was needed for a completely usable improvement. This argument is unsound, and constitutes an oblique and artificial attempt to undo the consequences of defendant's breach of its obligation to plaintiff. The excluded evidence would obviously have consisted of a retrospective juggling and pruning of certain of the items deleted from the contract to the end of showing that a completed and functioning project was a practical possibility without their inclusion. But defendant cannot exonerate itself by such specious means. Proof of items that might have been eliminated if the engineer, in the course of the construction, had acted within the authority of the contract to effect deletions necessary or desirable for the completion of the construction was not germane when the evidence showed the deletions were actually ordered simply because defendant could not fulfill its contractual obligations. There is no intimation in the record that, but for its failure to secure consent to put the new by-pass road in operation, defendant would have in fact made any omissions. The purported testimony would have consisted of mere speculations as to theoretical and hypothetical possibilities, unrelated to the considerations actuating defendant's purpose in ordering the deletions, and was properly rejected.

Defendant contends that the amount of damages is not supported by the evidence. It complains that plaintiff was allowed to introduce a tabulation entitled "Details of Plaintiff's Claim for Damages," containing certain items numbered as in the contract, a statement of the units deleted from these items, the unit bid price, the total bid price, the unit cost, the total cost, and a column designated "differences" which plaintiff alleged to be his damages. It is to be remarked that this exhibit was offered not for its probative value, but solely to assist the trial court in following the testimony on the topic of damages. For this limited purpose, it was received without objection.

Defendant asserts that in setting forth the units deleted, plaintiff did not adhere entirely to the contract figures but used instead, calculations derived from extrinsic sources. It cites as an example Item No. 3. In the contract, Item No. 3 called for the removal of approximately 12,110 square yards of bituminous surfacing at $1. per square yard. In his tabulation, plaintiff's claim for damages is based on a deletion of 31,500 units. Defendant argues that since plaintiff could only reasonably have expected the removal of 12,110 square yards of bituminous surfacing the damages should have been based upon this figure, instead of on the figure of 31,500 units. This is a most ingenuous approach to the realities of the contract between the parties. It is appropriate to observe that in virtually every instance, except where lump sum items are involved, the contract documents explicitly indicate that the quantities of work are approximations. This is a common practice in construction contracts in order to protect against possible miscalculations and to insure the flexibility necessary to meet the vicissitudes inherent in this type of undertaking. It is perhaps the exceptional situation in which the ultimate quantities of work done comport neatly with the approximate figures used for bid purposes. Section 20–03 of the Standard Specifications strongly supports the view that neither party could rely upon the estimates of quantity used for bid purposes as the definitive measure of the work to be done. It is there stated: "An estimate of quantities of work to be done and materials to be furnished under these specifications is given in the proposal. It is the result of careful calculations and is believed to be correct, but it is given only as a basis for comparison of proposals and the award of the contract. The owner does not expressly or by implication agree that the actual quantities involved will correspond exactly therewith; nor shall the bidder plead misunderstanding or deception because of such estimate of quantities, or of the character, location, or other conditions pertaining to the work. Payment to the contractor will be made only for the actual quantities of work performed or materials furnished in accordance with the plans and specifications and it is understood that the quantities may be increased or diminished as hereinafter provided without in any way invalidating the unit bid prices." Thus, though the figures given failed to accurately reflect the quantity of work to be done, plaintiff would be obligated, despite such discrepancies, to perform the work necessary to consummate the agreement. Hence, where the contract contemplated the removal of the by-pass road, and if this involved the removal of 31,500 square yards of surfacing, plaintiff could not have successfully asserted that he was required only to remove the 12,110 square yards designated as the estimate.

[24, 25] Without indulging in a circumstantial enumeration of the evidentiary details before the court, we are satisfied from a careful examination of the total contract and the exhibits relating to the project that the removal of bituminous paving from the entire by-pass road within the area described by the plans and specifications was therein provided for.[2] Under the evidence received, the court found that this would have entailed the removal of 31,500 square yards of paving, instead of 12,110 yards, which proved to be an inaccurate estimate. This is grounded on the premise that the extent of the work could only be ascertained from the requirements of the contract and the contract clearly indicated the by-pass road, a defined segment of the work, was to be removed in its entirety. Not only reason, but authority justifies the court's position. In Hackett v. State, 103 Cal. 144, 37 P. 156, 157, plaintiff agreed to construct a seawall and wharf under a contract where specifications provided: "'The work to be done * * * consists in furnishing all materials and erecting a stone embankment, an earth embankment, and a wharf.'" The invitation to bid specified the seawall to be 1000 feet long and 200 feet in width, and it was estimated that 216,000 tons of stone and 285,000 cubic yards of earth would be required. Upon completion of the construction it was found that only 119,025 tons of stone and 272,499 cubic yards of earth had been used. Plaintiff brought an action for a breach of contract and claimed damages based on the difference called for in the contract and the quantities actually used. In denying relief, the court observed that the contract called for a defined work of improvement, and that unit prices were recited in the bids because it was not possible to calculate in advance the precise amount of material which would be necessary. Though plaintiff was obligated to erect the wall, whether it required more or less than the quantities estimated, his compensation was governed by the amounts actually required to be paid for at the contract rate. Though the Hackett case is the converse of the situation here presented, the analogy is valid.

[26] There is no merit in defendant's claim that plaintiff did not show in detail how he arrived at his computation of damages as to various items on the tabulation. Both plaintiff and his expert witness testified that their calculations were based on their experience as to the cost of this type of operation. Defendant neither brought out any deficiencies in the sufficiency of this proof under cross-examination nor does its brief show wherein the evidence as to loss of prospective profits is inadequate. Defendant challenges plaintiff's estimates, but does not show that plaintiff lacked the experience, background or capacity to make reliable estimates. In cases of this character, it is difficult to measure with mathematical exactitude the detriment suffered; therefore, it is frequently held that a reasonable certainty only is required. McConnell v. Corona City Water Co., 149 Cal. 60, 67, 85 P. 929, 8 L.R.A.,N.S., 1171; Holt Mfg. Co. v. Thornton, 136 Cal. 232, 235, 68 P. 708; Sobelman v. Maier, 203 Cal. 1, 11, 262 P. 1087. In the McConnell case, supra, the lower court awarded damages for recovery of lost profits after the owner prevented further performance of a

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[2] For example, section 10–01 of the Special Provisions states in part: "Earthwork will consist of stripping the areas shown on the plans of all grain stubble and roots, excavation and embankment, and the removal of bituminous paving to subgrade of the paved road shown on the Plans as Sepulveda By-Pass."

contract to construct a tunnel. The court stated: "The court found upon evidence that there were about 1,422 feet of tunnel yet to be dug, and gave judgment for the profits upon this at the rate of $4.40 per foot. It is true that the character of the soil might have changed in that distance, and with the change in the character of the soil to nonwater-bearing, the profits of the contractor might have been decreased. It is true, also, that water in sufficient quantities might have been encountered before 1,422 feet additional had been driven, in which case, under the contract, the defendant had the right to order a cessation of the work; but as these were matters which could not be determined except by a completion of the contract, which defendant's conduct had prohibited, the court was justified in accepting the evidence, which under the circumstances was the best and most convincing that could be offered." 149 Cal. at pages 66–67, 85 P. at page 931. We are likewise satisfied that the court's construction was fairly sustained by the evidence.

[27] Defendant's next contention is couched as follows: "The damages should have been computed from the estimated quantities in the specifications rather than from the computation of the total work that could in any way have been required of the Respondent (plaintiff)." As has already been indicated, the estimated figures were merely tentative approximations of the work required to obtain a described improvement. They were not binding as such, but were susceptible of modification when the exact figures became known as the work progressed and took the desired form. This was patently the understanding of the parties. Section 50–03[3] of the Standard Specifications lends no support to defendant's suggestion that plaintiff may not capitalize on a so-called discrepancy in the quantum of work without having called this to defendant's attention. We have previously noted that section 50 relates to control of work and materials, and section 50–03 is primarily concerned with achieving uniformity with respect to the dimensions of the work required in the plans and specifications, and other contract documents. It does not purport to deal with the amount of work to be performed, and has no bearing upon any claimed right of defendant to omit portions of the work. Furthermore, there is no support in the record on which defendant can predicate its inference that plaintiff was aware of any discrepancy and that he consciously concealed such knowledge from defendant. Nor was this issue raised in the pleadings or urged at the trial. The ultimate fact is that having established the extent to which the existing by-pass road was to be removed, plaintiff was entitled to his loss of anticipated profits on this item. In this connection, defendant points out that the figure of 31,500 square yards used in computing damages as to Item 3 is greater than the 25% allowable percentage of increase under section 40–03. However, section 40–03 applies only to changes considered necessary and desirable to complete the project fully and acceptably. In addition, plaintiff was obligated to perform all the work under Item 3 and no change order governed by section 40–03 was necessary to require such performance.

[28, 29] Defendant asserts the court erred in allowing damages to subcontractors who were not parties to the action where no assignment of their claims for deletions is alleged or proved. In support of this, defendant refers to the following language from section 70–01 of the Stand-

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[3] "These specifications, the plans, special provisions, and all supplementary plans and documents are essential parts of the contract, and a requirement occurring in one is just as binding as though occurring in all. They are intended to be cooperative to describe and provide for a complete work. In case of discrepancy, figured dimensions, unless obviously incorrect, shall govern over scaled dimensions. Plans shall govern over specifications and special provisions shall govern over both plans and specifications.

"The contractor shall not take advantage of any apparent error or omission in the plans or specifications. In the event the contractor discovers any apparent error or discrepancy, he shall immediately call upon the engineer for his interpretion and decision, and such decision shall be final."

ard Specifications: "The owner will not recognize any subcontractor on the work. The contractor shall at all times when work is in operation be represented either in person, by a qualified superintendent, or other designated representative." This is another example of defendant's attempt to gain comfort from provisions of the contract read out of context and out of focus. As plaintiff points out, this section indicates that the contractor, as the person primarily liable, must in some authorized manner be present at the job site and no subcontractor could vicariously discharge this responsibility. The record shows that defendant was aware that plaintiff subcontracted certain phases of the work and made no objection. There is no substance in defendant's claim that evidence of the subcontracting agreements was hearsay and was of no value in proving the cost of the work. No issue was tendered in the pleadings or at the trial that plaintiff was not the real party in interest. Plaintiff testified under cross-examination that he had paid all monies due one of the subcontractors in support of his claim for damages on the second cause of action. No objection was made by defendant that this was hearsay, and it may not now be raised on appeal. Nor was any motion made to strike such testimony as being incompetent. It may not now be claimed that such evidence could not be considered by the court in substantiation of the finding of damages. Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156.

Plaintiff's recovery under the second cause of action was founded on a five-day stop order issued by defendant. The court found no reasonable necessity for the order suspending work and awarded plaintiff $1,735.88 for expenses necessitated by the order. In disavowing liability, defendant relies on sections 70–05 and 70–08 of the specifications.[4] The City asserts it required a period of time to study the conditions under which plaintiff was working in order to recommend a method of operations which could correct defects in plaintiff's performance.

[30, 31] We are in agreement with the lower court's view that although the engineer has considerable latitude in regard to stop orders, he is not empowered to discontinue operations without reasonable necessity therefor. The record shows that plaintiff was never informed as to the reason his mixing operations were unsatisfactory or the reason for the stop order. The court inferred from the evidence before it that rutting and tearing and loosening of the subgrade were due to the presence of a water trailer on plaintiff's equipment train. When the water wagon was unhitched, the conditions mentioned no longer occurred. The court was warranted in finding that a five-day stop order was not reasonably necessary under such circumstances, and particularly where plaintiff was neither advised of the reason for the order nor given any opportunity to alleviate the difficulty.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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[4] 70–05 "The engineer shall have the authority to suspend the work wholly, or in part, for such period or periods as he may deem necessary, due to unsuitable weather, or such other conditions as are considered unfavorable for the suitable prosecution of the work, or for such time as is necessary, due to the failure on the part of the contractor to carry out orders given or perform any or all provisions of the contract.

"If it should become necessary to stop work for an indefinite period, the contractor shall store all materials in such manner that they will not become an obstruction, nor become damaged in any way, and he shall take every precaution to prevent damage or deterioration of the work performed; provide suitable drainage by opening ditches, shoulder drains, etc., and erect temporary structures where necessary. * * *

70–08 "In the event the contractor is ordered by the engineer, in writing, to suspend work for some unforseen cause not provided for in the specifications, special provisions, proposal, contract, or work order and over which the contractor has no control, the contractor may be reimbursed for actual money expended on the job during the period of shut down. No allowance will be made for anticipated profits * * *"

124 Cal.App.2d 135

DE MELLO v. DE MELLO.

Civ. 4685.

District Court of Appeal. Fourth District. California.

March 24, 1954.

Motion by husband to set aside his default and judgment rendered thereon in a separate maintenance action upon the ground that default was taken through his mistake, inadvertence, surprise and excusable neglect. The Superior Court, Tulare County, Glenn L. Moran, J., denied husband's motion and he appealed. The District Court of Appeal, Mussell, J., held that in as much as husband's default was not entered until after he had filed divorce complaint and statements in husband's affidavit of merits to the effect that husband had reason to believe that default would not be entered against him were not disputed by wife, denial of husband's motion was an abuse of discretion.

Order reversed.

1. Appeal and Error ⚷957(1)
Judgment ⚷139

An application for relief from default is addressed to sound discretion of trial court, and its ruling will not be interfered with by reviewing court in absence of clear showing of abuse of such discretion. Code Civ.Proc. § 473.

2. Judgment ⚷139

It is the policy of the law that every case should be heard on its merits and discretion of trial court in passing upon application for relief from default is to be exercised in conformity with the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. Code Civ.Proc. § 473.

3. Judgment ⚷363

Statute authorizing a court in furtherance of justice to relieve a party from any judgment or order taken against him through mistake, inadvertence, surprise or excusable neglect is a remedial provision and is to be liberally construed so as to dispose of cases upon their substantial merits. Code Civ.Proc. § 473.

4. Appeal and Error ⚷957(1)

Where motion is made to set aside default and judgment entered thereon, reviewing court will listen more readily to appeal from order denying relief than to one granting relief. Code Civ.Proc. § 473.

5. Judgment ⚷163

Where motion is made to set aside default and judgment rendered thereon, even if showing is not strong, doubt should be resolved in favor of motion. Code Civ.Proc. § 473.

6. Husband and Wife ⚷299(1)

In hearing upon husband's motion to set aside his default and judgment rendered thereon in separate maintenance action upon ground of surprise and excusable neglect where husband's default was not entered until after he had filed divorce complaint and where statements, in husband's affidavit of merits to the effect that wife had agreed to keep open husband's time to plead so that a property settlement could be negotiated and issues settled without court action, were not disputed by wife, denial of husband's motion was an abuse of discretion. Code Civ.Proc. § 473.

7. Husband and Wife ⚷299(1)

In hearing upon husband's motion to set aside his default and judgment rendered thereon in separate maintenance action upon ground of surprise and excusable neglect where statement in husband's affidavit of merits showed that he had used due diligence in presenting his motion after he had discovered the facts and statements was not contradicted or denied, statement was a sufficient showing of due diligence. Code Civ.Proc. § 473.

Lewis, Field & DeGoff, San Francisco, for appellant.

McKinney & Ballantyne, Russell R. McKinney, Visalia, for respondent.

MUSSELL, Justice.

This is an appeal from an order denying defendant's motion to set aside his default and judgment rendered thereon in a separate maintenance action. The motion was made upon the ground that said default was taken against said defendant through his mistake, inadvertence, surprise and excusable neglect.

On July 22, 1952, plaintiff filed a separate maintenance action against defendant and a copy of the summons and complaint, together with an order to show cause was served upon defendant on the following day. Apparently the hearing on the order to show cause was continued three times and then went off calendar on August 25, 1952. On September 2, 1952, the parties entered into a property settlement agreement settling their property rights and providing for the custody and support of their minor child subject to confirmation by order of court. Plaintiff waived her right to support and alimony and it was agreed that in any suit between the parties for divorce or separate maintenance each party waived all claims or demands against the other for alimony, support money, court costs, attorneys' fees and all other charges. Defendant did not enter an appearance in the action for separate maintenance and on October 22, 1952, filed an action in the same court for divorce against plaintiff. The respondent states in her brief that this action was filed on November 21, 1952. However, the affidavit of merits filed by defendant, which is the only evidence before us in this connection, is that the filing date of said action was October 22, 1952. Apparently plaintiff, Alice DeMello was served with a copy of the summons and complaint in the divorce action on November 26, 1952. On November 24, 1952, defendant's default having been entered, a hearing was had in the separate maintenance action, at which time evidence was presented by plaintiff and she secured a decree authorizing her to live separate and apart from defendant, approving the property settlement agreement and providing for the custody and support of the minor child as agreed therein. There is no indication in the reporter's transcript of said hearing that the trial court was informed that the divorce action had been filed by defendant.

On May 8, 1953, defendant filed a notice of motion to set aside his default and filed therewith and in support thereof an affidavit of merits, stating, among other matters, that he was served with a copy of summons and complaint in the separate maintenance action on or about July 23, 1952; that thereafter plaintiff, by and through her attorneys, agreed to keep defendant's time to plead open so that a property settlement agreement could be negotiated and executed, and the issues raised in plaintiff's complaint settled and disposed of on an amicable basis rather than by court action; that on or about September 2, 1952, the parties entered into a property settlement agreement which settled each and every claim for relief, for which plaintiff was praying in her complaint; that defendant was informed by his attorney, as well as by plaintiff's attorneys, that said property settlement agreement completely settled and disposed of the pending proceedings without further suit; that defendant believed that if either party sued for divorce or separate maintenance that such suit would be required to be maintained in a new and separate action and that he was informed and believed that the said action would be dismissed without prejudice to either party; that he was unaware that plaintiff planned to enter his default on November 24, 1952, or at any time, or that plaintiff would apply to the court for a decree of separate maintenance; that plaintiff, therefore, filed his action for divorce on or about October 22, 1952; that plaintiff did not plead to the complaint therein until after she had entered defendant's default in the separate maintenance action, although she well knew at all times that defendant claimed to have a valid and substantial defense to her claims for separate maintenance and valid and substantial grounds for a divorce from her; that had he known that the separate maintenance action would not be dismissed, he would have filed a cross-complaint for divorce therein prior to the entry of his default; that he did not know until on or about February 17, 1953, that plaintiff had taken a default against him and had secured a decree of separate maintenance; that plaintiff refused to enter into a stipulation to set aside the default; that he has fully and fairly stated the case to his attorney and believes that he has a valid and substantial defense to plaintiff's action for separate maintenance upon the merits. The plaintiff failed to file an affidavit or other pleading in opposition to the motion and the foregoing statements in defendant's affidavit are not denied.

At the time of the hearing on the motion to set aside the defendant's default counsel appearing for plaintiff related a conversation he had that morning with Mr. McKinney, co-counsel, who was ill and unable to attend the hearing, in which Mr. McKinney stated as follows:

> "Mr. McKinney said to me this morning over the telephone that in the beginning Mr. DeMello wanted Mrs. DeMello to drop the complaint for separate maintenance and to file an action for a divorce. This she refused to do. This was talked about a great deal between Mr. DeMello, Mrs. DeMello, Mr. Rush and Mr. McKinney. But at times she was standing on her separate maintenance suit. He said also that after entering into the property settlement agreement there was no statement made to Mr. DeMello or even to Mr. Rush that there was no further proceedings in the matter."

It does not appear that it was stipulated that this statement by Mr. McKinney was to be received in or considered as evidence in the case.

The trial court denied defendant's motion and defendant appeals from the order denying it on the ground that the court abused its discretion in denying his application for relief from default.

[1–5] The application for relief from default having been made under the provisions of section 473 of the Code of Civil Procedure was addressed to the sound discretion of the trial court, and its ruling will not be interfered with by an appellate tribunal in the absence of a clear showing of abuse of such discretion. Proulx v. De Moti, 106 Cal.App.2d 265, 269, 234 P.2d 1009. It is the policy of the law that every case should be heard on its merits and the discretion of the trial court is to be exercised in conformity with the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. Brill v. Fox, 211 Cal. 739, 743, 297 P. 25. Section 473 of the Code of Civil Procedure is a remedial provision and is to be liberally construed so as to dispose of cases upon their substantial merits. Miller v. Republic Grocery, Inc., 110 Cal.App.2d 187, 194, 242 P.2d 396. As was said in Garcia v. Garcia, 105 Cal.App.2d 289, 291, 233 P.2d 23, 24, quoting from Hambrick v. Hambrick, 77 Cal.App.2d 372, 377, 175 P.2d 269:

> "'As has been said repeatedly: "* * * An appellate court, owing to the remedial character of the statute and the policy of applying it liberally to permit an opportunity to present a substantial defense, listens more readily to an appeal from an order denying relief than to one granting relief * * *." (Citing cases.) Even in a case where the showing under section 473 is not strong, or where there is any doubt as to the setting aside of a default, such doubt should be resolved in favor of the application. 14 Cal.Jur. p. 1076.' See, also, McBlain v. McBlain, 77 Cal. 507, 509, 20 P. 61; Wadsworth v. Wadsworth, 81 Cal. 182, 183, 22 P. 648 [15 Am.St.Rep. 38]; Landon v. Landon, 74 Cal.App.2d 954, 958, 169 P.2d 980."

It was further stated therein that:

> "It has been held that a default judgment by which a marriage is dissolved, property rights lost, character assailed, and children of tender years taken away from a parent, as is the case here, is a harsh judgment and should, upon proper application, be vacated without hesitation; failure to do so constitutes an abuse of discretion. Mulkey v. Mulkey, 100 Cal. 91, 34 P. 621; Rehfuss v. Rehfuss, 169 Cal. 86, 89–90–91, 145 P. 1020; Landon v. Landon, 74 Cal.App.2d 954, 958, 169 P.2d 980."

[6] In the instant case the default of defendant in the separate maintenance action was not entered until after the filing of the divorce complaint, the filing of which indicates that defendant believed, as stated in his affidavit, that he was not required

to answer plaintiff's complaint; that the case had been settled and that if either party desired further or additional relief, it was to be obtained by a new and separate action. No counter affidavits were filed by plaintiff in opposition to defendant's motion and there is no denial of the statement in his affidavit of merits that plaintiff "agreed to keep defendant's time to plead open so that a property settlement agreement could be negotiated and executed, and the issues raised in plaintiff's complaint settled and disposed of on an amicable basis rather than by court action". In view of the undisputed statements in defendant's affidavit of merits and the rules announced in the cases cited herein, we conclude that the default of defendant in the separate maintenance action should be set aside; that the action should be tried on the merits and that the trial court abused its discretion in denying defendant's motion.

It is argued that defendant failed to exercise due diligence in presenting his motion and in this connection cites Wolff & Co. v. Canadian Pacific Ry., 89 Cal. 332, 337, 26 P. 825, 826, where it is said:

> "The question as to what is 'a reasonable time,' short of the extreme limit of six months allowed by [this section] * * * must depend upon the circumstances of the particular case, all of which should be considered by the court."

And Somers Co. v. Smith, 50 Cal.App. 420, 421, 195 P. 462, stating:

> "A prime requisite for relief under [this section] is that the party claiming injury from mistake, inadvertence, surprise, or excusable neglect shall show affirmatively diligence on his own part after discovery of the facts."

However, the following statement appears in defendant's affidavit:

> "Defendant did not know, until on or about February 17, 1953, that plaintiff had taken a default against him, and had secured a decree of separate maintenance in the above entitled action; that thereafter defendant, through his attorneys, Lewis, Field and DeGoff, in San Francisco, California, requested plaintiff's attorneys to stipulate to set aside said default; that on or about March 27, 1953, plaintiff, by and through her attorneys, notified defendant and his attorneys, that she refused to enter into such a stipulation; that thereafter defendant's said attorneys requested copies of the complaint, decree of separate maintenance and property settlement agreement in the above entitled action, from plaintiff's attorneys, so that steps could be initiated to set aside defendant's default; that on or about April 10, 1953, defendant's said attorneys for the first time received such copies, and immediately commenced the preparation of this instant motion to set aside defendant's default."

This statement is not contradicted or denied and is a sufficient showing of diligence on the part of the defendant.

The order denying the motion to set aside the default and judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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124 Cal.App.2d 67

PEOPLE v. MATHEWS.

Cr. 5105.

District Court of Appeal, Second District,
Division 1, California.

March 23, 1954.

Rehearing Denied April 5, 1954.

Hearing Denied April 22, 1954.

Accused was charged with offering and giving a bribe to an executive officer of the State of California. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment and order denying a motion for new trial and accused appealed. The District Court of Appeal held that offer of a bribe by accused to police officer of City of Los Angeles constituted the offering of a bribe to an executive officer of the State of California within meaning of statute, although City of Los Angeles is a chartered city.

Judgment and order affirmed.

Doran, J., dissented.

Bribery ⚷1(2)

Where accused offered bribe to police officer of a chartered freehold city, accused was guilty of offering bribe to an "executive officer" of state within bribery statute. Pen.Code, §§ 7, subd. 16, 67, 68, 817; Const. art. 1, §§ 3, 13; art. 11, § 8½; U.S.C.A. Const. Amend. 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Executive Officer".

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Lowell Lyons, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Dep. Atty. Gen., for respondent.

PER CURIAM.

This is an appeal from the judgment and from the order denying a motion for a new trial.

The information alleged that defendant offered and gave a "bribe to S. A. Nelson, who was then and there an executive officer of the State of California, to wit, a police officer of the City of Los Angeles, County of Los Angeles, State of California, with the intent", etc.

The offense involved the offer by defendant of $35 to the officer when defendant was arrested for selling a pint of whiskey in violation of the law.

The appeal presents but one issue.

It is contended by appellant that, "Failure to prove bribery of an executive officer of the State of California fails to prove any cause of action under Section 67, Penal Code, therefore, defendant should be restored to his liberty and judgment vacated." In this connection appellant argues that, "The evidence indisputably shows and the Court must take judicial notice, that the City of Los Angeles was at all times herein material, a chartered freehold city, organized and existing under municipal home rule under provisions of Article XI, Section 8½ of the Constitution of the State of California, and, that said officer to whom defendant and appellant is alleged to have offered a bribe was in fact an officer of said City of Los Angeles and not an executive officer or any other officer of the State of California.

"Section 67 of Penal Code particularizes an 'executive officer *of* this state,' this definition is clear and unequivocal. Section 7, subdivision 16 of Penal Code correctly guides the interpretation of the above phrase in that it must be construed according to context." (Italics included.)

Section 67 of the Penal Code reads as follows:

"Every person who gives or offers any bribe to any *executive officer of this state,* with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer is punishable by imprisonment in the state prison not less than one nor more than fourteen years, and is disqualified from holding any office in this state." (Italics included.)

Respondent's argument to the contrary cites People v. Finkelstin, 98 Cal.App.2d 545, 220 P.2d 934, which relates to the Chief of Police of Oxnard, California, as the person to be bribed; and Singh v. Superior Court, 44 Cal.App. 64, 185 P. 985, which relates to the District Attorney of Glenn County, as the official to whom the bribe was offered. Respondent argues further that, "Prior to its amendment in 1933, Section 68 of the Penal Code read as follows:

" 'Every executive officer or person elected or appointed to an executive office, who asks, receives, or agrees to receive, any bribe, * * *.' People v. Lips, 59 Cal. App. 381, 385, 211 P. 22, applied that section to a deputy sheriff, and People v. Markham, 64 Cal. 157, 30 P. 620, applied it to a police officer."

In the Singh case, supra, 44 Cal.App. at page 67, 185 P. at page 986, the court comments as follows: "* * * We think what the Legislature intended to say in section 67 was that 'every person who gives or offers any bribe to any executive officer *in* this state,' etc. This construction is strengthened by the consideration that there is no other section in the Penal Code which makes it a crime to give or offer a bribe to an executive officer, either county or state, for the purpose of corruptly influencing his official action than section 67, and we shall not commit ourselves to the belief, in the absence of more persuasive reasons than those which learned counsel have been able to present here, that the Legislature has either intentionally or inadvertently omitted to pass a law authorizing the punishment of a person for corrupting or attempting to corrupt a county executive officer. And if the Legislature had intended to limit the application of section 67 to state officers, it would have been a very easy matter for it to have given apt and unambiguous expression of such intention. It would have undoubtedly said, if such had been its purpose, 'any state executive officer,' in the place of 'any executive officer of this state.'"

On the other hand appellant argues that, "The amendment of the Penal Code, Section 817, clearly defines municipal peace officers, and, as the City of Los Angeles is under a municipal freeholders charter, such persons are not executive officers of the state, and an attempted bribery of such person was not that class of person embraced within the statute.

"The decisions as to just who are and who are not executive officers has been clarified by the amendment in 1953 of the Statutes of California as to Section 817, Penal Code, where municipal police officers are stated to be peace officers.

"The trial court's holding plain clothes policemen employed by city were state executive officers in view of the terms of section 817 Penal Code and the Los Angeles freeholders charter under which the officers were employed was a denial of liberty to the defendant in violation of his rights vouchsafed to him under the XIV Amendment of the United States Constitution and Art. I, Secs. 3 and 13, of the Constitution of the State of California.

"In Commonwealth v. Dowe, 315 Mass. 217, 52 N.E.2d 406, a definition of who is an 'executive officer' is clearly stated, thusly:

"We think that the words 'executive officer' in the statute refer to an officer of the executive branch of the State Government, and not to a municipal officer having executive duties."

In this connection it is further argued that,

"Municipal policemen are not executive officers but municipal employees:

"In 2 Cal.Jur. (2) 64, it is said at Section 32:

"'A ministerial act has been defined as one which a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed, when a given state of facts exists.'"

In Singh v. Superior Court, supra, the court held that the crime here charged is committed when the accused offers a bribe to any executive officer in this state, while in People v. Finkelstin, supra, it was held that a police officer is an executive officer because his duties of law enforcement are executive in character.

From the foregoing it follows that the judgment and the order denying defendant's motion for a new trial should be affirmed. It is so ordered.

DORAN, Justice (dissenting).

I dissent.

The opinion in the Singh case, by changing the preposition "of" to "in", is judicial legislation.

Although in the Finkelstin case the Supreme Court denied a petition for a hearing, that is not conclusive. The case is not in point. In my opinion, inasmuch as the City of Los Angeles is a chartered city, the police officer is not an "executive officer of this state" within the meaning of the section of the code relied upon by respondent. A police officer of the City of Los Angeles is a civil service employee and is in fact and in law an "employee" within the meaning and application of section 67½ of the Penal Code. The reason for the two sections is obvious.

I would therefore reverse the judgment.

Hearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

124 Cal.App.2d 163

NATHANSON v. MURPHY et al.

Civ. 16160.

District Court of Appeal, First District,
Division 2, California.
March 25, 1954.

Motion to dismiss appeal and petition by appellants to be relieved of default for failure to file transcript in time. The District Court of Appeal, Kaufman, J., held that since appellants' petition and affidavits in support thereof, showed that failure of appellants to prepare and file transcript in time was due to inadvertence and default of court reporter, rather than that of appellants, petition would be granted on condition that appellants prepare and file transcript on appeal within 30 days from date of granting of petition.

Petition granted conditionally and motion denied.

Appeal and Error ⚷629

Where petition to be relieved of default, and affidavits in support thereof, showed that failure of appellants to prepare and file transcript in time was due to inadvertence and default of court reporter, rather than that of appellants, petition would be granted on condition that appellants prepare and file transcript on appeal within 30 days from date of granting of petition. Rules on Appeal, rules 4(a, c), 10 (a), 53(b).

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William Klein, San Francisco, for appellants.

Morgan V. Spicer and H. R. Whiting, San Francisco, for respondent.

KAUFMAN, Justice.

Motion to dismiss appeal and a petition to be relieved of default for failure to file transcript in time.

Notice of appeal was filed by appellants in this action on April 17, 1953, request for Reporter's and Clerk's Transcript was filed April 21, 1953, a copy of which latter notice was transmitted by the Clerk of the Court to the Reporter on April 21, 1953, as required by Rules on Appeal, Rule 4(a).

There was filed on May 6, 1953, a waiver of fees by the Reporter, and on May 7, 1953, a directory notice to the Reporter to prepare the Reporter's transcript was filed, pursuant to Rules on Appeal, Rule 4(c).

To date neither the Reporter's nor Clerk's Transcript has been filed.

Rules on Appeal regarding preparation and dismissal: "If the appellant shall fail to perform any act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion." Rules on Appeal, Rule 10(a).

The appellants were granted permission by this court on the hearing of the motion to dismiss the appeal to file a petition to be relieved of their default and to file affidavits in support thereof. Said petition and affidavits are now on file and satisfy this court that the failure to prepare and file the transcript in time was due to the inadvertence and default of the Court Reporter rather than that of the appellants.

Under Rule 53(b), Rules on Appeal: "The reviewing court for good cause may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal." See also Averill v. Lincoln, 24 Cal. 2d 761, 151 P.2d 119.

We conclude this is a proper case to grant relief from the default in failing to file the transcript on time on condition, however, that the appellants prepare and file the transcript on appeal within 30 days from the date hereof.

Petition to be relieved of default granted conditionally; motion to dismiss appeal denied.

NOURSE, P. J., and DOOLING, J., concur.

123 Cal.App.2d 837

PURE FOODS CORP. v. VOGEL.

Civ. 19635.

District Court of Appeal, Second District,
Division 3, California.
March 15, 1954.

Action for alleged breach of a contract for sale of 15 tons of No. 3 canning grade pears and 50 tons of field run pears, if available, by defendant's failure to deliver any field run pears to plaintiff. From a judgment of the Superior Court of Los Angeles County, Arnold Praeger, J., for defendant, plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that the evidence was sufficient to support the trial court's findings that defendant had no field run pears available and that the parties did not contemplate that defendant would be required to deliver No. 1 grade pears to plaintiff in fulfillment of the agreement to deliver field run pears.

Judgment affirmed.

1. Sales 🔑54

The words "if available," in contract for sale of specified quantity of field run pears, if available, should be given meaning which parties intended to give such words when contract was made.

2. Evidence 🔑461(1)

The intention of parties to contract for sale of 50 tons of field run pears, if available, as to meaning of words "if available," was not determinable, as matter of law, by reference solely to provisions of contract, which was ambiguous, so that testimony as to circumstances under which contract was made and conversation between seller and corporate buyer's secretary at time of execution of contract was admissible to show such intention.

3. Sales 🔑88

In action for alleged breach of contract for sale of 50 tons of field run pears, if available, by defendant's failure to deliver any such pears to plaintiff, whether they were available, whether parties intended that No. 1 grade pears should be regarded as field run pears, and what parties intended by use of words "if available," were fact questions for determination by trial judge in non-jury trial.

4. Sales 🔑417

In action for alleged breach of contract for sale of 50 tons of field run pears, if available, by defendant's failure to deliver any such pears to plaintiff, evidence was sufficient to support trial judge's findings that defendant did not have such quantity or any other amount of field run pears available and that parties did not contemplate that defendant would be required to deliver No. 1 grade pears to plaintiff in fulfillment of agreement to deliver field run pears.

5. Appeal and Error 🔑1046(5)

In action for alleged breach of contract for sale of 50 tons of field run pears, if available, by defendant's failure to deliver any such pears to plaintiff, trial judge's statement that it seemed obvious that defendant had 50 tons of field run pears, thereby causing plaintiff's counsel to discontinue cross-examination of witness as to availability of such pears, was not error warranting reversal of judgment for defendant, where judge stated on next day of trial that if he made such statement, he believed he was wrong, and that counsel might recall any witnesses thought proper to call in connection with such matter. Code Civ.Proc. § 2055.

6. Appeal and Error 🔑1046(5)

In action for breach of sale contract, trial judge's comment that he had his doubts as to whether plaintiff was entitled to recover any damages shortly after hearing plaintiff's counsel say to another, following court's adjournment, that he thought judge's ruling regarding measure of damages was wrong, was improper, but not ground for reversal of judgment for defendant.

Benjamin Chipkin, Los Angeles, for appellant.

Morris Kastle, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action for damages for breach of contract. In a nonjury trial judgment was for defendant. Plaintiff appeals and contends that the findings and judgment are not supported by the evidence.

On August 16, 1950, plaintiff and defendant entered into a written agreement which recited in part: "I, Roy G. Vogel, agree to furnish the following to the buyer, Harold Fisch, representing Pure Foods Corporation: 15 Tons No. 3 Canning Grade Pears at $70.00 per ton 50 Tons Field Run Pears, if available, which will meet No. 3 Canning Grade Specifications, or better, at $100.00 per ton." The 15 tons of No. 3 pears were delivered to plaintiff and there is no issue as to that part of the contract. No part of the 50 tons of field run pears was delivered to plaintiff. Plaintiff alleged that 50 tons of field run pears were available. Defendant denied that allegation.

Finding IV was as follows: Defendant did not have available 50 tons or any other amount of field run pears at any time during the pear season of 1950. He did not in any manner repudiate said contract. He did not sell or deliver any field run pears to anyone during the season of 1950. He did not have available for sale and delivery, after signing the contract, any No. 3 caning grade pears except the 15 tons delivered to plaintiff. After the execution of the contract the only pears sold and delivered by defendant were No. 1 grade pears. It was not within the contemplation of the parties at the time the contract was signed that defendant would be required to deliver to plaintiff No. 1 grade pears in fulfillment thereof. All the pears picked by defendant after the execution of the agreement, except those which graded No. 1, had to be destroyed because they did not comply with the requirements as to grade under existing market orders.

Appellant asserts that at the time the contract was made the pears were still on the trees and the evidence clearly shows that the field run pears were available. Defendant (respondent) testified that field run pears are pears that come into the packing shed directly from the trees, have not been processed, and may include No. 1 and various other grades of pears; the amount of field run pears, which meet No. 3 canning grade specifications or better, is determined in the following manner: all the pears, of all sizes as picked from the trees, are brought into the packing shed from the orchard in field boxes and they are inspected, and those which are wormy, scratched, bruised or damaged are rejected and taken out, and the remainder (except the ones which are too small to be No. 3 grade—that is less than 2⅛ inches in diameter) are field run pears that are of No. 3 canning grade or better. He also testified that during the pear season he had more than 50 tons of such field run pears in the shed—he had a total of approximately 190 tons; 32 tons of said total amount were No. 3 canning grade pears—15 tons of which were sold and delivered to plaintiff pursuant to the contract herein, and 17 tons were sold and delivered to Kern Food Products, Inc., pursuant to a written contract entered into between that company and defendant on July 26, 1950; about 40 tons of said total amount were not marketable; about 118 tons, the remainder of said total amount (except about 10 tons which were sold to charitable organizations and itinerant merchants) were sent on consignment to three commission brokers pursuant to oral agreements to consign No. 1 pears to them, which agreements were made with them prior to making said contract with plaintiff; the three brokers were H & F Company, Osage Produce Company, and Frank Moyer; in May, 1950, defendant told a representative of the Osage Company that he thought he would have enough pears so that he could split the sales among the three brokers, and he told that representative to send some empty lug boxes to him; he told a representative of the H & F Company that he thought he could furnish 10,000 boxes of No. 1 pears to that company (a lug box contains about 23 pounds of pears); about August 10, before the marketing season of 1950 (which was August 12 to 18), he told Frank Moyer that he thought he would send to him on consignment about 12,000 boxes of No. 1 pears; the three brokers sent empty boxes to him for his use in delivering the pears to them; the H & F Company sent about 6,000 empty boxes to him in June and July, and during the marketing season he sent to that company about 3,000 boxes of No. 1 pears; he sent 2266 boxes of such pears to the Osage Company; he sent 5761 boxes of such pears to Frank Moyer during the marketing season; on May 11, 1950, in response to an inquiry by plaintiff, he sent a postal card to plaintiff stating that the pear crop was lighter than it was last year, however, he imagined that he could furnish about 50 tons, but he should know more in a few weeks; the average price he received for the pears he sent to said brokers was about $220 a ton; he did not ship any field run pears in the season of 1950, and he did not sell any such pears to anyone who came to the ranch. Defendant testified further that on August 16, 1950, the date when the contract herein was made, the market price of No. 1 pears was around $160 or $200 a ton and he knew at said time that that was the market value; defendant had sold pears to plaintiff over a period of several years; on August 16, 1950, Mr. Fisch, the representative of plaintiff, came to the packing shed and said he wanted fruit; defendant replied that he had a very short crop and he could not commit himself to any definite amount due to his prior commitments but he would do what he could; Fisch said that he had to have a definite amount of fruit; defendant then "agreed" to furnish 15 tons, and told him that he would furnish more if he had it but he had to take care of his prior commitments first; then Fisch "wanted it in writing"; they went to the office (in defendant's home) and asked defendant's wife to typewrite the agreement; defendant and Fisch composed the agreement; Fisch insisted upon getting more than 15 tons; defendant told him that if he had the fruit available he would be willing to sell it to him; after the pears of the 1950 season were processed there were only two grades of pears—No. 1 and No. 3.

The wife of defendant testified in substance the same as defendant testified regarding the conversation between defendant and Fisch at the time the contract was made.

Representatives of the Osage Company and the H & F Company testified in substance the same as defendant testified with respect to (1) the defendant's commitments, made in May, to consign No. 1 pears to said companies, and (2) the quantity and quality of the pears sent by defendant to those companies during the marketing season.

Mr. Fisch, the secretary of plaintiff, testified that during the last few days of August, 1950, he called defendant by telephone and asked him about delivering the fruit; defendant replied that he did not have it; just before making the contract Fisch asked defendant how many tons he could sell; defendant replied that he was sure he could sell at least 15 tons of No. 3 pears; Fisch asked him how many tons of field run pears, which would meet No. 3 or better, he would try to give him; defendant replied he would make a contract for 50 tons at $100; Fisch then told him to write the contract; defendant said that he was not sure how many tons he would have, and he wanted to put in the words "if available"; Fisch said that he had no objection; then they signed the contract.

[1, 2] The words "if available," appearing in the contract should be given the meaning which the parties intended to give them at the time they made the contract. It cannot be said as a matter of law that such intention can be determined by reference solely to the provisions of the contract. As stated at the trial by counsel for appellant, the contract is ambiguous. It was proper to receive testimony as to the circumstances under which the contract was made and as to the conversation between defendant and Mr. Fisch at the time of making the contract.

Appellant argues to the effect that the words "if available" were intended to mean that field run pears of such specifications would be delivered to plaintiff if the orchard produced 50 tons of such pears; that defendant admitted that more than said amount had been produced; that even if defendant had made prior commitments to consign No. 1 pears, the No. 1 pears were available for delivery to plaintiff because the pears which were to be consigned or were on consignment were still owned by defendant and he could have withdrawn them from consignment; that even if there were no marketable pears of a lower grade than No. 1, the No. 1 pears should have been used to comply with the agreement to furnish "field run pears."

[3, 4] Whether the field run pears were available was a question of fact for the determination of the trial judge. Also, whether the parties intended that No. 1 pears, exclusive of other grades, should be regarded as field run pears was a question of fact. Also, the question as to what the parties intended by the use of the words "if available" was a question of fact. Defendant and his wife testified, as above stated, that defendant told Mr. Fisch, at the time the agreement was made, that he had made prior commitments for No. 1 pears and he would have to take care of those commitments first, and if he had the pears available he would sell to him; after the papers were processed there were only two grades of marketable pears, No. 1 and No. 3—only 32 tons of No. 3 (15 tons of which were sold to plaintiff and 17 tons were sold to Kern Food Products under a prior commitment). Mr. Fisch testified that defendant said that he was not sure how many tons of the specified field run pears he would have and he wanted to put the words "if available" in the contract. The evidence was sufficient to support the findings that defendant did not have available 50 tons or any other amount of field run pears; and that it was not within the contemplation of the parties that defendant would be required to deliver No. 1 pears in fulfillment of the agreement to deliver field run pears. Also, the evidence supports the other findings.

[5] Appellant's counsel asserts that he did not complete his cross-examination of Mr. Vogel, under section 2055 of the Code of Civil Procedure, for the reason that the trial judge said, during that examination, that "It seems perfectly obvious that they had 50 tons of field-run pears." Counsel asserts that by reason of said statement he was misled and prevented from having a fair trial, in that, he did not pursue further the question as to availability of the pears but proceeded to question the witness regarding damages. It appears that later in the trial (the next day), when appellant's counsel referred to said statement, the judge said that if he had made such a definite statement (as that referred to) he believed that he was wrong, and if appellant's counsel had been misled he had permission to recall such witnesses as he thought proper to call in connection with that matter. Under the circumstances, it does not appear that reversible error was committed.

[6] Appellant also asserts that the judge was antagonistic and biased toward appellant's counsel after the judge had heard a remark of appellant's counsel, made in the hallway, to the effect that he thought that a ruling of the judge regarding the measure of damages was wrong. Appellant also asserts that a comment made by the judge, upon hearing counsel's remark, indicates that the judge had prejudged the case. After the judge had made the statement above-mentioned to the effect that the pears were available, he made a certain ruling regarding the measure of damages. Soon thereafter court adjourned, and while appellant's counsel and Mr. Fisch were in the hallway going toward the elevator appellant's counsel said that he thought that the ruling was wrong. The judge, who had just entered the hallway, said "I have heard that before." A few moments later the judge said: "Besides I have my doubts whether plaintiff is entitled to recover any damages at all." The last-mentioned comment of the judge should not have been made, however, it did not constitute reversible error.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

124 Cal.App.2d 39

CASTAGNOLI v. CASTAGNOLI et al.

Civ. 15696.

District Court of Appeal, First District,
Division 1, California.
March 22, 1954.

Action to recover amount of loan from plaintiff to defendant husband, used by him in purchase of a dwelling which he thereafter undertook to convey to joint names of himself and his defendant wife, who was allegedly aware of terms of loan and orally agreed to abide by them. On motion of defendant wife to set aside default judgment, the Superior Court, County of San Mateo, A. R. Cotton, J., entered order setting aside default, and plaintiff appealed. The District Court of Appeal, Finley, J. pro tem., held that when notice of motion was based only upon statutory grounds that judgment was taken through mistake, inadvertence, surprise or excusable neglect, trial court could consider only those grounds, and when judgment was not void upon its face, and more than six months had expired between date of entry of default and filing of notice of motion, court had lost jurisdiction to act under statute, and order purporting to set aside default was void.

Order reversed.

1. Judgment 🔑151

Statute providing that notice of motion must state grounds upon which it will be made, authorizes a trial court to consider only such grounds as are specified in the motion, and thus motion to set aside default, setting forth only the statutory grounds would be considered as having been based upon only such grounds. Code Civ.Proc. §§ 473, 1010.

2. Judgment 🔑153(1)

Where more than six months had elapsed between date of entry of default judgment and filing of notice of motion to set it aside, and judgment was not void upon its face, court lost jurisdiction to act under provision of Code of Civil Procedure pertaining to relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect, and order setting aside default on basis of motion urging only such grounds, was void. Code Civ.Proc. §§ 473, 1010.

3. Judgment 🔑153(1)

The six months limitation period for obtaining relief from judgment taken through mistake, inadvertence, surprise or excusable neglect commenced to run from the clerk's entry of the default and not from the date of entry of the judgment. Code Civ.Proc. §§ 473, 1010.

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Thomas L. Bocci, Jr., Daly City, John A. Putkey, San Francisco, for appellant.

Antonio J. Gaudio, South San Francisco, for respondent.

FINLEY, Justice pro tem.

This appeal is by plaintiff Louis Castagnoli from an order setting aside the default of defendant Lorraine Castagnoli and the judgment entered thereon. The other defendant, John Castagnoli, is not a party to the appeal. The only question for decision is whether the trial court had the power to set aside the default after six months from the time respondent's default was entered.

From the complaint it appears that defendants are husband and wife; that plaintiff loaned John Castagnoli $5,114.87 as a deposit on a home to be purchased by said defendant. The alleged understanding was that this sum was to be repaid in the event the home was sold, otherwise it was to be repaid upon satisfaction of a deed of trust obligation on the home owing to the Bank of America. The complaint goes on to state that after the loan was originally made defendant John Castagnoli undertook to convey this real property to the joint names of himself and his wife, Lorraine Castagnoli, who was aware of the terms of the loan and orally agreed to abide by them; that defendants sold the property and the proceeds are in the hands of a real estate broker who is holding them in escrow subject to instructions of defendants; that demand was made upon defendants to repay the loan with interest but that they have failed and refused to do so.

It appears from the briefs but not from the record that appellant is the father of respondent John Castagnoli; that the loan was made to John before his marriage to Lorraine; that during the marriage John placed title to the property in both his and his wife's name; that thereafter Lorraine filed for divorce and pursuant to an agreement between John and Lorraine the property was sold and the money placed in escrow subject to disposition upon the court's order in the divorce action which was still pending at the time this action was filed and apparently at the time judgment herein was entered.

Further, the judgment herein recited that defendant John Castagnoli appeared and filed "his Notice and Waiver of Appearance," and submitted himself to the jurisdiction of the court and stipulated that a default might be entered against him.

From the clerk's transcript it appears that the complaint was filed and summons issued on October 22, 1951. Summons was served upon respondent Lorraine Castagnoli in the City and County of San Francisco on October 26, 1951, and from the augmented record it appears that her default was entered in January, 1952. Judgment by default was made and entered on August 14, 1952 and notice of motion to set aside her default and the judgment entered thereon was filed October 6, 1952. On November 14, 1952 the court made its order granting the motion.

The notice of motion, so far as the same is material here, reads as follows: "Said motion will be made upon the ground that the said default judgment was taken against said defendant, Lorraine Castagnoli, through her mistake, inadvertence, surprise, or excusable neglect, as will more particularly appear by the affidavit of her attorney, Antonio J. Gaudio, served herewith, the verified answer of said defendant, copies of which are served herewith upon all of the other records and files in the action."

It will be noted that the *only* grounds urged are those set forth in section 473 of the Code of Civil Procedure. The notice of motion was accompanied by a copy of a proposed answer which is one of the conditions precedent to the granting of relief under that section.

Respondent claims that "though framed in the form of a motion to set aside default in the usual form, it was, necessarily, on the uncontroverted facts, addressed to the equity side of the trial court."

[1-3] With this contention, however, we cannot agree. Section 1010 of the Code of Civil Procedure provides that a notice of motion must state the grounds upon which it will be made, and this section has been construed to mean that the trial court may consider only such grounds as are specified in the motion. W. H. Marston Co. v. Kochritz, 80 Cal.App. 352, 251 P. 959; Mojave, etc., R. Co. v. Cuddeback, 28 Cal.App. 439, 152 P. 943; Garrett v. Garrett, 31 Cal.App. 173, 159 P. 1050. Appellant's notice of motion was based only upon the grounds set forth in section 473 of the Code of Civil Procedure and we must therefore conclude that the trial court considered only those grounds and based its order thereon in setting aside the default. The judgment is not void upon its face, and, inasmuch as more than six months had expired between the date of entry of default and the filing of the notice of motion to set it aside, the court had lost jurisdiction to act under Section 473 of the Code of Civil Procedure, and the order setting aside appellant's default and the judgment was void. Morgan v. Clapp, 207 Cal. 221, 277 P. 490; Richert v. Benson Lumber Co., 139 Cal.App. 671, 34 P.2d 840; Reeh v. Reeh, 69 Cal.App.2d 200, 158 P.2d 751. The six months' limitation period commences to run from the clerk's entry of the default and not from the date of entry of judgment. Doxey v. Doble, 12 Cal.App.2d 62, 54 P.2d 1143; Title Insurance, etc., Co. v. King, etc., Co., 162 Cal. 44, 120 P. 1066; McLain v. Llewellyn Iron Works, 56 Cal.App. 58, 204 P. 869.

The order appealed from is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

124 Cal.App.2d 8

GREENINGER v. RUELLE et ux.

Civ. 15669.

District Court of Appeal, First District,
Division 2, California.
March 18, 1954.

Action by executrix of decedent's estate to recover the reasonable value of real property which decedent had conveyed to defendants by two grant deeds, in which action plaintiff alleged that the deeds did not determine consideration to be paid therefor by defendants and that defendants had failed, neglected and refused to pay any consideration for such conveyance. The Superior Court, Marin County, Thomas F. Keating, J., entered judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that in view of fact that the Civil Code expressly excludes consideration as a condition of an effective transfer, conveyance of real property by deed which contains no reference to consideration, and which does not on its face recite that it is a gift or without consideration, gives rise to no inference of a promise to pay reasonable value of property conveyed.

Judgment affirmed.

1. Deeds 🔑15

Consideration is not essential to effectiveness of a grant of real property. Civ. Code, § 1040.

2. Deeds 🔑6

Deeds are not executory contracts. Civ.Code, § 1040.

3. Deeds 🔑192

In view of fact that the Civil Code expressly excludes consideration as a condition of an effective transfer, a conveyance of real property by deed which contains no reference to consideration, and which does not on its face recite that it is a gift or without consideration, gives rise to no inference of a promise to pay reasonable value of property conveyed. Civ. Code, §§ 1040, 1092.

Charles L. James, San Francisco, Joseph L. Bortin, San Francisco, for appellant.

Nelson & Boyd, San Rafael, for respondents.

DOOLING, Justice.

This is an appeal by the plaintiff from a judgment of dismissal entered after plaintiff's failure to amend her complaint within the time allowed by the court upon the sustaining of defendants' demurrer.

Appellant alleged that she is the executrix of the last will of Roland C. Greeninger, deceased; that the decedent conveyed certain real property to defendants by two grant deeds annexed to the complaint; that the deeds do not determine the consideration to be paid therefor by defendants; that defendants have failed, neglected and refused to pay any consideration for said conveyance; and that on the date of the transfer the real property conveyed was and now is of the reasonable value of $5000. The prayer is for judgment for $5000 with interest.

It is appellant's theory that the deeds, being instruments in writing, are "presumptive evidence of a consideration", Civ. Code, § 1614; and that where no consideration is fixed therein "the consideration must be so much money as the object of the contract is reasonably worth." Civ. Code, § 1611. Appellant attempts to bolster this argument by reference to Civ.Code, § 1066: "Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this article."

[1, 2] A grant of real property requires no consideration to be effective. Civ.Code, § 1040; Odone v. Marzocchi, 34 Cal.2d 431, 437, 211 P.2d 297, 212 P.2d 233, 17 A.L.R. 2d 1109; Cambridge Co. v. Moore, 62 Cal. App.2d 134, 144 P.2d 57; 9 Cal.Jur. 135. The deeds in this case were substantially in the statutory form and the statutory form omits any reference to consideration or the lack of it. Civ.Code, § 1092. Deeds are not, contrary to appellant's contention, executory contracts. Civ.Code, § 1040.

[3] In effect appellant is asking the court to hold that a conveyance of real property by deed which contains no reference to consideration (unless the deed on its face recites that it is a gift or without consideration) must give rise to the inference of a promise to pay the reasonable value of the property conveyed. Since the Civil Code expressly excludes consideration as a condition of an effective transfer, the court would be amending the code if it indulged in such an inference as between the parties to the conveyance.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

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124 Cal.App.2d 1

STATE COMPENSATION INS. FUND et al.
v.
INDUSTRIAL ACC. COMMISSION et al.

No. 15949.

District Court of Appeal, First District,
Division 1, California.
March 18, 1954.

Rehearing Denied April 16, 1954.

Proceedings on petition for writ of review of an award of compensation given to a special nurse procured by county hospital to furnish her services to a charity case. The District Court of Appeal, Bray, J., held that evidence warranted conclusion that hospital had the right to exercise authoritative control over the nurse who was to be paid by it from funds made available from separate source for such purpose, and that nurse was in fact an employee.

Award affirmed.

1. Workmen's Compensation 🔑259

Although a special nurse is ordinarily employed by patient through patient's doctor and is not subject to interference or control of the hospital and is not an employee of hospital for purposes of Workmen's Compensation Law, the employer-employee relationship may exist between the hospital and the special nurse in a particular case, thus making injury to nurse compensable.

2. Workmen's Compensation 🔑307

The decisive test of whether an employer-employee relationship exists, or whether a person is in fact an independent contractor, is whether the alleged employer has the right of authoritative control, in contradistinction to mere suggestion as to detail.

3. Workmen's Compensation 🔑1452

In compensation case involving a special nurse injured when serving at county hospital with reference to a charity patient, evidence warranted finding that the hospital had the right to general control of the special nurse and the right to discharge the nurse, within contemplation of test for determining whether the employer-employee or independent contractor relationship exists.

4. Workmen's Compensation 🔑338

A special nurse called by county hospital to serve with reference to a charity patient, with nurse's charges for her services to be paid by hospital from fund made available to it, in cases of the particular type involved, was the employee of the hospital and not independent contractor and entitled to compensation for injuries received while so serving, when hospital had the right of authoritative control over the nurse.

5. Workmen's Compensation 🔑338

Fact that special nurse procured by county hospital for services with reference to charity polio patient made out her bill for services to the patient did not preclude finding that nurse was in fact an employee of the hospital at the time she suffered injuries while rendering her services, when the evidence conclusively demonstrated that such was in fact the relationship.

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Donald Gallagher, Loton Wells, Donald V. Mitchell, San Francisco, for petitioners.

Everett A. Corten, T. Groezinger, San Francisco, for respondents.

BRAY, Justice.

Petition for writ of review of an award given one Mrs. Genevieve Lonergan.

Question Presented.

Was Mrs. Lonergan, a special duty nurse, the employee of the County of Alameda (Highland Hospital) or an independent contractor?

Evidence.

The commission found that Mrs. Lonergan was the employee of the Highland Hospital, which is owned by Alameda County. The Benjamin Warren Black Memorial Fund receives money made available to it by the National Foundation for Infantile Paralysis through its Alameda County chapter. The office manager of the Alameda County Institutions is one of the trustees of the fund. Under the understanding with the Polio Foundation, if a polio patient was not able to pay for the special nurse, the Black Memorial Fund would do so. The hospital never paid from its own funds. The practice at the hospital is that if a patient needs a special duty nurse, such patient's physician informs the hospital. A deposit to cover the nurse's charges is then required of the patient or the one responsible for the patient's bills. The hospital then phones the directory of registered nurses (no connection with the hospital or county) and the directory sends a registered nurse to the hospital. This is the method followed whether the patient is to pay the nurse or her pay is to come from the fund. A special nurse is required to follow the orders of the physician attending the patient. Nurses (other than special) must follow procedure laid down by the hospital. Special nurses may choose their own methods. General nurses attend more than one patient. Special nurses attend one special patient only. The patient here was a charity patient of the hospital. Mrs. Lonergan was notified by the nurses' registry to go to Highland Hospital for a polio case. On arrival she reported to the assistant superintendent of nurses. She was referred to the nurse in charge of the post polio floor, who asked if she knew anything about a respirator. On replying that she did not, the nurse said she would orient her. The nurse spent about an hour in showing her how to work the respirator. Mrs. Lonergan then started to take care of the patient in the respirator, who was then practically unconscious. The next day while working at the respirator she was injured. Mrs. Lonergan, prior to her injury, was not informed as to who was to pay her. She sent to the assistant director of nurses at the hospital her bill for her two days' services. The bill was made out to the patient. She was paid from the Black Memorial Fund. Highland Hospital is the only hospital in Alameda County with facilities for the care of respiratory poliomyelitis cases. The procedure for the care and treatment of all patients suffering from acute poliomyelitis is the same, regardless of whether they are pay or charity patients. The patient is placed in an artificial respirator and a special nurse is ordered by the doctor. This nurse renders service for her particular patient only.

Employee or Independent Contractor?

[1] Ordinarily a special nurse is employed by the patient through the patient's doctor and is not subject to the interference or control of the hospital and is not an employee of the hospital. In re Feciuch's Estate, Sur., 26 N.Y.S.2d 390; Payne v. Santa Barbara Cottage Hospital, 2 Cal.App. 2d 270, 37 P.2d 1061; Brown v. St. Vincent's Hospital, 222 App.Div. 402, 226 N.Y. S. 317; Ware v. Culp, 24 Cal.App.2d 22, 74 P.2d 283. The relation between the patient employing a special nurse and such nurse is that of independent contractor and not of employer and employee. Moody v. Industrial Acc. Comm., 204 Cal. 668, 269 P. 542, 60 A.L.R. 299. Ordinarily there is no relationship between a hospital and the doctors treating patients therein in the nature of employer and employee, nor are they under the hospital's control. But they may be, and such relationship may exist. In Brown v. La Societe Francaise, 138 Cal. 475, 71 P. 516, it was held that the surgeon was the servant or agent of the society (an association for mutual benefit) in treating its members in its hospital, the by-laws of the society providing for medical and surgical treatment, including the services of doctors, etc. Inderbitzen v. Lane Hospital,

124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905, refers to many cases holding physicians as employees of hospitals for the purpose of establishing liability in the hospital for the tort of the physician. In that case plaintiff's injuries were caused by interns and doctors employed by the hospital which had undertaken to give plaintiff necessary hospital and medical attention. In Bowman v. Southern Pac. Co., 55 Cal.App. 734, 204 P. 403, the railroad maintained a hospital for its employees and supplied them hospital and medical attention, and was held liable for the negligent treatment of a patient by its physicians. As the cases hold that the professions of doctor and nurse are so closely allied that decisions applicable to the one apply equally well to the other, Moody v. Industrial Acc. Comm., supra, 204 Cal. 668, 671, 269 P. 542, 60 A.L.R. 299; Ware v. Culp, supra, 24 Cal.App.2d 22, 28, 74 P.2d 283, it would appear then that special nurses can be employed by a hospital. "It should be noted that a nurse or physician may be the servant of a hospital, thus requiring the application of the doctrine of respondeat superior even though they are performing professional acts." Rice v. California Lutheran Hospital, 27 Cal.2d 296, 304, 163 P.2d 860, 865.

In our case, the patient was a charity patient, that is, the County of Alameda through its hospital was required and undertook to provide hospital and medical care to her. See section 200, Welfare and Institutions Code, providing authority to boards of supervisors to provide for the care and maintenance of the indigent sick. In section 202, Welfare and Institutions Code, the board of supervisors is authorized to secure for the indigent sick hospital service from any public or private hospital. "Hospital service" as used in the section includes, among other, medical, surgical, nursing services and "such other care, service or supplies as may be necessary for the treatment of the sick or injured." Undoubtedly the same type of services may be supplied at a county's own hospital as the county may procure at other hospitals.

[2] Here the medical care was performed by physicians employed by the hospital. These physicians in carrying out their duties as employees of the hospital, determined that it was necessary that the patient have the care of a special nurse and so informed the hospital, which thereupon obtained such a nurse by requesting the registry to send one. The patient here did not employ the nurse. Actually through the media of the physicians and nurse the hospital was performing its duty to its charity patient. Rather the nurse was employed by the hospital directly or through its employees, the doctors. It is unrealistic to say that the doctors were acting as agents for the patient. Another determining factor is the application of the test laid down by the cases: "'* * * "The decisive test of the relationship is: Who has the right to direct what shall be done, and when and how it shall be done? Who has the right to general control? * * * In other words, the test of what constitutes independent service lies in the control exercise. The test of control means complete control, and we must carefully distinguish between authoritative control, and mere suggestion as to detail. * * *"'" Ware v. Culp, 24 Cal.App.2d 22, 29, 74 P.2d 283, 286.

[3-5] It is a reasonable inference from the evidence in our case that the hospital had the right to general control. Mrs. Lonergan reported to the superintendent of nurses. No one told her by whom she was employed or who was to pay her. The superintendent sent her to both the charge nurse on the polio floor and the nurse in charge of the post polio floor. The latter inquired as to her knowledge of respirators and then instructed her in the use of a respirator. While this circumstance might support an inference that this instruction, as claimed by petitioner, was merely an endeavor on the part of the hospital to see that the respirator was used properly, as it might have done in the case of a special nurse employed by the patient herself, a situation similar to that in Mt. Meadow Creameries v. Industrial Acc. Comm., 25 Cal.App.2d 123, 76 P.2d 724, where the court held that there was a limited control solely indicating a desire on the part of the one exercising that control to obtain satisfactory results under the contract with the

one performing the work and not sufficient control to constitute an employer-employee relationship, such a conclusion is not compelled. In view of the relationship between the hospital and this charity patient, namely, that the hospital and its staff had the sole responsibility for the patient's care, an inference readily arises that the hospital was actually controlling and directing this use. Moreover, because of that relationship it is reasonable to infer that the hospital had the right of control and the right of discharge. The existence of "right of control, and not the extent of its exercise, gives rise to the employer-employee relationship." Perguica v. Industrial Acc. Comm., 29 Cal. 2d 857, 859–860, 179 P.2d 812, 813; California Compensation Ins. Co. v. Industrial Acc. Comm., 86 Cal.App.2d 861, 866, 195 P. 2d 880. Although the method to be pursued in the routine care of the patient was left to the judgment and discretion of Mrs. Lonergan, can it be doubted that if her services were not satisfactory to the hospital or the doctors, she would have been discharged without consulting the wishes of the patient? "Strong evidentiary support of the employment relationship is 'the right of the employer to end the service whenever he sees fit to do so.'" Perguica v. Industrial Acc. Comm., supra, 29 Cal.2d at page 860, 179 P.2d at page 813; California Compensation Ins. Co. v. Industrial Acc. Comm., supra, 86 Cal.App.2d 861, 195 P.2d 880. The fact that the hospital did not pay and had no funds with which to pay special nurses, is not determinative of the question of who is the nurse's employer. In Department of Natural Resources of California, Division of Fish and Game v. Industrial Acc. Comm., 216 Cal. 434, 14 P.2d 746, one Means was held to be an employee of the Fish and Game Commission although he was paid by a commercial fisherman. There the court quoted from County of Los Angeles v. Industrial Acc. Comm., 123 Cal. App. 12, 11 P.2d 434, where the salary of a deputy marshal of the Municipal Court of Los Angeles was paid by the County of Los Angeles and it was held that he nevertheless was an employee of the city of Los Angeles. "'* * * Although, in most cases where the contract of employment exists between individuals, the source of payment as a rule is one of the indicia of the existence of the relationship, in cases involving governmental functions, this does not always seem to be true.'" 216 Cal. at page 438, 14 P.2d at page 748. In Claremont Country Club v. Industrial Acc. Comm., 174 Cal. 395, 163 P. 209, L.R.A. 1918F, 177, a caddy was held to be the employee of the country club although his wage was paid by the person using him. Highland Hospital was legally prohibited from paying a special nurse from its own funds, but that limitation would not preclude it from employing personnel for which funds are available to it from another source. Nor is Mrs. Lonergan bound by the statement sent in to the hospital. Obviously, she was not employed by the patient. She sent the statement to the county's director of nurses who stated that she would mail the check as soon as possible.

The award is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

123 Cal.App.2d 912

HUGHES et al. v. GORLEK et ux.

Civ. 4682.

District Court of Appeal, Fourth District, California.

March 17, 1954.

Action on an account stated and on an open book account for services and goods furnished. From order of Superior Court, Tulare County, Glenn L. Moran, J., granting motion for change of venue, plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that fact that motion for change of venue in action against husband and wife was not supported by affidavit showing wife's residence in county to which change was sought did not preclude granting of motion when notice of motion recited her residence in such county, and affidavit of husband alleged his residence therein, since wife's residence is presumed to be same as that of husband, in absence of evidence to contrary.

Order affirmed.

1. Venue ⚷70

Fact that motion for change of venue in action against husband and wife on alleged account stated was not supported by affidavit showing wife's residence in county to which change was sought did not preclude granting of motion when notice of motion recited her residence in such county, and affidavit of husband alleged his residence therein.

2. Domicile ⚷5

There is a natural presumption that the residence of the wife is the same as that of her husband in the absence of evidence to the contrary.

3. Venue ⚷22(1)

Where plaintiffs alleged that an account was stated in the county in which the action was commenced and that defendants became indebted to plaintiffs on an open book account in that same county, all of which was denied by verified answer, plaintiffs had not brought themselves within exception to the usual rule for venue and change of venue to county of residence of defendants was proper. Code Civ.Proc. § 395.

4. Appeal and Error ⚷965

Order granting motion for change of venue would not be disturbed where there was a conflict between the facts alleged in complaint and those alleged and sworn to in answer on question of whether defendants became indebted to plaintiffs in county in which action was commenced. Code Civ. Proc. § 395.

McCormick, Moock & McCormick, Visalia, for appellants.

No appearance for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order granting a change of place of trial.

The first count of the complaint in this action alleged that on January 30, 1952, an account was stated in the county of Tulare by and between the plaintiffs and the defendants finding that $825 was due to the plaintiffs, which amount the defendants agreed to pay. In a second count, it was alleged that within four years last past, and in the county of Tulare, the defendants became indebted to the plaintiffs upon an open book account in the sum of $825 for services and goods furnished. Both defendants filed a verified answer, denying generally and specifically each and every allegation contained in each count of the complaint, and denying that they were indebted to the plaintiffs in any amount or at all. At the same time the defendants filed a notice of motion for change of venue, together with a motion for change of venue, asking the court to change the place of trial to the municipal court of the Los Angeles judicial district. The notice of motion, which was sworn to, states, among other things, that each of the defendants is a resident of the county of Los Angeles and that the motion will be made and based upon that notice, the affidavit of residence served therewith, and the pleadings in the action. The motion for change of venue mentions only "the defendant", was signed by the "attorney for defendant" and was verified by the defendant husband. It states that "the defendant" moves for this change of trial upon the ground "that he is a resident of the county of Los Angeles," and that this motion is made and based upon the notice of motion filed and upon the pleadings in the action. There was also filed on the same day an affidavit of the defendant husband stating that he is the defendant in the action, that he was at the commencement of the action and now is a resident of the county of Los Angeles and not a resident of the county in which the action was commenced, and this is followed by the usual statement that he has a meritorious defense to the action. The plaintiffs did not file a counteraffidavit, but chose to rely upon the verified complaint. After a hearing the court made the order transferring the case to the municipal court for the Los Angeles Judicial District, and the plaintiffs have appealed from that order.

[1, 2] It is first contended that the court erred in ordering a change of venue in the absence of any showing that the defendant wife was also a nonresident of the county where the action was commenced, it being argued that there was no showing of such fact. There was nothing in the verified complaint, which is relied upon by the plaintiffs in opposition to the motion, with respect to the residence of the defendants. The affidavit of the defendant husband stated that he was at the commencement of the action, and now is, a resident of the county of Los Angeles. In the absence of anything indicating the contrary, there is a natural presumption that the residence of the wife is, and has been, the same as that of her husband. Moreover, it was alleged in the notice of motion, which was sworn to, that both defendants were residents of Los Angeles County. In the complete absence of any showing or claim to the contrary the evidence, with respect to the residence of both defendants, was sufficient to support the court's conclusion and order.

[3] The appellants further contend that the court erred by ordering a change of venue since it appeared that the action was brought in the county where the contract was entered into, and where it was to be performed. It is argued that by alleging that an account was stated in the county of Tulare, and that the defendant became indebted to the plaintiffs in that county on an open book account, they have brought themselves within the exceptions to the usual rule provided for in Section 395 of the Code of Civil Procedure. These contentions are without merit. Goossen v. Clifton, 75 Cal. App.2d 44, 170 P.2d 104; Crofts & Anderson v. Johnson, 101 Cal.App.2d 418, 225 P. 2d 594, 596. The rules which are controlling here are fully discussed in those cases. In the latter case, among other things, the court said:

> "Moreover, to constitute an account stated there must be something more than a showing that a statement setting forth the account is sent the debtor. There must be an admission of the correctness of that account by the debtor either directly or by acquiescence. So far as the evidence to date is concerned, there is no showing that defendant admitted the account in either way. So, there is no evidence before the court as to where, if at all, the account actually was stated. Therefore, the court could not determine that as to the account stated Alameda County was the county in which the contract was made or was to be performed."

[4] At best, there was a conflict between the facts alleged in the complaint and those alleged and sworn to by the defendants, and the action of the trial court cannot be disturbed.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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124 Cal.App.2d 17

RAGGHIANTI v. HARRIS.

Civ. 15743.

District Court of Appeal, First District, Division 2, California.

March 19, 1954.

Rehearing Denied April 16, 1954.

Suit by plaintiff on alleged oral contract for purchase and sale of quarter interest in defendant's business. The Superior Court, Alameda County, Thomas J. Ledwich, J., found for defendant and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that statute of frauds requirement of a written note signed by party to be charged was not met by defendant's testimony in a prior proceeding that he had made such a contract.

Judgment affirmed.

1. Frauds, Statute of 🔑144

Defendant's testimony in prior unrelated proceeding that he had made alleged oral contract for sale of quarter interest in defendant's business, did not take contract out of statutes of frauds. Civ.Code, §§ 852, subd. 1, 1624a, 1724.

2. Frauds, Statute of ⚷144

Where defendant in prior divorce action allegedly admitted he had entered into oral contract with plaintiff for sale of business but former wife was not a party to suit between plaintiff and defendant and there was no evidence that defendant through such testimony gained any advantage over plaintiff, doctrine of estoppel did not preclude defendant from relying on statute of frauds. Civ.Code, §§ 852, subd. 1, 1624a, 1724.

3. Estoppel ⚷58

One of primary elements of defense of estoppel is that party relying on estoppel must have been injured or prejudiced thereby. Civ.Code §§ 852, subd. 1, 1624a, 1724.

Joseph L. Alioto, Marvin J. Colangelo, San Francisco, for appellant.

Nathan G. Gray, Berkeley, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on an alleged oral conduct for the purchase and sale of a one-quarter interest in defendant's business. Defendant had judgment.

Two questions are involved: (1) When a contract for the sale of property is wholly oral are the provisions of sections 1624a, and 1724 of the Civil Code, and of section 1973a of the Code of Civil Procedure, requiring a written note "signed by the party to be charged", met by proof that in another unrelated action the defendant had testified that he had made such a contract? (2) Can appellant rely on the doctrine of estoppel?

[1] The first question must be answered in the negative. In Garnsey v. Gothard, 90 Cal. 603, 27 P. 516, it was held that the verified answer in a prior proceeding admitting the execution of the contract was sufficient to take the case out of the statute. In Baker v. Baker, 3 Cal.Unrep.Cas. 597, 31 P. 355, 357, a case involving Civil Code, sec. 852, subd. 1, requiring a written instrument declaring a trust to be "subscribed by the trustee", it was held that a signed deposition was sufficient. But in both cases there was a note or memorandum "signed by the party to be charged". But here there was nothing signed by the respondent and the case comes squarely within the rule of Hashagen v. Hashagen, 80 Cal. 514, 22 P. 294, where it was held that the testimony of defendant in a prior proceeding was not sufficient to take the case out of the statute. This is just a simple case of our following the statute as written. If the respondent had repeated his statements to any man on the street it would have been just as ineffective as his testimony in court. Oral repetition of that which is required to be in writing does not take the place of a writing.

[2, 3] (2) The second question must be answered in the negative. None of the primary elements of estoppel are present. It seems to be appellant's contention that through the admission of the contract by the respondent in his prior divorce action he thereby gained an advantage over his wife. But the former wife is not a party to this suit. There is no evidence that respondent, through that testimony, gained an advantage over the appellant herein, or that the latter suffered any injury thereby. One of the primary elements of the defense of estoppel is that the party relying on it must have been injured or prejudiced thereby. "He must show that he was misled by the conduct of the other party, that in reliance thereon, he was induced to do something which he otherwise would not have done, and that he will be injured by allowing its truth to be disproved." 10 Cal.Jur. p. 639. Since the claim of estoppel is based wholly on the oral testimony of the respondent that such oral contract had been made, there is no showing that the appellant was injured or prejudiced by such testimony or that because of it he was induced to act upon it to his injury.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

123 Cal.App.2d 826

PEOPLE v. EDDY.

Cr. 5097.

District Court of Appeal, Second District,
Division 2, California.
March 15, 1954.

Robbery prosecution. The Superior Court, Los Angeles County, Benjamin J. Scheinman, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that the evidence supported the conviction.

Affirmed.

1. Robbery ⚿24(1)

Evidence that defendant had abetted robbery with guilty intent supported conviction for first-degree robbery. Pen.Code, § 31.

2. Criminal Law ⚿741(2)

Whether defendant, although absent from scene of crime, aided and abetted the crime of which he is accused is question of fact for trial court to be found from all the circumstances in proof. Pen.Code, § 31.

3. Criminal Law ⚿538(3)

Where corpus delicti of robbery was established, defendant's confession to police officer was itself sufficient to connect defendant with the robbery. Pen.Code, §§ 211, 211a.

4. Criminal Law ⚿409

Officer's testimony that defendant had admitted that recorded statement of alleged associate as to details of robbery was correct was sufficient proof of defendant's admission of his own guilt. Pen. Code, §§ 31, 211, 211a.

5. Robbery ⚿15

Proof that defendant had discovered presence of narcotics at hospital, had suggested robbery to associate, had borrowed automatic pistol to be used in the robbery and had taken his share of the loot made defendant a principal. Pen.Code, §§ 31, 211, 211a.

6. Robbery ⚿11

Where robbers used force in their theft and were armed with deadly weapon, crime was robbery in the first degree. Pen.Code, §§ 211, 211a.

7. Criminal Law ⚿1159(2)

The rule that oral admissions must be viewed with caution is a rule to be observed by trial court and is ineffective on appeal. Code Civ.Proc. § 2061.

8. Criminal Law ⚿1144

Trial court in criminal prosecution is presumed to have observed rules for trials and to have followed the law.

9. Criminal Law ⚿406(1)

Record of criminal prosecution failed to show that trial court had abused its discretion either in admitting testimony of oral admissions or in applying such testimony to the problem in hand. Code Civ. Proc. § 2061.

10. Criminal Law ⚿1166½(6)

Where defendant did not request continuance because of alleged harmful effect of incident viewed by jury venire, and did not exhaust peremptory challenges, and voir dire examination disclosed that none of jurors had been influenced by the incident, defendant was not entitled to reversal of judgment of conviction on ground that jury could not give him fair trial.

11. Criminal Law ⚿1144(15)

The jury are presumed to have understood and to have obeyed cautionary instruction.

12. Criminal Law ⚿1166½(6)

Cautionary instruction telling jury that events concerning alleged associates of defendant had no bearing on defendant's case and that defendant was entitled to be tried on testimony from witness box cured any prejudice suffered by defendant because jury venire witnessed arrest of associate in courtroom for possessing deadly weapon.

13. Criminal Law ⚿829(1)

Defendant was not prejudiced by refusal of requested instruction where instruction given covered the subject of requested instruction. Pen.Code, § 211.

14. Criminal Law ⚿404(4)

Although robbery victim was unable to identify exhibit as the pistol used by robber, where owner of pistol testified that he had loaned it to defendant and that it had been returned by defendant's alleged associate, police officer testified that defendant had stated that he and alleged associate had discussed robbery and had obtained gun from its owner, exhibit was entitled to be admitted as item in sum of evidence in robbery prosecution. Code Civ.Proc. § 1954.

15. Criminal Law ⚿404(1)

Identification of exhibit need not be positive to justify its admission. Code Civ.Proc. § 1954.

16. Criminal Law ⚿561(1)

The doctrine of reasonable doubt, applicable in criminal case, applies to proof of guilt, not to the proving of each event asserted to be a link in the inculpating chain of incidents.

17. Criminal Law ⚿784(4)

Instruction, defining both circumstantial and direct evidence and advising jury that to warrant conviction, either class of evidence must carry convincing quality and that if evidence were susceptible of two interpretations and both appeared reasonable, it was jury's duty to adopt interpretation in favor of accused, and that jury should make only reasonable deductions from evidence and should find for defendant unless proved circumstances not only were consistent with hypothesis that defendant was guilty, but were irreconcilable with any other rational conclusion, correctly advised jury as to effect of circumstantial evidence.

18. Criminal Law ⚿1036(1)

Defendant could not object to admission of evidence for first time on appeal.

19. Criminal Law ⚿455

In prosecution for robbery wherein narcotics were obtained, where police officer had testified on direct as to conversations with defendant to effect that defendant had shared stolen narcotics and had once had narcotic habit, and defendant offered evidence that he had never used narcotics and had no scars on his arm from use of narcotics by injection, rebuttal testimony of officer that he had examined defendant's arms and had found puncture marks and some breaking down of blood vessels was not opinion evidence, but was merely a factual description of defendant's arm, and was pertinent, admissible proof.

◆

Minsky & Garber, by Albert C. Garber, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Dep. Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant, convicted of robbery, seeks a reversal on the grounds of (1) the insufficiency of the evidence, (2) deprivation of his liberty without due process of law, (3) admission of unlawful evidence, (4) rejection of offered instructions.

The Evidence Is Sufficient.

Two associates of appellant, Dallas and Bernita Blumenthal, entered the Hofgaarden Medical Center, a hospital in Alhambra, on December 7, 1952, near midnight. From the adopted evidence and the verdict, appellant had been treated at the Hofgaarden for an injury on December 1, 1952. He had supplied his confederates with the revolver used in the robbery of the hospital which was in charge of Mr. Cosand, the night watchman. Appellant borrowed the weapon, exhibit 1, from a friend, one George Hopkins who at the trial identified it as the one which belonged to his father and had been kept in a drawer in the Hopkins home. After appellant had failed to return the pistol within three days, Hopkins could not find appellant but recovered it from Charles Finley, appellant's codefendant. It was the only time George had ever loaned it to appellant.

The robbery occurred according to plan. Mr. Cosand was alone when the Blumenthals entered. As he addressed Bernita, his back was toward Dallas. When he turned around, the man was pointing a gun at him, threatened to kill him if he moved. Dallas forced him to lie on the floor. At that time Cosand observed two other men present. In compliance with the robbers' demands, he told them the money was in the drawer of the desk. They took their victim to the rear and tied him up. On the next day Miss Harris, the business manager, discovered that the hospital had been robbed of $25.50 in money in addition to twenty-five cans and bottles of pharmaceuticals, consisting in the main of morphine derivatives.

Shortly after the robbery, on learning that the police were inquiring for him, appellant betook himself to the city of Yuma, Arizona. He was arrested there on March 12, 1953. Lieutenant Miller of the Alhambra police called for him on the following day and returned him to Alhambra. Having at first declined to discuss the crime before consulting his mother, appellant subsequently talked freely to the officer concerning the Hofgaarden robbery. He stated that while he was there on December 1 to be treated for a lacerated finger, he noticed some narcotics in the cabinets; that thereafter he discussed with Charles Finley the matter of robbing the Medical Center of its narcotics and where they might get a gun for the purpose. Appellant told Finley of a fellow named George from whom he could borrow a gun and that he and Finley called on George Hopkins; that they called on the Blumenthals and discussed with Dallas the robbery of the Hofgaarden; that he refused to accompany them on the adventure but that the Blumenthals, Kenneth, Dallas and Bernita, drove away with Finley in the latter's car; that they returned with some narcotics and hypnotics, two cans of ether and a doctor's pill box; that they divided the booty equally; that he injected sodium pentothal in his arm; that "he was hooked, but he had kicked the habit in Yuma"; that he departed from Alhambra because he knew the police were looking for him.

Lieutenant Miller and a fellow officer played a tape recording they had taken of Charles Finley's statement to the police, and requested appellant to make any corrections. He promptly recognized Finley's voice. In his recording Finley stated he had met appellant and discussed with him the possibilities of robbing the Hofgaarden; that appellant knew where they could obtain a gun; that they visited "George's house" and appellant got the gun; that they went to Blumenthal's place where appellant gave the pistol to them and Finley; that appellant remained there while the Blumenthals and Finley accomplished the robbery, returned and divided the stolen narcotics.

Appellant told the officers that the recording was correct. He admitted borrowing the Hopkins' gun and giving it to Finley. Lieutenant Miller examined appellant's arms and found puncture marks.

At the trial appellant claimed he had gone to Yuma for an asthmatic condition, but voluntarily returned with Officer Miller. He declared that he had not been with the Blumenthals at the Hofgaarden and proved he was at home.

[1–6] The recited facts prove the robbery. It is abundantly shown that appellant was connected with it; that he advised and encouraged the crime by his first conversation with Finley and by loaning him George Hopkins' automatic. He abetted the act of the Blumenthals and Finley with a guilty intent. Penal Code, sec. 31; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Terman, 4 Cal.App.2d 345, 347, 40 P.2d 915. Whether a defendant, although absent from the scene, aided and abetted the crime of which he is accused is a question of fact for the trial court to be found from all the circumstances in proof. People v. Wilson, 135 Cal. 331, 333, 67 P. 322. The corpus delicti of the robbery having been established by the night watchman and the business manager of the hospital, appelitself sufficient to connect the prisoner with
itself sufficient to conect the prisoner with
the felony. People v. King, 30 Cal.App.2d 185, 195, 85 P.2d 928. The officer's testimony that appellant did not deny Finley's recorded statement but said it was correct is

a sufficient proof of appellant's admission of his guilt. People v. Amaya, 134 Cal. 531, 536, 66 P. 794; People v. Bisbines, 132 Cal. App. 239, 241, 22 P.2d 762. But we are not forced to rely upon such evidence although it is sufficient. It was proved that appellant was the author of the crime; had made the discovery of the presence of the narcotics at the Hofgaarden; had suggested the robbery to Finley and then borrowed the automatic pistol to be used on the victim, and later took his share of the loot. Such proof makes appellant a principal. People v. Dolan, 38 Cal.App.2d 96, 98, 100 P.2d 791. Because the robbers used force in their theft and were armed with a deadly weapon, it was robbery in the first degree. Penal Code, secs. 211, 211a.

[7–9] Appellant's protest that his oral admissions must be viewed with caution has no application here. That was a rule to be observed by the trial court and it is ineffective on appeal. Code Civ.Proc. sec. 2061; People v. Holman, 72 Cal.App.2d 75, 89, 164 P.2d 297. That court is presumed to have observed the rules for trials and to have followed the law. There is no showing that it abused its discretion either in admitting testimony of oral admissions or in applying it to the problem in hand. The ultimate fact of guilt is clearly established by the evidence.

Due Process

Appellant assigns as error the conduct of the court in proceeding with the trial immediately following the occurrences which he asserts prevented his having a fair trial. The events complained of are set forth by him substantially as follows: The trial was set for June 8, 1953, in Department A of the Pasadena Superior Court, the master criminal calendar. Appellant and seven other persons were brought into the courtroom where the venire of the week were present. Amidst that scene, the accused Bernita Blumenthal, then out on bail, was arrested by the sheriff's detail for possessing a deadly weapon which she had intended to pass to her husband, then sitting in the jury box beside appellant. Such arrest created a furor: numerous photographs of the Blumenthals were taken; "all metropolitan newspapers in our Los Angeles area carried feature stories and pictures. * * * The Pasadena newspaper carried the story as its headline feature on page 1." From this appellant proceeds to say that "the notoriety and publicity attending the Blumenthal incident prejudiced the jury against the appellant. * * * Before any evidence was heard, jurors and prospective jurors were referring to the prisoners as 'a bunch of young gangsters and hoodlums and a menace to the community.' Fuel was added to the flame of excitement created by the court's arraignment and acceptance of the plea of the Blumenthal boys in the presence of the jury and the court's statements and questions in regard to the use of narcotics in the presence of the jury and also reference to their prior records." It is then recited that the court called the case of People v. Bernita Fay Blumenthal and ordered it to trial, exonerated her bail and fixed it at $10,000. Because of the great excitement in Department A and of the presence of various photographers and reporters and the unusually large number of sheriffs and because every person accused, except appellant, pleaded guilty "in the presence of the jury venire," appellant contends that he was by reason of the atmosphere thus created denied a fair trial.

If the events of the morning in question occurred as recited, it was the duty of appellant then and there to request a continuance or a change of place of trial to a court where he would not suffer the disadvantage of having to select a jury that had witnessed the events of which he complains. He did not do so. On the contrary, he rejected the offer of the prosecuting attorney to request a continuance.

[10] Also, when the jurors were examined on voir dire, it was developed that none of them had been influenced by the colloquies, motions, requests, orders, arrests and accusations that had occurred in their presence. Neither did appellant exhaust his peremptory challenges. He was not forced to a trial at that time, but with evident complacence accepted the situation rather than take a continuance. He

is not, therefore, entitled to a reversal on the ground that the jury could not give him a fair trial for the reason that he has not shown that he was prejudiced by the occurrences of June 8; and he accepted the jury knowing the facts. People v. Stonecifer, 6 Cal. 405, 411; People v. Ward, 105 Cal. 335, 338, 38 P. 945; People v. Cross, 64 Cal.App. 443, 445, 221 P. 684. In People v. Ward, supra, it was, in effect, held that a failure to challenge the jurors for cause constituted a waiver on behalf of defendant to do so. In People v. Stonecifer, supra, it was held that a party who accepts a juror, knowing him to be disqualified, "is estopped from afterwards availing himself of such disqualification." Appellant and his counsel knew at the time as much about the alleged disqualification of the jurors they accepted as they have ever known.

[11, 12] Moreover, the court took cognizance of the events that had occurred just prior to the examination and acceptance of the jury by telling them that the events concerning the Blumenthals "have no bearing whatsoever on the case which is now before you. The defendant is entitled to be tried by you on the testimony * * * from the witness box, and only from such testimony." The jury are presumed to have understood and obeyed the instruction. People v. Northey, 77 Cal. 618, 630, 631, 19 P. 865, 20 P. 129.

Refusal to Instruct as to Specific Intent

[13] The court refused to read Caljic instruction 72C[1]. Appellant now argues that inasmuch as section 211 of the Penal Code requires that all elements of larceny are essential to the crime of robbery and that since a specific intent to appropriate another's property is one of such elements, the jury should have been directed to find such intent in the accused. But the court gave an instruction[2] which generously covered the subject and is a full compliance with the law. People v. Quinn, 77 Cal.App.2d 734, 738, 176 P.2d 404; People v. White, 5 Cal.App. 329, 335, 90 P. 471; People v. Castile, 3 Cal.App. 487, 488, 86 P. 746.

Because 72C of Caljic does not include an instruction as to a particular, specific intent and left it to the court to conjecture as to appellant's wishes, it did not in effect constitute an instruction that the specific intent to commit larceny is necessary to the crime of robbery. Having failed to request a correct instruction on specific intent, and because the court's instruction substantially covered the subject appellant's assignment on that score is not well taken. People v. Bletson, 117 CalApp.2d 731, 734, 256 P.2d 614; People v. Cohen, 99 Cal.App. 515, 517, 278 P. 1056.

The Automatic Pistol

[14] There was no error in the court's receiving in evidence the Mauser automatic pistol. (Exhibit 1.) Mr. Cosand testified that one of the robbers held a gun on him. While he was unable to say that Exhibit 1 was the same weapon used by Blumenthal, yet George Hopkins testified that he loaned the Mauser to appellant; that it was returned by Finley. Appellant told Lieutenant Miller that he and Finley had discussed a robbery of the Hofgaar-

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[1] "Concerning Specific Intent. In the case of certain crimes, it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime may not be committed. Thus in the crime of robbery, a necessary element is the existence in the mind of the perpetrator of the specific intent to commit larceny, and unless such intent so exists the crime is not committed."

[2] "Robbery is the felonious taking of personal property of any value in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

"An essential element of the crime of which the defendant is accused is intent, the law requiring that to constitute such a crime there must exist a union or joint operation of criminal conduct and criminal intent. The intent to do the forbidden thing constitutes the criminal intent. The law requires that to be guilty of crime, one must intend the conduct that fits the description of the crime and must engage in that conduct knowingly and wilfully."

den in order to get narcotics and where to get a gun; that he could borrow one from one George; that he and Finley visited George Hopkins' home and obtained the automatic he loaned the Blumenthals and told him of the "set-up" at the Hofgaarden. In his recorded statement, Finley said appellant had borrowed the gun from George and gave it to Blumenthal. After such proof, exhibit 1 was entitled to be admitted as an "item in the sum of the evidence."

[15] The automatic was admitted into evidence without objection in the exercise of a sound discretion. Code Civ.Proc. sec. 1954. While any article "cognizable by the senses" must be identified, People v. Ferns, 27 Cal.App. 285, 287, 149 P. 802, yet such identification need not be positive. People v. Ferdinand, 194 Cal. 555, 563, 229 P. 341; People v. Hightower, 40 Cal.App.2d 102, 107, 104 N.E.2d 378; People v. Harsch, 44 Cal.App.2d 572, 576, 112 P.2d 654. The fact that Cosand did not identify the Mauser as the gun pointed at him is not important in the light of all the other evidence. See People v. Peete, 54 Cal.App. 333, 348, 202 P. 51.

A Rejected Instruction

[16] Appellant requested the court to read the following instruction to the jury: "When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt."

To give such instruction would have been error. The law does not require that each fact in a chain of circumstances be proved beyond a reasonable doubt. The doctrine of reasonable doubt applies to proof of guilt and not to the proving of each event asserted to be a link in the inculpating chain of incidents. People v. Mansour, 103 Cal.App.2d 592, 598, 230 P.2d 52; People v. Klinkenberg, 90 Cal. App.2d 608, 632, 204 P.2d 47, 613.

Instructions on the Kinds of Evidence

[17] The court instructed the jury on the two kinds of evidence, circumstantial and direct, defined both and advised them that to warrant a conviction, either class of evidence must carry the convincing quality and that if the evidence is susceptible of two interpretations and both appear reasonable, it is the duty of the jury to adopt the interpretation which will prove the innocence of the accused, but in any event to adhere to the practice of making only reasonable deductions from the evidence. Also, the jury was admonished that they were not to find defendant guilty "unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion." Such instructions correctly set forth all the law with respect to circumstantial evidence necessary for their consideration. People v. Carroll, 79 Cal. App.2d 146, 149, 179 P.2d 75.

The Testimony as to Marks on Appellant's Arm

[18, 19] On rebuttal, Lieutenant Miller testified that on March 14, 1953, he had examined appellant's arms and found "puncture marks" and "some breaking down of some of the blood vessels" and that appellant had told him that he had used heroin but had "kicked" the habit at Yuma and that at that time he was using approximately a cap a day. Appellant assigns the admission of such evidence to have been prejudicial. If he thought so, he should have objected to the evidence when offered and not have waited until he reached the reviewing court to announce his grievance.

However, there was no error in allowing such testimony. On direct, the officer had testified to his conversations with appellant, as above narrated, wherein it appeared that after the robbery appellant shared the stolen narcotics with his confederates; was "hooked"; was using a "cap" a day, and "kicked the habit in Yuma." In response thereto, appellant denied that he had ever used narcotics and testified that he had no scars on his arm from the use of narcotics by injection and that he did not exhibit any puncture marks to Officer Miller. Such testimony was supported by testimony of appellant's mother. Thereupon, Lieutenant Miller, without objection on rebuttal, gave the testimony now asserted to have been prejudicial. Such testimony was not opinion evidence, but merely a factual description of appellant's arm. As such, it was pertinent proof. People v. Russo, 133 Cal.App. 468, 474, 24 P.2d 580; People v. Gibson, 106 Cal. 458, 476, 39 P. 864. The testimony of Officer Miller on rebuttal relative to narcotics and their use was a mere repetition of what appellant had said to him. It was admitted without objection, and is therefore not the subject to review. People v. Bigelow, 104 Cal.App.2d 380, 388, 231 P.2d 881.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.

123 Cal.App.2d 844

In re SMITH'S ESTATE.

SMITH v. HICKS et al.

Civ. 19927.

District Court of Appeal, Second District, Division 3, California.

March 15, 1954.

Proceeding for settlement of account of executrix. The Superior Court, Los Angeles County, J. F. Moroney, J., entered judgment settling accounts and allowing commissions and fees, and the aggrieved party appealed. The District Court of Appeal, Vallée, J., held inter alia, that the commissions earned by executrix and indebtedness of executrix' insolvent estate to decedent's estate for money which executrix had converted to her own use constituted cross-demands and commissions would be applied to payment of the indebtedness.

Affirmed in part and reversed in part.

1. Executors and Administrators 🔑153

A person who embezzles property of a decedent is chargeable therewith. Probate Code, § 612.

2. Executors and Administrators 🔑464, 468

Where executor or administrator dies, his accounts may be presented by his personal representative to, and settled by, the court in which the estate of which he was executor or administrator is being administered, and upon petition of successor of such deceased executor or administrator, such court shall compel personal representative of deceased executor or administrator to render an account of the administration of his testator or intestate, and must settle such account, and such procedure is exclusive, instead of suit in equity, and filing of claim is not prerequisite to institution of such proceeding. Probate Code, § 932.

3. Executors and Administrators 🔑469(1)

A probate court, in determining issues arising in connection with administration of estate, may bring to its aid the full equitable powers with which, as superior court, it is invested. Probate Code, § 932.

4. Executors and Administrators 🔑275

Set-Off and Counterclaim 🔑1

The right of set-off is based on equitable principle that no one shall be permitted to share in distribution of fund until he has discharged his obligation to contribute to the fund, and such right may be asserted against any known or ascertainable indebtedness that is due an estate, regardless of whether it was incurred before or after decedent's death. Probate Code, § 932; Code Civ.Proc. § 440.

5. Account, Action on 🔑2

The debits and credits of a mutual account constitute cross-demands which are deemed to compensate each other. Code Civ.Proc. § 440.

6. Set-Off and Counterclaim 🔑8(2)

The insolvency of party against whom set-off is claimed constitutes sufficient ground for allowance of set-off not otherwise available. Code Civ.Proc. § 440.

7. Executors and Administrators ⚷74

An administrator occupies no better position than that which was occupied by party from whom he accounts.

8. Set-Off and Counterclaim ⚷8(2)

A court of equity will compel set-off when mutual demands are held under such circumstances that one of them should be applied against the other and only the balance recovered, and insolvency of party against whom relief is sought affords sufficient ground for invoking such equitable principle. Code Civ.Proc. § 440.

9. Executors and Administrators ⚷118, 500

A representative shall be charged with losses resulting from his default or neglect and shall be allowed his commissions, and so far as necessary, commissions will be applied to payment of such losses. Code Civ.Proc. § 440; Probate Code, § 932.

10. Executors and Administrators ⚷500

Where estate of executrix was indebted to estate of decedent for money which executrix had converted to her own use, and estate of executrix was insolvent, the commissions earned by executrix and indebtedness to decedent's estate constituted cross-demands and commissions would be applied to payment of the indebtedness. Code Civ.Proc. § 440; Probate Code, § 932.

11. Executors and Administrators ⚷500

Fact that permitting estate of decedent to apply commissions earned by executrix to payment of indebtedness owed by estate of executrix for moneys converted by executrix to her own use would deprive administrator of insolvent estate of executrix of compensation for his services in administering estate of executrix was not ground for disallowing such set-off, in view of fact that administrator of estate of executrix had no right to look to decedent's estate for his commissions. Probate Code, § 950.

12. Executors and Administrators ⚷468

Proceeding by which it was sought to have account of administrator of estate of executrix surcharged in the amount of the losses caused by executrix was, in effect, an action in conversion to recover possession of assets. Probate Code, § 950.

13. Executors and Administrators ⚷260

An assertion of right to property adverse to estate is not a claim within statute declaring priority of claims against estate, and person asserting such right is not a creditor of the estate. Probate Code, § 950.

◆

Henry O. Wackerbarth, Los Angeles, for appellant.

Clarence A. Singer, Hollywood, for respondent William Hicks.

VALLÉE, Justice.

Appeal from an order of the probate court settling accounts and allowing commissions and fees.

Elizabeth C. Smith died testate on December 16, 1947. Her will was admitted to probate; and Dessie D. Johnston, named therein, was appointed executrix. Dessie died testate on August 18, 1949. On September 21, 1949, Emilie Choate, a daughter of Dessie, was appointed administratrix-with-the-will-annexed of the estate of Elizabeth Smith. On December 14, 1949, Emilie was removed as such administratrix. On January 9, 1950, Ethel M. Smith, another daughter of Dessie, was appointed administratrix-with-the-will-annexed. Ethel converted all of the assets into cash, excepting those specifically bequeathed. On May 28, 1952, she filed a final account, report, and petition for distribution.

Dessie's will was admitted to probate and William Hicks was appointed administrator-with-the-will-annexed. On December 10, 1951, Hicks, on behalf of Dessie, deceased, filed in the estate of Smith a first and final account. On May 28, 1952, Ethel, as representative of the estate of Smith, filed objections to the account, claiming that Hicks had failed to account for moneys collected by Dessie as executrix and appropriated by her to her personal use.

The account filed by Ethel and that filed by Hicks were heard together. The court sustained some of the objections made by Ethel to the account filed by Hicks and ordered that that account be surcharged in the amount of $2,031.19. This amount was made up of $1,556.19, money of the estate of Smith that Dessie had collected and used for her own benefit and not for the estate, and $475, money of that estate which Dessie had collected, for which Hicks had not accounted. The court allowed $686.06 for services rendered by Dessie as executrix of the estate of Smith.

On July 21, 1952, the court, by minute order, ordered the $686.06 set off against the $2,031.19. On December 30, 1952, the minute order of July 21, 1952, was corrected to provide that the $686.06 be paid to the estate of Johnston, and that it not be set off against the $2,031.19. Findings of fact and a formal order were thereafter made in which the court adjudged that the "$686.06 shall not be offset against, or deducted from, the sum of $2031.19 which the Court has heretofore found to be due to the Estate of Elizabeth C. Smith, deceased, from the Estate of Dessie D. Johnston, deceased," and that "$2031.19 is due and owing to Ethel M. Smith, as such Administratrix, from William Hicks, as Administrator of the Estate of Dessie D. Johnston, deceased, and William Hicks, as such Administrator, is hereby ordered to pay said sum to Ethel M. Smith, as such Administratrix, in the due course of administration of the Estate of Dessie D. Johnston, deceased." The order also settled the account of Ethel, the account of Hicks, allowed commissions and fees, and distributed the estate of Elizabeth C. Smith. Ethel, as representative of the estate of Smith and individually as a legatee, appealed from the entire order; however, her attack is directed only to that part of the order which adjudges that the $686.06 shall not be set off against the $2,031.19.

Appellant claims that the estate of Johnston is insolvent, which respondent concedes; that the probate court is vested with equitable jurisdiction; that the right of equitable setoff applies where one of the parties is insolvent; and that, irrespective of the fact of insolvency, the court should have set off the commissions against the indebtedness of the estate of Johnston. We have concluded that appellant's contentions are well taken.

[1, 2] If any person embezzles the property of a decedent, he is chargeable therewith. Probate Code, § 612. If an executor or administrator dies, his accounts may be presented by his personal representative to, and settled by, the court in which the estate of which he was executor or administrator is being administered; and upon petition of the successor of such deceased executor or administrator, such court shall compel the personal representative of the deceased executor or administrator to render an account of the administration of his testator or intestate, and must settle such account. Probate Code, § 932. Section 932 provides the exclusive procedure instead of a suit in equity. In re Estate of Clary, 203 Cal. 335, 338, 264 P. 242. The filing of a claim is not a prerequisite to the institution of a proceeding under section 932. In re Estate of Clary, supra, 203 Cal. 344–345, 264 P. 245.

[3] A probate court, in determining issues arising in connection with the administration of an estate, may bring to its aid the full equitable powers with which, as the superior court, it is invested. In re Estate of Baldwin, 21 Cal.2d 586, 594, 134 P.2d 259.

Section 440 of the Code of Civil Procedure provides: "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

[4] The right of setoff is based on the equitable principle that no one shall be permitted to share in the distribution of a fund until he has discharged his obligation to contribute to the fund. 21 Am.Jur. 635, § 452. The right may be asserted against any known or ascertainable indebtedness that is due an estate, regardless of whether it was incurred before or after the decedent's death. 21 Am.Jur. 636, § 455.

[5–7] The debits and credits of a mutual account constitute cross-demands which are deemed to compensate each other. Hart v. Cooper, 47 Cal. 77; Jones v. Mortimer, 28 Cal.2d 627, 170 P.2d 893. The insolvency of a party against whom a setoff is claimed constitutes a sufficient ground for the allowance of a setoff not otherwise available. Downey v. Humphreys, 102 Cal.App.2d 323, 336, 227 P.2d 484. An administrator occupies no better position that that which was occupied by the party for whom he accounts. See Downey v. Humphreys, supra, 102 Cal.App. 2d 336, 227 P.2d 492.

[8] "[A] court of equity will compel a set-off when mutual demands are held under such circumstances that one of them should be applied against the other and only the balance recovered. The insolvency of the party against whom the relief is sought affords sufficient ground for invoking this equitable principle." Harrison v. Adams, 20 Cal.2d 646, 648, 128 P.2d 9, 11, and cases there cited; 31 Cal.L.Rev. 212.

In Re Estate of Gamble, 166 Cal. 253, 135 P. 970, it was held that the probate court properly set off a judgment which the personal representative had obtained on the estate's behalf against a legacy in favor of the judgment debtor, since the two claims were cross-demands on the principle stated in section 440 of the Code of Civil Procedure. People v. California Safe Deposit & Trust Co., 168 Cal. 241, 141 P. 1181, L.R.A.1915A, 299, holds that the rule of mutuality as to setoff is not controlling in actions by or against personal representatives of an estate involving its assets, but will be departed from in cases where the setoff cannot in any respect embarrass the administration of the estate or prejudice the rights of any other party interested in its assets.

[9] The rule in this state is that a representative shall be charged with losses resulting from his default or neglect and shall be allowed his commissions. This will be done so that, so far as necessary, commissions will be applied to the payment of such losses. In re Estate of Roberts, 27 Cal.2d 70, 76, 162 P.2d 461; 11b Cal. Jur. 456, § 1021. In Matter of Estate of Isaacs, 30 Cal. 105, the executors had paid interest on a claim in excess of the rate provided by law. It was held they were liable for the excessive interest paid and the probate court had properly deducted the amount from their commissions. In Re Estate of Clary, 203 Cal. 335, at page 346, 264 P. 242, at page 246, the court stated: "In the instant case, the executor, C. M. Clary, deceased had earned a portion of his commission as an executor, which was due him from the estate. As Clary could not sue himself, and as it was 'his duty to collect the debt for the estate, he must be held officially liable for any money he could have so applied at any time during his official term. If he has not so applied it, he has not faithfully executed the duties of his trust according to law. * * *' In re Estate of Walker, supra [125 Cal. 242, 57 P. 991]. It was C. M. Clary's duty to report his indebtedness to the probate court and to have paid it, if it was possible for him to have done so. The commissions earned by him could, and should have been applied to his indebtedness. The fact that he died pending the administration of the estate did not affect the situation in any sense." In Re Estate of Fulmer, 203 Cal. 693, at page 702, 265 P. 920, at page 924, 58 A.L.R. 430, it is said: "[T]he court should and must, allow to the appellant the commissions due him as administrator, for the statute contemplates that the amount of such commissions is to be ascertained when the final account is rendered. In re Estate of Miner, 46 Cal. 564, 572. Under our decisions, an administrator, while chargeable with losses resulting from his default or neglect, is, nevertheless, allowed his commissions. In re Estate of Carver, 123 Cal. 102, 105, 55 P. 770. *The one should be balanced against the other.* 11 Cal.Jur. 1158, § 763, and authorities there cited." (Italics added.)

In Re Jackson's Estate, 200 Wash. 116, 93 P.2d 349, 123 A.L.R. 1281, the trial court set off the amount of an executor's commissions against his indebtedness to the estate even though he had assigned his right to the commissions to a third person. In affirming the order, it was held, 200 Wash.

118, 121, 93 P.2d 350, 351, 123 A.L.R. 1283, 1284: "The principal question is whether the court had the right to provide that Nilsen's fees as executor should be applied upon the indebtedness which he owed the estate. * * * [T]he rule of retainer is equitable in its nature and based upon the principle that one should not be permitted to share in the distribution of a fund until he has discharged his obligation to contribute to that fund. If the fees of the executor are not applied upon his indebtedness to the estate, then they will go to Knudsen under the assignment. It would seem to be inequitable to take these fees out of the estate, while Nilsen is indebted to it in a greater sum than the amount thereof, and give them to a third person." See, also, Burbank's Adm'x v. Duncan, 53 S.W. 19, 21 Ky.Law Rep. 826; In re Kraeuter's Estate, 125 N.J.Eq. 120, 4 A.2d 383.

[10] The estate of Johnston is indebted to the estate of Smith in the amount of $2,031.19, moneys of the estate of Smith which Dessie Johnston, while acting as executrix of the will of Smith, converted to her own use. Dessie Johnston, as executrix of the will, earned commissions of $686.06. The estate of Johnston is insolvent and cannot pay the $2,031.19 to the estate of Smith. If the $686.06 commissions is not set off against the indebtedness of $2,031.19, the $686.06 will be paid by the estate of Smith to the estate of Johnston, and the latter estate will be unjustly enriched in that amount. On the other hand, if the commissions are set off against the indebtedness, the estate of Smith will be reimbursed to the extent of $686.06. Applying the principles of law, to which we have referred, we cannot escape the conclusion that the commissions should have been set off against the indebtedness. The commissions and the indebtedness constitute cross-demands and the commissions should be applied to the payment of the indebtedness. If Dessie Johnston were alive, there could be no question but that a set-off would be ordered. As said in Re Estate of Clary, supra, 203 Cal. 335, 347, 264 P. 242, the fact that she died pending administration of the estate did not affect the situation in any sense.

[11] In support of the order, respondent Hicks argues that the $686.06 was properly ordered paid to the estate of Dessie Johnston without setting it off against her indebtedness to the estate of Smith in order to afford him an opportunity to be compensated for his services in administering the estate of Johnston. He also argues that to set off the commissions against the indebtedness would give appellant a preference and priority in contravention of section 950 of the Probate Code,[1] and would deprive the estate and the United States of any inheritance and estate taxes that may be due.

Respondent is administrator of the estate of Johnston, not of the estate of Smith. The probate of the estate of Smith and that of the estate of Johnston are two separate and distinct proceedings. The $686.06 was allowed for the services of Dessie Johnston, as executrix of the will of Elizabeth Smith, and not for the services of Hicks. Respondent, as administrator of the estate of Johnston, has no right to look to the estate of Smith for his commissions.

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[1] Section 950 of the Probate Code reads: "The debts of the decedent, the expenses of administration and the charges against the estate must be paid in the following order:

"(1) Expenses of administration;

"(2) Funeral expenses;

"(3) Expenses of last illness;

"(4) Family allowance;

"(5) Debts having preference by the laws of the United States;

"(6) Wages, to the extent of six hundred dollars ($600), of each employee of the decedent, for work done or personal services rendered within 90 days prior to the death of the employer. If there is not sufficient money with which to pay all such labor claims in full the money available must be distributed among the claimants in accordance with the amount of their respective claims;

"(7) Mortgages and other liens, in the order of their priority, so far as they may be paid out of the proceeds of the encumbered property. If such proceeds are insufficient for that purpose, the part of the debt remaining unsatisfied must be classed with general demands against the estate;

"(8) Judgments rendered against the decedent in his lifetime, in the order of their date;

"(9) All other demands against the estate."

[12, 13] The proceeding by which Ethel sought to have the account of Hicks surcharged in the amount of the losses caused by Dessie Johnston was, in effect, an action in conversion to recover possession of assets. 11b Cal.Jur. 312, § 896; 33 C.J.S., Executors and Administrators, § 244, p. 1252; 21 Am.Jur. p. 557, § 310, p. 879, §§ 904, 906, p. 827, § 794. An assertion of a right to property adverse to an estate is not a claim in the sense used in the statute, and a person asserting such right is not a creditor of the estate. In re Estate of Cutting, 174 Cal. 104, 108, 161 P. 1137; Tanner v. Best's Estate, 40 Cal.App.2d 442, 445–446, 104 P.2d 1084; Erickson v. Boothe, 79 Cal.App.2d 266, 277, 179 P.2d 611. See, also, Hutchinson v. Lamb, Brayt., Vt., 234–235. Cf. Newport v. Hatton, 195 Cal. 132, 150–151, 231 P. 987. The $2,031.19 is not an asset of the estate of Johnston. It is an asset of the estate of Smith, in the possession of Hicks as administrator of the estate of Johnston, although valueless except to the extent of the commissions allowed for the services of Dessie Johnston, as executrix. Since it is not an asset of the estate of Johnston, it is not available for the payment of inheritance or estate taxes, assuming there are such, that may be due from that estate. The estate of Smith is not a creditor of the estate of Johnston, and section 950 of the Probate Code providing the order in which debts of a decedent, expenses of administration, and charges against an estate shall be paid, has no application.

We hold that the commissions of $686.06 should have been set off against the $2,031.19 converted by Dessie Johnston to her own use.

The order, insofar as it adjudges that the commissions allowed for the services of Dessie Johnston, as executrix, not be set off against the moneys converted by her to her own use, is reversed, with directions to the superior court, sitting in probate, to amend its order in conformity with the views we have expressed. In all other respects, it is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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124 Cal.App.2d 10

EATON et al. v. BROCK.

Civ. 15684.

District Court of Appeal, First District,
Division 2, California.
March 18, 1954.

Action by a creamery and a consumers' cooperative corporation against State Director of Agriculture to have declared valid a contract whereby for a consideration of $1.20 per month per customer cooperative undertook to collect and guarantee payment of all accounts of creamery's customers who were members of cooperative. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered judgment for creamery and cooperative, and Director of Agriculture appealed. The District Court of Appeal, O'Donnell, J. pro tem., held, inter alia, that evidence justified finding that contractual consideration was just and reasonable compensation for services rendered by cooperative.

Judgment affirmed.

1. Contracts 🔑141(1)

Where the illegality of a contract does not appear upon the face of a complaint it becomes a matter of affirmative defense that must be specially pleaded, and in such case the burden of proof is on defendant.

2. Contracts 🔑141(1)

Where complaint and contract attached thereto did not disclose any invalidity in the contract, it was defendant's burden to prove illegality of contract.

3. Agriculture ⚷6

Contract between a creamery and a consumers' cooperative corporation whereby for a consideration of $1.20 per month per customer cooperative undertook to collect and guarantee payment of all accounts of creamery's customers who were members of cooperative, was supported by adequate consideration and did not violate unfair practice provisions of Milk Control Act. Agricultural Code, §§ 4280, 4361; Corporations Code, §§ 12200–12956.

4. Evidence ⚷177

In action by a creamery and a consumers' cooperative corporation against state director of agriculture to have declared valid a contract whereby for a consideration cooperative undertook to collect and guarantee payment of all accounts of creamery's customers who were members of cooperative, refusal to admit a cost study prepared by an auditor of Department of Agriculture and based upon books of creamery and five other milk distributors was proper in view of absence of showing that books themselves would have been admissible if offered. Code Civ.Proc. § 1855, subd. 5.

5. Trial ⚷48

Where an offer of evidence includes several different matters, some of which are vulnerable to objection, the entire offer may be rejected. Code Civ.Proc. § 1855, subd. 5.

6. Appeal and Error ⚷854(2)

Though trial judge may erroneously state his reasons for his conclusions in an opinion, nevertheless, if evidence supports his findings and findings support judgment, it will be affirmed on appeal.

7. Evidence ⚷506

In action by a creamery and a consumers' cooperative corporation against state director of agriculture to have declared valid a contract whereby for a consideration of $1.20 per month per customer cooperative undertook to collect and guarantee payment of all accounts of creamery's customers who were members of cooperative, refusal to permit employee of state department of agriculture to express his opinion as to the effect a sustention of the validity of the contract would have on milk industry at large, was proper.

* * *

Edmund G. Brown, Atty. Gen., W. R. Augustine, Deputy Atty. Gen., for appellant.

Hardy, Carley & Thompson, Lewis K. Scott, Palo Alto, for respondent Consumers' Cooperative Soc. of Palo Alto.

Crist, Stafford & Peters, John M. Donegan, Palo Alto, for respondent Toyon Creamery.

O'DONNELL, Justice pro tem.

This is an action for declaratory relief brought by plaintiffs Emery Eaton, doing business as Toyon Creamery, and Consumers' Cooperative Society of Palo Alto, Inc., a corporation (hereinafter called "Co-op"), against the State Director of Agriculture as defendant (hereinafter sometimes called the "Director") wherein plaintiffs seek to have the validity of a certain contract between Eaton and Co-op judicially decreed.

Plaintiff Eaton is a licensed retail milk distributor. The Co-op is a cooperative corporation organized under sections 12200–12956 of the Corporations Code. It operates a super market, drug store, dry cleaning establishment, frozen food locker, service station, and a complete insurance service. The Co-op's customers participate in the profits of its enterprises which are paid to them in the form of patronage dividends at the close of each fiscal year. Of Eaton's 4500-odd customers some 700 are members of Co-op.

On February 16, 1949 Eaton and the Co-op entered into the written contract which is the subject of the instant action. By the terms of that contract the Co-op undertook to collect and to guarantee payment of all accounts of Eaton's customers who were members of the Co-op, and further agreed to solicit new customers for Eaton. In consideration therefor Eaton agreed to pay Co-op the sum of $1.20 per month per customer.

In 1935 the Legislature adopted the so-called "Milk Control Act." Chapter 13 of Division 4, Sections 735–738 of the Agricultural Code. In 1953 and after the trial of the instant case, the Milk Control Act was transferred to Chapter 17 of Division 6, Sections 4200–4416, of the Agricultural Code. The declared purpose of the legislation is to stabilize the production and distribution of milk throughout the State. To that end it authorizes the State Director of Agriculture to prescribe marketing areas within the State and to establish within such areas minimum wholesale and retail prices for milk. The Director has established one such marketing area which is comprised of San Mateo County and parts of the City of Palo Alto and has set therein a minimum retail price for milk of 19½¢ per quart and a minimum wholesale price of 16½¢ per quart. Eaton's business is conducted in this marketing area. Section 4361 (formerly part of Section 736.13) of the Agricultural Code provides: "No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article, and the use or attempted use of any method, device or transaction whereby any distributor sells or offers or agrees to sell to any retail store, restaurant, confectionery or other place for consumption on the premises, or consumer or any retail store, restaurant, confectionery or other place for consumption on the premises, buys or offers or agrees to buy from any distributor, or sells or offers or agrees to sell to any consumer fluid milk or fluid cream, or either, at a price less than that established by the director under the provisions of this article, whether by discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift, or otherwise and whether any such discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift applies directly to fluid milk or fluid cream or is allowed upon or in connection with the sale or handling of any other commodity or product, is hereby prohibited."

A controversy arose between Eaton and Co-op on the one hand, and the Director on the other, as to the validity of the Eaton-Co-op contract under the provisions of the section just quoted. The Director took the position that the $1.20 per month contract rate for Co-op's services is grossly in excess of the reasonable value of those services and that therefore the contract is invalid as being a device for the sale of milk at a price less than set by the Director, under the prohibition of Section 4361. Plaintiffs asserted the bona fides of the contract and the adequacy of the contractual consideration. This action to have the contract declared valid ensued.

[1, 2] Defendant's first contention is that the trial court erred in requiring him to assume the burden of proving the illegality of the contract. He urges that plaintiffs should have been made to carry the burden of establishing the reasonableness of the $1.20 contract rate. Defendant cites no authorities in support of this contention. Indeed, the authorities are all to the contrary. Where the illegality of a contract does not appear from the face of the complaint it becomes a matter of affirmative defense that must be specially pleaded. And in such case the burden of proof is on the defendant. Hamilton v. Abadjian, 30 Cal.2d 49, 179 P.2d 804; Gelb v. Benjamin, 78 Cal.App.2d 881, 178 P.2d 476; Vagim v. Brown, 63 Cal.App.2d 504, 146 P.2d 923; 12 Cal.Jur.2d p. 508; 17 C.J.S., Contracts, § 585, p. 1226. Such is the case here. There is nothing on the face of the complaint, nor the contract attached thereto, that discloses any invalidity. The trial court therefore properly required the defendant to assume the burden of proving illegality.

We come now to consider defendant's basic contention that the contract is a device for the evasion of the price schedule set by the defendant under the Milk Control Act.

The trial court found that the contractual consideration of $1.20 per month per customer "is a fair, just and reasonable compensation for such services." Defendant contends that this finding is not supported by the evidence and that the judgment decreeing the validity of the contract is therefore in error. This contention is predicated on a "cost study" introduced into evidence by plaintiffs, covering the year 1951 and the first five months of 1952, that shows Eaton's direct selling, collecting and advertising costs to be less than 90¢ per month per customer. Defendant takes the position that the substantial disparity between the contract price of $1.20 and the amount for which Eaton performs the same type of services for his customers who are not Co-op members conclusively demonstrates that the contract constitutes a device for the evasion of the price schedule set by the Director and thus results in a violation of Agricultural Code, Section 4361.

Defendant's argument ignores the testimony of plaintiffs' witnesses to the effect that the cost study covers only Eaton's direct collection and solicitation expenses and does not attempt to allocate to those aspects of the business any portion of the general overhead expense. The argument also ignores the following testimony of Eaton: "Let's put it this way: If I paid some responsible, financially able person to guarantee all my accounts and give me one full check at one time—say the 15th of each month, we wouldn't have to bother with collections or anything of that kind. I believe it would be a pretty nice business.

"Q. You think you'd be tickled to death to do it? A. Yes, I do.

"Q. Well, in other words, then, you figure, with your paying that $1.20 to the Co-op for each one of your customers which you serve, that you're saving yourself money? A. I think I am.

"Q. You're making more money on that deal than you would one of your own customers? A. That's right.

"Mr. Donegan: And you estimate that your cost per month on the non-Co-op customers, for the cost you didn't incur for the Co-op customers, is at least $1.20 a month? A. Yes, sir."

These additional factors justify the court's finding of sufficiency of consideration. Too, in this connection it should be remembered that the burden of establishing the invalidity of the contract rested with defendant.

[3] The finding of adequacy of consideration disposes of defendant's contention, advanced for the first time on appeal, that the contract is violative of the unfair practices provisions of the Milk Control Act. (Section 4280, formerly section 736.3, of the Agricultural Code.)

The finding of adequacy of consideration also makes it unnecessary to discuss other arguments of defendant relative to the interpretation of the Milk Control Act and its application to the facts of the instant case. As defendant himself says in his closing brief: "No matter how complicated respondents try to make it, the issue here is simply whether the contract is valid under Section 736.13 (4361) of the Agricultural Code. This depends on whether the sum of $1.20 per customer, per month, is a fair, just and reasonable compensation for the services rendered under the contract."

Before leaving this phase of the case it perhaps should be noted that at the trial of the instant action defendant abandoned his affirmative defense that Co-op's distribution of a portion of its profits among its members constitutes an unlawful rebate (Agricultural Code, section 4361) to those of its members who are customers of Eaton. Defendant deferred to the decision in Certified Grocers of California v. State Bd. of Equalization, 100 Cal.App.2d 289, 223 P.2d 291. In that case the court held that the provisions of the Corporations Code which permit cooperative corporations to declare patronage dividends are paramount to the provisions of the Alcoholic Beverage Control Act which prohibit sales of liquor at less than posted prices and secret rebates. In view of these facts no more need be said of this defense.

Defendant offered in evidence a cost study prepared by George O'Neil, an auditor in the Department of Agriculture, that purported to show the selling, collection and advertising costs of Eaton and five other milk distributors in the same marketing area. This study showed Eaton's costs to be 39¢ per month per customer, and those of the other five to range between a low of 35¢ and a high of 51¾¢. Plaintiffs objected to the admission of the study on the grounds that no proper foundation was laid for its introduction and that it was hearsay. The trial court sustained the objection. Defendant contends the ruling was error, citing subdivision 5 of Section 1855 of the Code of Civil Procedure. That section provides: "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases: * * 5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

[4] It should be here observed that the books of the distributors, other than Eaton, from which the figures in the cost study were prepared were not produced in court. Moreover, O'Neil testified on cross-examination that no audit of the books was made, and that he did not know of his own knowledge whether or not the books were correct. Defendant's contention is answered in People v. Doble, 203 Cal. 510, at page 515, 265 P. 184, at page 187, wherein the court said: "It is manifestly error to admit in evidence, under section 1855, subd. 5, of the Code of Civil Procedure, a summary of books where the books themselves are not shown to be admissible in evidence. We, of course, are not intending to hold that the books in each case must be actually received in evidence to warrant the introduction of such summary so long as they are available for use of the opposing party, but their introduction in evidence is the safest rule, and it is not a technical objection to require that a showing be first made that such book entries are entitled to admission if they are actually offered." Further it affirmatively appeared from O'Neil's testimony that his cost study did not take into account the time devoted by the milk route drivers in the solicitation and collection of accounts. This was, of course, one of the substantial items of Eaton's expense. Also, it only covered a period of one month.

[5] But assuming the admissibility of O'Neil's figures as they relate to Eaton's operations, yet defendant did not offer these figures independently of those pertaining to the other five distributors. Rather, he offered the study as a whole. Where an offer of evidence includes several different matters, some of which are vulnerable to objection, the entire offer may be rejected. Swafford v. Board of Education, 127 Cal. 484, 59 P. 900; Rose v. Southern Trust Co., 178 Cal. 580, 174 P. 28; Lewis v. Western Truck Line, 44 Cal.App.2d 455, 112 P.2d 747; 24 Cal.Jur. p. 761.

[6] Defendant complains that the trial court misconceived the theory upon which the case was tried. He refers to comments made by the trial judge from time to time during the course of the trial on the evidence in the case and the applicability of the Milk Control Act thereto. It would unduly protract this opinion to discuss in detail the trial judge's comments and the matters which prompted them. It is enough to say that a reading of the entire record in the case reveals that he had a thorough grasp of the issues involved and of the pertinent evidentiary matters. Moreover, as is noted in Jones v. Tierney-Sinclair, 71 Cal.App.2d 366, 372, 162 P.2d 669, 672: "It has been repeatedly held that although the trial judge may erroneously state his reasons for his conclusions in an opinion, if the evidence supports the findings and the findings support the judgment it will be affirmed on appeal." See also Northern California Power Co. v. Waller, 174 Cal. 377, 163 P. 214; Foshee v. Wolters, 86 Cal. App.2d 766, 195 P.2d 930; De Cou v. Howell, 190 Cal. 741, 214 P. 444.

[7] Finally, defendant assigns as error the trial court's refusal to permit William J. Hunt, of the State Department of Agriculture, to express his opinion as to the effect the sustaining of the validity of the contract would have on the milk industry

at large. The ruling was correct. The only proper subject of inquiry in the case was whether the contract did or did not violate the Milk Control Act.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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123 Cal.App.2d 870

SMALL v. SMALL.

Civ. 19759.

District Court of Appeal, Second District, Division 3, California.
March 16, 1954.

Action by husband for divorce. Plaintiff, who was granted an interlocutory decree, subsequently moved for final judgment. The Superior Court, Los Angeles County, Elmer D. Doyle, J., entered order denying the motion, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained finding that, subsequent to entry of interlocutory decree, there had been a bona fide reconciliation and condonation with intention that thenceforth the parties should live together as husband and wife, and that they had so lived together thereafter for about two years.

Order affirmed.

1. Divorce 🔑156

Whether agreement for reconciliation, entered into during period between entry of interlocutory decree of divorce and proceeding upon motion for final judgment of divorce, was conditional, was question of fact to be determined by trial court.

2. Appeal and Error 🔑1008(3), 1011(2)

When an issue of fact has been submitted to a trial court upon affidavits, and an appeal has been taken from the order therein, reviewing court is governed by the same rule that applies when such an issue has been submitted upon oral testimony, and if there is a substantial conflict in material statements in the affidavits, determination of factual issues by trial court is conclusive on appeal.

3. Divorce 🔑156

Where, after entry of an interlocutory decree, events occur to change the status or relation of the parties, such as condonation and a resumption of the marital relation, entry of final decree is not ministerial act, but becomes a judicial act in the performance of which trial court has a broad discretion.

4. Divorce 🔑156

In proceeding upon husband's motion for final judgment of divorce, evidence sustained finding that, subsequent to entry of interlocutory decree, there had been a bona fide reconciliation and condonation with intention that thenceforth the parties should live together as husband and wife, and that they had so lived together thereafter for about two years.

5. Divorce 🔑184(1)

Husband's appeal from order denying motion for final judgment of divorce did not present question of sufficiency of order denying wife's motion to dismiss the action, or order modifying prior order for support of minor child.

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Robert E. Austin and John N. Helmick, Los Angeles, for appellant.

Paul E. Gervais and Porter C. Blackburn, Burbank, for respondent.

PARKER WOOD, Justice.

Plaintiff appeals from an order denying his motion for a final judgment of divorce.

In 1949 plaintiff commenced an action for divorce. Defendant filed an answer to the complaint, and also filed a cross-complaint for separate maintenance. On January 31, 1950, after a trial, an interlocutory decree of divorce was granted to plaintiff; defendant was awarded custody of the two minor sons, 18 and 20 years of age; plaintiff was ordered to pay to defendant $120 a month for the support of said minors; and it was ordered further that a property settlement agreement theretofore entered into between the parties "be not set aside." In August, 1950, plaintiff returned to defendant's home and resided there until September, 1952, when he moved to another dwelling place. On October 20, 1952 (after one son had become 21 years of age), defendant made an application for modification of the order for support of the other son. On November 17, 1952, pursuant to stipulation, the court modified said order by directing plaintiff to pay $100 a month, during the school term, for support of the minor son. On December 4, 1952, plaintiff filed a notice of motion for a final judgment of divorce. He also filed his affidavit in support of the motion. On December 12, 1952, defendant filed a notice of motion to dismiss the divorce action on the ground that the parties had become reconciled. She also filed her affidavit and four other affidavits in support of her motion. Thereafter plaintiff filed his affidavit in opposition to her motion to dismiss the action, and defendant filed her affidavit in opposition to his motion for final judgment of divorce. The motions were referred to a court commissioner for hearing and for findings and recommendations thereon. The motions were submitted upon the affidavits on file and the arguments of counsel.

The findings of the commissioner were, in part, that during August, 1950, the parties became reconciled; that the reconciliation was complete in every respect; that the parties occupied the same bedroom and cohabited; that the reconciliation was entered into for permanency and there was mutual condonation of past offenses by both parties. The recommendations were: "Motion for final judgment of divorce is denied. Motion to dismiss the action herein is denied. There was a bonafide reconciliation and condonation of past offenses followed by the restoration of the plaintiff to all marital rights, with the intention that thenceforth the plaintiff and the defendant should live together as husband and wife and they did so live together as husband and wife from August 1950 to Sept. 1952." The court made its order, based upon said findings and recommendations, that plaintiff's motion for final judgment of divorce is denied, and defendant's motion to dismiss the action is denied.

Appellant contends that the agreement for a reconciliation was conditional, and that the court erred in denying his motion for a final decree of divorce.

The statements in the affidavits regarding reconciliation were conflicting. Appellant, in his affidavit in support of his motion for final judgment, stated in part that: in August, 1950, defendant invited him to call upon her to discuss a reconciliation; he called upon defendant and they discussed their relationship; it was agreed that plaintiff would occupy a room in defendant's home for the purpose of ascertaining whether it would be possible for the parties to become fully reconciled, that the arrangement was temporary, and that it should not affect their legal relations unless they determined that it was possible for them to be happy together; said relationship continued until September, 1952; defendant did not at any time during said period have an intention of assuming a relationship of affection but enticed plaintiff to come into her home with the hope of being able to gain financial advantage therefrom; since the interlocutory decree the parties have not cohabited; about September 1, 1952, defendant treated him in such a vicious manner that he could no longer remain in her home, and he has lived at other places since that time. In his affidavit in opposition to defendant's motion to dismiss the action, appellant stated in part that: at the time the parties discussed a reconciliation, defendant promised that she would treat him in a kind manner; defendant said that if he was dissatisfied that she would give him his freedom whenever he wanted it; upon said terms he returned, intending to do everything he could to re-establish a home with defendant, and he announced to everyone that he expected to spend the rest of his life with her; defendant did not live up to her promises, but abused plaintiff; she insisted that they sleep in different rooms; plaintiff continued to reside with defendant and delivered his pay check to her; defendant became more disagreeable toward plaintiff and on September 1, 1952, when he questioned one of their sons regarding an automobile accident, she ordered him to leave her home.

Defendant, in her affidavit in support of her motion to dismiss the action, stated in part that: upon her invitation, plaintiff called upon her to discuss a reconciliation; at that time they agreed to resume a marital relationship, and that such arrangement would be permanent; plaintiff returned to her home and resumed marital relations with her, occupying the same bed an cohabiting with her at all times during the period between August, 1950, and September, 1952; in September, 1952, while their minor son was under the care of a doctor, the plaintiff was cross-examining the son (regarding an automobile accident), and defendant asked plaintiff not to talk to the son in that manner; plaintiff continued his abuse of the son, and she said that plaintiff could leave if he was going to continue to injure the son's health. In her affidavit in opposition to plaintiff's motion for final judgment of divorce, defendant stated in part that: it was the understanding of the parties at the time of the reconciliation in August, 1950, that they would live together as a trial reconciliation and "that when it was time for the final decree they would decide if the reconciliation should continue"; on February 1, 1951, she asked plaintiff what he was going to do about the divorce and he stated that he was going to do nothing, whereupon she said that it was not fair to hold the divorce over her head, and she asked him if he was happy; he said, "Yes, I am happy as long as things continue as they are"; since that time he has refused to dismiss the action and has threatened to get a final decree of divorce unless defendant agreed to all his demands; defendant has lived up to her promises; they shared the same bed until both parties agreed that they could sleep better if they occupied twin beds in the same room; during the time of the reconciliation defendant operated a cafe and at all times contributed large sums of money for the support of plaintiff, defendant and the children; she expended large sums of money upon the express agreement that their differences were reconciled and the divorce action would be dismissed; plaintiff did not use his funds, except that for the last six months of the reconciliation he gave her $50 a month as part of the rent.

Affidavits of three sons of the parties, filed in support of defendant's motion to dismiss the action, recited in part that: after plaintiff returned home to live with defendant he continually stated that he had returned home to stay and permanently resume marital relations with defendant; since the reconciliation defendant treated plaintiff with great love and affection.

[1-4] As above stated, appellant contends that the agreement for a reconciliation was conditional. Whether the agreement was conditional was a question of fact to be determined by the trial court. See Angell v. Angell, 84 Cal.App.2d 339, 343, 191 P.2d 54. As above stated, the motions were submitted upon affidavits. When an issue of fact has been submitted to a trial court upon affidavits, and an appeal has been taken from the order therein, an appellate court is governed by the same rule that applies when such an issue has been submitted upon oral testimony, and if there is a substantial conflict in material statements in the affidavits the determination of the factual issues by the trial court is conclusive on appeal. See Doak v. Bruson, 152 Cal. 17, 19, 91 P. 1001; Brainard v. Brainard, 82 Cal.App.2d 478, 480-481, 186 P.2d 990; Wolfson v. Haddan, 105 Cal.App.2d 147, 149, 233 P.2d 145. In the present case there were many substantial conflicts in the statements in the affidavits with respect to material matters. "Where, after the entry of an interlocutory decree, events occur to change the status or relation of the parties, such as condonation and a resumption of the marital relation, the entry of the final decree is not a ministerial act; it becomes a judicial act in the performance of which the trial court has a broad discretion." Nemer v. Nemer, 117 Cal.App.2d 35, 38, 254 P.2d 661, 663. The trial court herein found, among other things, that there was a bona fide reconciliation and condonation with

the intention that thenceforth the parties should live together as husband and wife, and that they did so live together thereafter about two years. The evidence supports the findings and the order denying the motion for a final judgment.

[5] Appellant asserts further, in effect, that the superior court's recognition of the interlocutory decree by modifying it to require him to pay more for the support of a son, and that court's refusal to recognize it as the basis for a final decree, are inconsistent positions with reference to the validity of the interlocutory decree, and the result is that his status under that decree is uncertain. The order modifying the order for support of the minor was made upon stipulation prior to the filing of the motion for final judgment. That order and the order denying the motion to dismiss the action are not involved on this appeal. The appeal herein presents only the question as to the sufficiency of the order denying the motion for final judgment.

The order denying the motion for a final judgment of divorce is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

124 Cal.App.2d 173

PEOPLE v. DAVIS.

Cr. 5082.

District Court of Appeal, Second District, Division 3, California.

March 25, 1954.

Defendant was convicted on four counts of an indictment for receiving stolen property. From a judgment of the Superior Court, Los Angeles County, Edwin L. Jefferson, J., on the jury's verdict, defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence of defendant's possession of the stolen goods and his evasive, contradictory and false answers to police officers' questions corroborated the testimony of the thief, who was defendant's accomplice, as to witness' sale of the goods to defendant, so that the evidence was sufficient to support the convictions.

Judgment affirmed.

1. Criminal Law 🔑507(5)

The thief and receiver of stolen property are not accomplices, unless they conspire together in a prearranged plan for one of them to steal and deliver property to the other, in which case the thief is an accomplice, whose testimony against the receiver must be corroborated to support convictions of receiving stolen property. Pen.Code, § 1111.

2. Criminal Law 🔑511(6)

In prosecution for receiving stolen property, evidence of defendant's possession of stolen goods and evasive, contradictory and false answers to police officers' questions regarding such goods corroborated testimony of thief, who was defendant's accomplice, as to selling goods to defendant, so that evidence was sufficient to support convictions. Pen.Code, § 1111.

3. Criminal Law 🔑1173(2)

In prosecution for receiving stolen property, trial court's refusal of defendant's requested instructions to jury that conviction could not be had on accomplice's testimony, unless corroborated by other evidence tending to connect defendant with commission of offense, was error, but not prejudicial to defendant, in view of evidence strongly corroborating thief's testimony as to selling stolen goods to defendant. Pen.Code, § 1111.

4. Criminal Law 🔑481

In prosecution for receiving stolen property, whether evidence was sufficient to show that defendant was qualified as expert witness to give opinion as to value of automotive equipment and tools, purchased by him from burglars who stole them, was within trial court's discretion to determine.

5. Criminal Law 🔑460

In prosecution for receiving stolen property, trial court did not err in sustaining objection to question asked defendant as to value of automotive equipment and tools purchased by him from burglars who stole them, where state presented no evidence of such value and there was no indication of what defendant's answer to question would have been.

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Gerald J. Levie, Kaufman & Leland, and Sidney W. Kaufman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Martin M. Ostrow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was convicted of four counts of receiving stolen property. He appeals from the judgment and from the order denying his motion for a new trial.

During the night of September 19, 1952 a machine shop or service department of an automobile company in Fullerton was burglarized and certain machinery and tools were stolen therefrom.

During the night of October 14, 1952 a machine shop of a sales company in Santa Monica was burglarized and certain machinery, tools and tires were stolen therefrom.

During the night of October 15, 1952 a jewelry store in Pismo Beach was burglarized and about 95 new watches, about 50 repaired watches, some wedding and other rings, and diamonds were stolen therefrom.

During the night of October 27, 1952 a garage of an automobile company in Huntington Beach was burglarized and certain machinery, tools, tires, a typewriter, and an adding machine were taken therefrom.

On December 1, 1952 police officers arrested defendant at his home where he and his mother resided. In that home the officers found many articles of machinery, many watches and other items of jewelry, many tools, an adding machine and a typewriter which had been stolen from said burglarized places. The articles of machinery included a power drill, hydraulic valve lift, valve refacer, power buffers, a sander, and a timing light. Said stolen property was identified by the owners of said burglarized places as property that was stolen from said places on the above-mentioned dates. The portion of the property which belonged to each respective owner was returned to him. The owner of the automobile company in Fullerton testified that the reasonable value (as of the date of the burglary) of the property returned to him was $1,000 to $1,200 approximately. The owner of the jewelry store testified that the reasonable value (as of the date of the burglary) of the watches and jewelry returned to him was $4,000 to $5,000 approximately. The owner of the automobile company in Huntington Beach testified that the reasonable value (as of the date of the burglary) of the property returned to him was as follows: typewriter about $75; adding machine $150; and four tires $15 each.

An officer testified that defendant said that he bought the typewriter and adding machine from some marines by the names of Ward, Brush, and Bell and he paid $50 for them; the boys wanted $1,000 for the jewelry but he paid them $310 for it; he paid those boys over $700 for the tools and the jewelry; they were fellows who hung around Clisby's garage; he had not known them very long; he did not know what business they were in, but the talk around the garage was they were marine deserters.

The officer also testified that on December 1, 1952, prior to the arrest of defendant, he and four other officers entered defendant's house when defendant was absent, and they awaited therein for his return; there was a porch at the front of the house; about 9 p. m. defendant came upon the porch and entered the room; before the defendant entered, the officer (witness) heard a noise which sounded like an object dropping on wood; when defendant entered the room he said, "What is this all about?"; the officer said, "[L]ook at all the jewelry we have laid out on the bed there. I think you have a pretty good idea."; defendant said, "That is junk jewelry, just old stuff I have accumulated over a long period of time."; the officer said, "We are looking for a satchel with jewelry in it. Where is the satchel?"; defendant said, "I don't know what you are talking about."; then the officer went upon the porch and found a satchel—a canvas bag up against the side of the house; he brought the satchel into the room and opened it—it contained about 20 articles of new jewelry, watches, and rings in cases; then defendant said that he bought that jewelry from the marines above-mentioned.

The officer testified further that he asked the defendant about the tools which were found in the basement; defendant said that he had been in the wrecking business and he had had all the tools for two years; the officer asked him about the power tools; he replied that he had had everything for two years, he could not remember where he got each article, he had been working for Lockheed since March and he did not get anything since he had been working there; thereafter the officer showed him a teletype which described and gave the serial numbers of the tools, and it also stated that the tools were taken in a recent burglary—after March; the officer then told him that his story about not getting any tools since March was not possible; defendant said, "Yes, that's right, I bought these tools, I bought them from two Marines, Bobby Joe Brush and Dick Ward."

The officer testified further that he asked defendant about a ring that was on defendant's finger, upon which ring there was inscribed "L 1940"; he replied, that he got it when he graduated from Lincoln High School in 1940. The next day the officers, in referring to that ring, told defendant that officers had found another ring with the same date on it; defendant then said that the ring was not his graduation ring, that he had bought it from the same marines.

Another officer testified that, about three weeks after the arrest, he asked defendant if he had ever left any watches, that were involved in the Pismo Beach burglary, with a Mr. Chastain, a watch repairer; he replied, "No"; the officer asked him if he was sure about that; defendant replied that he was sure.

Mr. Chastain, a watch repair man, testified that he had known defendant about 12 years; that in October, 1952 defendant brought three watches to him to be repaired. Those watches were identified as watches that were stolen from the Pismo Beach store.

Richard Ward, called as a witness by the People, testified that he was serving a term in a state prison for burglary committed in Orange county; he had known defendant about 7 months—having met him about July, 1952 at Clisby's garage; at the time he met defendant he (witness) was in the Marine Corps, and he was introduced by Bob Brush, another marine, who said, at that time, that defendant would buy anything that they would bring to him; defendant then said that he would like to get some tires and that he was interested in tools and power tools; they said they would see what they could do and then they would see him. He testified further that on September 20, 1952, about 1 a. m., he and Brush entered a building in Fullerton, which was occupied by an automobile company, and took therefrom several tools and a grinding machine; they did not have permission of the company to enter the building or to take anything therefrom; the next day they took said articles to defendant's home; they and defendant argued over the price "we wanted," and defendant wanted to know if they got the things outside Los Angeles County—that he did not want anything that was in the county because it could be traced to him too easily; they told him it was outside the county and he would not have to worry about the property being traced; they sold said property to defendant for $110 or $115, and they put all the property in his cellar. He testified further that in October, 1952 about 2 a. m., he and Bill Bell entered a building in Santa Monica, which was occupied by an automobile company, and took therefrom 2 new tires, several tool boxes, and a drill or two; they did not have permission of the company to enter the building or to take anything therefrom; the next evening they took said articles to defendant's home and told him they got them "way up the Coast"; defendant wanted to take the tools to his girl friend's house; they took the tools there, and then they and defendant argued about the price; he bought everything they had stolen from said automobile company; defendant said that he had quite a few tools but he would still take tires, that, since Christmas was near, if they could get some watches and things of that sort he could get rid of them easily; they said they would look around. He testified further that on October 22, 1952, at 9:30 p. m., he, Bell and one Henke broke into and entered a jewelry store in Pismo Beach, and took therefrom watches and rings, including about 50 watches that were there for repairs; then that same evening, they took those things to Clisby's garage in Los Angeles and there they sold 3 or 4 watches to different persons; defendant came there and told them to bring the things to his house so that he could look at them; they took all the things, except the 3 or 4 watches they had sold, to his house; they told him they wanted $1,000 for all the jewelry; he said that was too high; the next evening they took 20 watches and some rings to his house; the other jewelry was left in a locker at the garage; the ring cases had the words "Pismo Beach" on them; defendant said "I see this came from Pismo Beach"; they said that he should not worry about it—"we got away clean, nobody saw us"; defendant bought the watches for $10 each; later that evening Ward, Bell and Henke (the burglars) had an argument and Ward "split up with them" and left them, and they took the remainder of the stolen jewelry. He testified further that on October 28, 1952, about midnight, he and Brush broke into and entered a building in Huntington Beach, which was occupied by an automobile company, and took therefrom 6 tires, tools, a valve grinder, an adding machine and a typewriter; the next day they took all the said stolen articles to defendant's house, and told him that they got the articles outside Los Angeles County; he bought some of the tools; the next day he bought the adding machine and typewriter for $50. He also testified that the ages of himself, Brush, Bell and Henke, respectively, were: 20, 22, 19, and 19 years.

Defendant testified that in recent years he had engaged in buying wrecked cars; he had accumulated tools during the past two or three years; he first stored the property on Central Avenue, and then he moved it to the basement of his home; one day in September or October, 1952, at Clisby's garage, which is a hangout place for mechanics, Brush asked him if he would be interested in buying some tools—he had a friend who was selling a garage; about two weeks later Brush and Ward were at the garage with tools in Ward's car; he looked at the tools there, then they went to his house and he bought the tools for $210 and put them in the basement; Brush said that he would bring more tools from his friend who was selling a garage; defendant said he would buy the tools; about four weeks later Brush and Ward were at Clisby's garage with more tools in the back of a car; they went to defendant's home and he bought the tools for $150; he bought tools and tires from them on another occasion and paid them $70; one evening when he went to Clisby's garage Ward and Bell were there selling watches for $10 each; the watches were in a big container and people were coming in from both sides of the street and buying watches; Bell said that he was tired of selling the watches one by one and he would like to make a deal on all the watches for $1,000; defendant offered him $350 or $400 for them but the offer was not accepted; some of the watches were new and some were used; about 9:30 p. m. of that day they came to his house and he bought 18 or 20 watches and 2 rings for $200; the next day he bought 15 or 18 more watches from Bell for $200; Bell gave defendant about 25 used watches which he (Bell) could not sell; he also left with defendant, for safekeeping, a suitcase with watches in it; defendant put the suitcase in the basement but he never opened it; defendant left 3 watches with Mr. Chastain for repair; he had forgotten that he had taken the watches there; he gave Bell and Ward $50 for an adding machine and a typewriter with the understanding that they could redeem them, but they never returned to get them; he told a police officer that a ring that he (defendant) had on his finger was a ring he received when he was graduated from Lincoln High School, but he had "lied" when he said that; he told the officers that he did not know that the property had been stolen and that he had no idea that it was stolen property.

The evidence established that the property which appellant bought from Brush, Ward and Bell was stolen property. The principal question of fact before the trial court was whether appellant knew that it was stolen property.

[1, 2] Appellant contends that Ward was an accomplice of appellant, that the testimony of the accomplice was not corroborated as required by section 1111 of the Penal Code, and therefore the evidence was insufficient to support the convictions. He argues that the evidence shows a conspiracy between appellant and Ward wherein there was a preconceived plan that Ward and his associates would steal certain property and sell it to appellant, and that under such circumstances the thief is an accomplice. The general rule is that the thief and the receiver of stolen property are not accomplices, but an exception to that rule is that where the thief and the receiver conspire together in a prearranged plan for one to steal and deliver the property to the other, the thief is an accomplice. People v. Lima, 25 Cal.2d 573, 576, 577, 578, 154 P.2d 698. In that case the defendant operated an olive crushing plant where he purchased olives from which he made olive oil. It was claimed therein that he knowingly purchased olives that had been stolen by two prosecution witnesses from nearby orchards. He denied that he had purchased the stolen olives, and those olives were never seen at his plant. It was held therein that said two prosecution witnesses were accomplices, that there was no evidence other than that of the accomplices tending to connect the defendant with receiving the stolen olives, and because of the total absence of evidence corroborative of the testimony of the accomplices the evidence was insufficient to support the conviction. In the present case the testimony of Ward was corroborated. Stolen goods, consisting of heavy machinery, several boxes of various kinds of tools, dozens of new and used watches, some rings and diamonds, an adding machine and a typewriter, of the value of approximately $6,000 were found in appellant's home. He paid about $700 for all the property. He made evasive and false answers to officers' questions regarding the property. When he was on the front porch and about to enter his house, he saw a friend of his and a police officer in the house "handcuffed together," and at that time he dropped the satchel of watches on the porch. When officers directed his attention to the many watches and jewelry in his house, he said it was junk jewelry—old stuff he had accumulated over a long time. When the officer asked about the satchel with jewelry in it (which appellant had dropped on the porch a few minutes previously), appellant said he did not know what the officer was talking about. He admitted that he "lied" when he told the officers that the stolen ring he was wearing was a graduation gift. When he was confronted with the machinery and the tools in the basement (which had been stolen a few weeks previously) he said that he had had everything for 2 years and he did not get anything after he started to work for Lockheed in March. The possession of the goods, and the evasive, contradictory and false answers of appellant strongly corroborated the testimony of Ward.

[3] Appellant asserts further that the court erred prejudicially in refusing to give instructions, requested by appellant, to the effect that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. It was error to refuse to give such an instruction, but in view of the strong corroborative evidence the error was not prejudicial. In People v. Coakley, 108 Cal.App.2d 223, at page 228, 238 P.2d 633, 636, the court said, in referring to the failure to give such an instruction: "There was abundant corroboration aside from the Reyes' testimony to connect appellants with the crime charged. The articles stolen * * * were found in appellants' apartment. Ac-

cess to the typewriter was made difficult by their placing it in the attic. * * * Neither appellant denied they had possession of the stolen property. Possession itself was sufficient corroboration. * * * In addition to the possession of the stolen articles and the confession of appellants, they are now confronted by the falsehoods they told the officers in their efforts to exculpate themselves * * *. Such contradictions by one accused, or his silence or his lies are independent corroborative evidence. [Citations.] In view of such strong corroboration it is a reasonable deduction that the refusal of the court to give the requested instructions was not prejudicial."

[4, 5] Appellant also asserts that the court erred in sustaining an objection to questions, asked appellant, as to the value of certain automotive equipment and tools. He argues that the People had introduced evidence as to the inadequacy of the price he had paid for those things, and that he should have been permitted to introduce evidence that the price he paid was similar to the market value of the goods. He had testified that during a period of approximately 3½ years he worked with some fellows who were in the business of buying wrecked cars; he had not "exactly bought any equipment," but he would buy cars on the street which had tools in them; during said time he purchased automotive equipment and tools and he became "somewhat" familiar with the costs, on the used market, of that type of merchandise. The question was: "What was the value of the property you purchased at the second transaction [with the burglars—the tools taken in Santa Monica]?" The objection was made upon the ground that no foundation was laid for the opinion of the witness. It was within the discretion of the court to determine whether the evidence was sufficient to show that he was qualified as an expert to give such an opinion. He was not the owner of the property. The People had not presented any evidence as to the value of the things stolen in said second transaction. Also it was not indicated what the answer would have been, and it cannot be said that the answer would have tended to prove adequacy of price paid for the stolen goods. It was not error to sustain the objection.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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123 Cal.App.2d 799

Ex parte FERGUSON.

Cr. 2993.

District Court of Appeal, First District,
Division 1, California.
March 15, 1954.

Hearing Denied April 14, 1954.

Petition for writ of habeas corpus to secure release from custody under a commitment for contempt of court. The District Court of Appeal, Bray, J., held that petitioner was improperly held in contempt for refusal to be sworn and to testify on order to show cause why he should not be held in contempt, since the proceeding was criminal in nature, but that he was properly held in contempt for refusal to obey the order directing him to turn over certain assets to a receiver.

Writ discharged and petitioner remanded to custody for further proceedings.

1. Witnesses 🔑300

Defendant who refused to be sworn or to testify on order directing defendant and his business partners to show cause why they should not be punished for contempt for refusal to surrender to the receiver, as directed by prior order, the property belonging to them individually and as copartners charged with payment of certain judgment, could not be found guilty of contempt in so refusing, since he had the right to refuse to be sworn or to testify because a criminal proceeding was involved. Pen. Code, § 1323; Const. art. 1, § 13.

2. Witnesses 🔑300

Contempt of court is a criminal offense with reference to which the person charged cannot be compelled to be a witness against himself. Pen.Code, § 1323; Const. art. 1, § 13.

3. Witnesses 🔑305(2)

The filing of a verified answer to an affidavit for order to show cause why defendant should not be held in contempt for failure to deliver certain assets to a receiver, was merely a traverse of the pleading which brought defendant into court, and it did not have effect of waiving his right to refuse to testify. Pen.Code, § 1323; Const. art. 1, § 13.

4. Habeas Corpus 🔑94

On habeas corpus the court is limited to the single question of jurisdiction, and it cannot review questions of fact decided by court having jurisdiction of the person and subject matter.

5. Receivers 🔑72

Where petitioner for habeas corpus had, prior to contempt proceeding arising out of violation of court order directing that certain assets be turned over to a receiver unsuccessfully petitioned court for writ of prohibition to annul the order, affidavit for order to show cause why petitioner should not be cited for contempt was not required to contain an allegation that petitioner had notice of appointment of the receiver.

6. Receivers 🔑72

Affidavit of receiver for order to show cause why defendant should not be punished for contempt for refusal to surrender certain assets, as ordered by court, which alleged demand by receiver upon defendant and his partners, the refusal to deliver the property, and that there was belonging to defendant and his partners large amounts of equipment located at certain point, constituted sufficient charge of failure to obey court order to give court jurisdiction to hear and determine whether defendant should be punished for contempt.

7. Appeal and Error 🔑1050(1)
Receivers 🔑72

In proceedings on order directing defendant to show cause why he should not be punished for contempt for refusing to turn over certain assets to receiver as directed by court order, competent and admissible evidence was sufficient to support finding of contemptuous refusal when defendant was able to comply with the court order, and thus admission of transcript of defendant's testimony on order of examination and of a chattel mortgage executed by defendant and his partners prior to appointment of the receiver, even if error could not have been prejudicial error.

8. Habeas Corpus 🔑106

In habeas corpus proceedings by one confined for contempt, the order punishing for contempt is not subject to attack on ground of error of court in exercise of its jurisdiction, or of irregularities of procedure subsequent to acquisition of jurisdiction, nor may reviewing court inquire as to correctness of findings which constitute basis of conviction or finding of fact recited in order of commitment.

9. Habeas Corpus 🔑4

A petitioner for habeas corpus who was a party in original proceedings in which a receiver was appointed on a money judgment, followed by an order directing petitioner to turn over certain assets, and the holding of petitioner in contempt for violation of such order, was not entitled, in absence of an appeal from order appointing receiver, to a writ of habeas corpus on ground that appointment of receiver was improper. Code Civ.Proc. §§ 564, subd. 3, 714, 715.

10. Execution 🔑409

If there be property which cannot be reached by execution, and which judgment debtor refuses to apply to satisfaction of a judgment against him, he may be compelled, upon examination, in proceeding supplementary to execution, to deliver the property to a receiver for disposal of the property in aid of the execution. Code Civ.Proc. §§ 714–721.

11. Habeas Corpus 🔑22(2), 109

Where a defendant was properly found in contempt for refusing to obey order directing him to turn over certain assets to a receiver, and was improperly found in contempt for refusing to testify on order to show cause why he should not be held in contempt, the error in convicting defendant on one charge did not acquit him on the other charge, and he was not entitled to discharge on habeas corpus on ground that separate penalties were not prescribed for the two offenses, but he would be remanded to custody of sheriff for further proceedings in the trial court upon the verdict. Pen.Code, § 1484.

◆

Murle C. Shreck, E. R. Vaughn, Sacramento, for petitioner.

Alden Ames, San Francisco, for respondent.

BRAY, Justice.

Petition for writ of habeas corpus to secure release from custody under a commitment for contempt of court.

Questions Involved.

1. Upon a hearing of a contempt charge can the defendant be compelled to testify? 2. Is the affidavit for the order to show cause sufficient concerning disobedience of the court's order? 3. Regularity of order appointing referee. 4. Effect of commitment on two counts, one being erroneous.

Record.

In an action in the Superior Court of Alameda County entitled "M. Allen, Plaintiff, v. Mervin L. Gardner et al., Defendants; Mervin L. Gardner, Cross-Plaintiff, v. E. K. Ferguson, Jr., et al., Cross-Defendants" Mervin L. Gardner obtained judgment for $54,237.87 against certain cross-defendants, including E. K. Ferguson, Jr., Gordon A. Ferguson and petitioner, Reed C. Ferguson, as copartners doing business under the fictitious name and style of Ferguson Bros., a copartnership. Thereafter, in a supplementary proceeding, the individual interests of said partners in said partnership were charged with the payment of said judgment and one George Finster was appointed receiver of all assets and property of said partnership to satisfy the debts of said partnership and said judgment. Said defendants were ordered to deliver such assets and property to said receiver. Thereafter there was filed in said court "Affidavit of George Finster as Receiver for Obtaining Order to Show Cause." An order to show cause was thereupon issued directing the three Fergusons to appear and show cause why they should not be punished for contempt for refusal to surrender to the receiver the property belonging to them individually and as copartners. At the hearing of the order to show cause petitioner was found guilty of contempt of court for (1) refusing to be sworn or testify, and (2) failing to comply with said order requiring the delivery of said property to the receiver. Petitioner was then committed to the Alameda County jail for five days "or until he shall be discharged pursuant to law" and also ordered to pay a fine of $250.

1. Refusal to Testify.

[1-3] At the hearing of the order to show cause petitioner refused to be sworn or to testify. There can be no question but that he had the right to so refuse and that the court erred in finding him guilty of contempt in so doing. In Ex parte Gould, 99 Cal. 360, 33 P. 1112, 21 L.R.A. 751, the petitioner was ordered to show cause why he should not be adjudged guilty of contempt in violating an injunction. Upon the hearing, he refused to be sworn or testify as a witness on the ground that he could not be compelled to be a witness against himself as the proceeding was of a criminal nature. The trial court committed him for contempt. The Supreme Court held that contempt of court is a criminal offense and that both article I, section 13 of the Constitution and section 1323 of the Penal Code provide that a defendant in a criminal action cannot be compelled to be a witness against himself; that the court could not compel the petitioner to be sworn or to testify and could not find him guilty of contempt for his refusal. To the same effect, Hotaling v. Superior Court of State of California in and for City and County of San Francisco, 191 Cal. 501, 217 P. 73, 29 A.L.R. 127 (contempt for violation of order directing cancellation of corporate stock); Brophy v. Industrial Accident Commission, 46 Cal.App.2d 278, 115 P.2d 835 (contempt proceeding in Industrial Accident Commission for failing to

obey commission's order to supply medical reports). Respondent contends that because petitioner filed a verified answer to the affidavit for the order to show cause denying its allegations he waived his right to refuse to testify. The answer has no such effect. It is merely a traverse of the pleading which brought him before the court, similar to the plea of not guilty in a criminal case. In a contempt proceeding "the affidavits of the defendant constitute the answer or plea." In re Roth, 3 Cal.App.2d 226, 229, 39 P.2d 490, 491.

2. Sufficiency of the Affidavit.

Petitioner contends the affidavit was insufficient to give the court jurisdiction to find him guilty of contempt of violating the court's order, the remaining charge. The affidavit sets forth that affiant is the receiver appointed in the order, identifying it; that pursuant to the authority vested in him he made demand upon the cross-defendant partners to deliver to him the property and equipment belonging to them; that the demand was refused; that prior to his appointment, supplementary proceedings were had and petitioner was examined under oath concerning the location of the property of the cross-defendants; that petitioner "gave testimony in regard thereto that was manifestly evasive, and he made pretense of ignorance of the facts concerning the property of cross-defendants, for the sole purpose of placing difficulties in the way of the collection of the judgment." On information and belief he stated "the fact to be that a large amount of equipment belonging to the cross-defendants, of very considerable value, is now located in or near the City of Red Bluff, California; that other pieces of equipment are located on Mare Island; the exact description and number of pieces of such equipment can only be ascertained from said cross-defendants;" that in view of the attitude of petitioner and cross-defendants' attorneys affiant believes that further supplementary proceedings for examination of cross-defendants "would be of no avail."

[4, 5] In In re Carpenter, 36 Cal.App.2d 274, at page 277, 97 P.2d 476, at page 477, the court said: "It is elementary that on habeas corpus the court is limited to the single question of jurisdiction. Adjudication of questions of fact, the court having jurisdiction of the person and subject-matter, cannot be reviewed." Thus our inquiry here is limited to the question of whether the affidavit was sufficient to give the trial court jurisdiction to hear the matter. See Groves v. Superior Court, in and for Los Angeles County, 62 Cal.App.2d 559, 145 P.2d 355; In re DuBois, 120 Cal.App.2d 890, 262 P.2d 340. Respondent concedes that petitioner had notice of the order appointing the receiver and expressly waived any claim that such fact had to be set forth in the affidavit, in view of the fact that prior to the contempt proceeding petitioner had unsuccessfully petitioned this court for a writ of prohibition to annul the order. See Mattos v. Superior Court of Merced County, 30 Cal.App.2d 641, at page 647, 86 P.2d 1056, at page 1059, to the effect that the failure to aver notice of an injunction is not required in an affidavit for contempt in violating that injunction, as, "The court which tries the original action will take judicial notice of the fact that the accused person was present in court personally or by attorney and participated in the hearing at which the injunction was granted."

[6] The affidavit alleges demand by the receiver upon petitioner and his partners for the property and equipment belonging to them and their refusal to deliver them to him; that there is belonging to said partners large amounts of equipment at Red Bluff and Mare Island. This constitutes sufficient charge of failure to obey the court order to give the court jurisdiction to hear and determine whether petitioner should be punished for contempt.

[7] Petitioner contends that the court improperly admitted the transcript of petitioner's testimony on order of examination and a chattel mortgage executed by the partners prior to the appointment of the receiver. These are all matters that do not go to the question of jurisdiction. However, we might point out that the record shows that disregarding these documents there is still ample evidence to support the court's findings. So if these documents were in-

admissible (a question we deem it unnecessary to determine) no harm was done. The evidence was sufficient, too, to support the court's finding that petitioner was able to comply with the court's order. Petitioner's contention in this behalf was that the partnership property was not in his possession but in that of one of the other partners. It is elementary that each partner has the right to possession and control of the partnership property.

[8] As said in In re Risner, 67 Cal.App. 2d 806, 155 P.2d 667, in habeas corpus proceedings the order punishing for contempt is not subject to attack on the ground of error of the court in the exercise of its jurisdiction, or of irregularities of procedure subsequent to the acquisition of jurisdiction, nor may the reviewing court inquire as to the correctness of the findings which constitute the basis of the conviction or the findings of fact recited in the order of commitment. " 'The court will not consider the sufficiency of the evidence to sustain the charge or to support the findings as to the existence of facts—e. g., ability of the petitioner to comply with the violated order.' " 67 Cal.App.2d at page 811, 155 P.2d at page 671.

3. Order Appointing Receiver.

[9, 10] Petitioner contends that that order is void and hence he could not be held in contempt for disregarding a void order. He bases his contention on Ellis v. Superior Court of Riverside County, 138 Cal. App. 552, 33 P.2d 60, which held that a receiver could not be appointed under section 564, subdivision 3 of the Code of Civil Procedure on a money judgment. It might be pointed out that in that case the court stated that if the petitioner for writ of review had been a party to the proceeding in which the order appointing the receiver was made, she would have been barred from obtaining the writ because of her failure to appeal from that order. Petitioner here was a party in the original proceeding and failed to appeal from the order appointing the receiver. Moreover, the receiver was not appointed pursuant to section 564, subdivision 3 of the Code of Civil Procedure but under supplementary proceedings. Code Civ.Proc. §§ 714, 715. As said in Tucker v. Fontes, 70 Cal.App.2d 768 at page 771, 161 P.2d 697, at page 699, " * * * it is well settled that if after hearing the evidence introduced at the hearing of the supplemental proceeding the court concludes that the situation calls for the appointment of a receiver, it is authorized to make such appointment." The court stated further, 70 Cal.App.2d at page 772, 161 P.2d at page 699, quoting from Pacific Bank v. Robinson, 57 Cal. 520, " '* * * if there be property which cannot be reached by execution, and which the judgment debtor refuses to apply to the satisfaction of the judgment, he may be compelled, upon examination, in proceedings supplementary to execution, to deliver it in satisfaction of the judgment (§§ 714–721, Code Civ.Proc.); i. e., to a receiver appointed to dispose of it in aid of the execution. * * *' " The order appointing the receiver is not void.

4. Commitment.

[11] The court properly found petitioner in contempt for refusing to obey the order and improperly found him in contempt for refusing to testify. The question then arises as to the proper disposition of the case, in view of the fact that separate penalties were not prescribed by the court. Petitioner contends that the writ must be granted and he be completely discharged from suffering any penalty whatever, basing his contention on Barry v. Superior Court, 91 Cal. 486, 27 P. 763, and In re Barry, 94 Cal. 562, 29 P. 1109, where it was held that another department of the superior court had no power to enter an additional judgment in a contempt proceeding after another department of that court had already entered judgment; In re Moore, 93 Cal.App. 488, 269 P. 664, where it was held that the trial court had no jurisdiction to issue a second commitment; People v. McAllister, 15 Cal.2d 519, 102 P.2d 1072, to the effect that in a criminal case the trial court has no jurisdiction to vacate or change a sentence once it has been entered; and White v. White, 130 Cal. 597, 62 P. 1062, Vance v. Smith, 132 Cal. 510, 64 P. 1078, and Street v. Hazzard, 27 Cal.App. 263, 149 P. 770, concerning the finality of judgments in civil cases. These cases ob-

viously are not in point. A case more analogous to the situation here is In re McCoy, 32 Cal.2d 73, 194 P.2d 531. There the defendant pleaded guilty to a misdemeanor and was sentenced to the county jail. On habeas corpus it was held that because he had been denied the services of an attorney, the judgment of conviction was void. There, as here, the defendant contended that such finding entitled him to a complete release. The court pointed out that section 1484 of the Penal Code provides that in habeas corpus proceedings "'The court or judge must * * * dispose of such party as the justice of the case may require * * *'" and then said, 32 Cal.2d at page 77, 194 P.2d at page 533, "So a petitioner will not necessarily be discharged merely because the judgment and commitment are void, if there is valid process under which he may be held." The court further stated that denying the defendant an attorney did not acquit him of the charge, and remanded the defendant to the custody of the sheriff for further proceedings in the police court. So here, the court's error in convicting petitioner of one charge did not acquit him of the charge upon which he was properly convicted. In Matter of Smith, 152 Cal. 566, 93 P. 191, the defendant was convicted of burglary but sentenced on a holiday. On habeas corpus it was held that the sentence was illegal but that fact did not entitle the prisoner to discharge. He was remanded to the sheriff to await the further action of the superior court upon the verdict. In In re Dal Porte, 198 Cal. 216, 244 P. 355, the defendant was convicted on two counts, one for the sale of intoxicating liquor, the other for its possession. He was sentenced to one penalty. On habeas corpus it was held that his sentence was illegal, having occurred on a legal holiday. It appeared, too, that the police court in which he was tried did not have jurisdiction of the offense charged in the first count but did of that in the second count. Referring to the general rule that a judgment based upon a general verdict of guilty by a jury finding the defendant guilty under an indictment containing two counts charging two separate crimes, where one count was radically defective, would be reversed even though the other count was perfectly good, the court held nevertheless that the fact that the offense charged in the first count of the complaint was one over which the police court did not have jurisdiction would not be sufficient to oust the court of jurisdiction of the offense over which it had jurisdiction. The defendant was then remanded to custody to await the further action of the police court.

In State ex rel Hinckley v. Sixth Judicial District Court, 53 Nev. 343, 1 P.2d 105, it was held that the fact that the court found the relator guilty of a contempt not charged did not make void the judgment finding him guilty of the contempt charged.

The situation before the court in a contempt proceeding based upon separate acts is different from that before a jury in a criminal case, based on separate counts. It is highly important that courts require full respect for and obedience to its orders, and the fact that a trial court may erroneously find a person guilty of contempt should not be grounds for releasing him from a charge of contempt of which he has properly been found guilty. The superior court here is entitled to sentence petitioner for the contempt of which he was properly found guilty, thereby disposing of him "as the justice of the case may require."

The writ is discharged and the petitioner is remanded to the custody of the sheriff for further proceedings in the superior court.

PETERS, P. J., and FRED B. WOOD, J., concur.

123 Cal.App.2d 889

WILSON et al. v. GURNEY.

Civ. 8413.

District Court of Appeal, Third District, California.

March 16, 1954.

Action by motorist and guest passengers for personal injuries and property damage resulting from an intersectional collision between motorist's automobile and truck. The Superior Court, Del Norte County, Finley, J., sitting without a jury, found defendant was free from negligence and that motorist's negligence was sole, direct and proximate cause of the accident. From judgment in favor of defendant and denial of motion for new trial plaintiffs appealed. The District Court of Appeal, Schottky, J., held evidence was sufficient to support finding that truck owner was free from negligence and that motorist's negligence was a sole, direct and proximate cause of the accident.

Judgment affirmed.

1. Appeal and Error 🔑110

Under statute providing that appeals may be taken from final judgment entered in action or special proceeding commenced in the Superior Court or from an order granting a new trial, order denying plaintiff's motion for a new trial was not appealable. Code Civ.Proc. § 963.

2. Automobiles 🔑244(12, 58)

In action for personal injuries and property damages allegedly resulting from collision at intersection when overtaking automobile attempted to pass defendant's truck, which was in process of making a left-hand turn, evidence was sufficient to support findings that truck driver was free from negligence, and automobile operator's negligence was sole, direct and proximate cause of the accident. Vehicle Code, § 530 (b) (2).

3. Automobiles 🔑245(2)

Where evidence as to negligence of motorist and that of truck operator was highly conflicting it was for trial court sitting without jury to weigh evidence and resolve the conflicts.

4. Automobiles 🔑172(15)

Driver of truck had right to assume that overtaking motorist would not attempt to pass at point of intersection in violation of statute which forbids driving a vehicle on left side of roadway when approaching within 100 feet of or when traversing any intersection. Vehicle Code, § 530(b) (2).

5. Automobiles 🔑244(34)

In action by automobile occupants for injuries and property damage resulting from collision when overtaking automobile attempted to pass truck at intersection against truck driver who allegedly looked to rear when he approached intersection and started to slow down for turn, noticed plaintiff's automobile over one quarter of a mile to the rear, gave hand signal for left-hand turn but did not look again for automobile when he started to make the left-hand turn, evidence supported finding that truck driver was not negligent in failing to look for automobile when he started his turn. Vehicle Code, § 530(b) (2).

6. Trial 🔑66

Where plaintiffs moved to reopen case for purpose of introducing in evidence a copy of state highway officer's diagram from which officer testified at trial, but there was no showing that plaintiffs could not have introduced the diagram during the trial and data on diagram would only have been cumulative, trial court did not err in denying the motion.

◆

Elbert E. Hensley, Los Angeles, Allan M. Carson, Los Angeles, of counsel, for appellants.

Falk & Falk, Eureka, for respondent.

SCHOTTKY, Justice.

Plaintiffs commenced an action to recover for personal injuries and property damage resulting from a collision between a Lincoln two-door sedan and a dump truck loaded with gravel. Plaintiff Wilson was the driver of the Lincoln automobile, and the other plaintiffs were guests in the car. The dump truck was being driven by defendant Gurney, its owner. Defendant Gurney filed an answer denying the material allegations of the complaint, and also filed a cross-complaint for damage to his truck, but said cross-complaint was dismissed by him during the trial. The action was dismissed also as to the fictitious defendants.

[1] The case was tried by the court sitting without a jury, and the court found that defendant was free from negligence in the matter; that no act or omission on his part in any way caused the collision or any damage suffered by any of the plaintiffs; and that driver Wilson was negligent and that this negligence was the sole, direct and proximate cause of the accident. Judgment was entered in favor of defendant in accordance with said findings, and plaintiffs' motion for a new trial was denied. Plaintiffs have appealed from the judgment and also from the order denying plaintiffs' motion for a new trial. Since the order is not appealable, Code Civ.Proc., sec. 963; Pipoly v. Benson, 20 Cal.2d 366, 368, 125 P.2d 482, 147 A.L.R. 515, plaintiffs' appeal therefrom must be dismissed.

Appellants make the following contentions: (1) That the finding that respondent was not negligent in the matter is unsupported by the evidence; (2) that the finding that appellant F. E. Wilson (the driver of the Lincoln sedan) was negligent is likewise unsupported by the evidence; (3) that the court erred in granting judgment in favor of respondent and against the other appellants who were guests in the Lincoln sedan; and (4) that the court erred in denying appellants' motion to reopen the case. The first three contentions attack the sufficiency of the evidence, and before discussing them we shall give a brief summary of evidence, bearing in mind the familiar rule that all conflicts in the evidence must be resolved in favor of the prevailing party.

The accident occurred at about 9:45 a. m. on the morning of July 5, 1950, at or near the intersection of U. S. Highway 101 and a public road known as Kent Street or Citizens Dock Road, just south of the City of Crescent City in Del Norte County. Highway 101 is a two-lane highway and runs in a northwesterly and southeasterly direction at this point. Kent Street intersects the highway from the westerly side, in a so-called "T" intersection. Both vehicles were proceeding in the same direction on Highway 101, approaching the intersection from the south. The highway is straight for a distance of approximately 1800 feet south from the intersection. The weather was clear and the sun was shining. The collision occurred when respondent was making a left turn into Kent Street and driver Wilson was attempting to bring his car to a stop after he had crossed over into the left lane in an effort to overtake and pass the truck.

The evidence shows that respondent had a rear view mirror on his truck and that he could see both lanes of the highway behind him by looking into the mirror. He testified that when he was about 220 to 230 feet from the intersection he observed the Lincoln sedan coming around a bend in the road behind him, but he could not estimate its speed. The sedan was then approximately 1800 feet from the intersection, or more than a quarter of a mile behind respondent's truck. It was in the right-hand lane on the highway. At that time respondent, who had been traveling at about 35 miles per hour, reduced his speed and made a hand signal for a left turn. He testified that he continued to give the hand signal until he reached the intersection. The impact occurred while he was making the left turn, and he admitted that he did not look into the mirror again, to check the position of the other car, before starting to cross the center line in making the turn.

Skid marks showed that the Lincoln sedan skidded about 115 feet before the impact and thereafter skidded, somewhat sideways, another 43 feet before stopping on Kent Street. These marks also showed that the Lincoln was in the left-hand lane on Highway 101 when the brakes were first applied, and that the car angled toward the left and was partially off the pavement during the last 40 feet or so before the impact. The truck and load, which weighed about 30,000 pounds, apparently was pushed sideways a few feet by the impact, and then went forward and stopped at about the northwesterly corner of the intersection. Respondent testified that his speed was less than 10 miles per hour when he started to make the turn. Respondent testified that his front wheels were about even with Kent Street when he started to make the left turn and Officer Plaisted of the State Highway Patrol, who measured the skid marks, testified that the point at which impact occurred "was almost even with Kent Road; very little off."

[2, 3] We are unable to agree with appellants' contentions that the findings of the court as to negligence are not supported by the evidence. As is usual in such cases, the evidence was highly conflicting, and it was for the trial court to weigh the evidence and resolve the conflicts. The following analysis by the trial court in its memorandum opinion is fully supported by the record:

> "In the present case the court cannot escape the conclusion that the Lincoln car was being driven at a considable rate of speed, that it proceeded to a point close behind the truck and then turned rather sharply out into the west lane and started to pass. The probabilities would seem to indicate that a signal of intent to turn was given by defendant but that the Lincoln was traveling too fast to retard speed sufficiently to turn back in behind the truck. According to the pictures introduced into evidence the intersection was clearly visible for a considerable distance by a vehicle approaching from the south and the driver should not have attempted to pass. It does not seem probable that a horn signal was given at least until too late to warn defendant in time to stop his left hand turn.
>
> "It is the law of course that negligence on the part of a driver of a vehicle cannot be attributed to his guests. Undoubtedly the other plaintiffs were all guests of plaintiff F. E. Wilson. In order for the guests to recover from this defendant, however, they must have sustained the burden of proving their case against him by a preponderance of the evidence. The court does not feel that plaintiffs' proof establishes negligence amounting to want of ordinary care on the part of defendant or that, assuming any negligence at all, it was the proximate cause of the collision. It is obvious that the accident would not have happened had the driver of the Lincoln not attempted to pass at the intersection in violation of law, and the fact that he did so attempt constitutes negligence and the direct and proximate cause of the accident and injuries."

[4, 5] There is evidence that respondent did look when he approached the intersection and started to slow down for the turn. There is also evidence that he gave a hand signal for a left turn. The law prohibits overtaking and passing a vehicle within 100 feet of an intersection such as this (Veh. Code, sec. 530(b) (2), and respondent would have been justified in assuming that the sedan would not try to pass him at this point. He might also reasonably assume, from the distance of the sedan behind him, that it would not be in a position to pass him before he made the left turn. Respondent did not look again for the sedan when he started his left-hand turn across the highway, but the court found that this was not negligence and the finding is supported by evidence.

We are convinced that the issues of negligence, contributory negligence, and proximate cause were questions of fact for the trial court to determine, and that the trial court's findings in favor of respondent upon said issues are supported by substantial evidence in the record.

[6] Appellants contend also that the court erred in denying their motion to reopen the case. Apparently no affidavit was filed in support of the motion, but their argument shows that their sole purpose in having the case reopened was to permit them to introduce in evidence a copy of a diagram made by Officer Plaisted and from which he testified at the trial. The

data on the diagram would only have been cumulative and, moreover, there is no showing that appellants could not have introduced it during the trial. The court did not err in denying the motion. In re Estate of Jepson, 178 Cal. 257, 261, 172 P. 1107.

No other points raised require discussion.

The purported appeal from the order denying a new trial is dismissed. The judgment is affirmed.

PEEK, J., and PAULSEN, J. pro tem., concur.

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123 Cal.App.2d 853

MURPHY v. ABLOW.

Civ. 19935.

District Court of Appeal, Second District, Division 3, California.

March 15, 1954.

Rehearing Denied April 7, 1954.

Hearing Denied May 6, 1954.

Action to recover moneys alleged to have been paid by plaintiff to defendant in violation of the usury law. The Superior Court of Los Angeles County, Florence M. North, J. pro tem, entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Vallée, J., held that evidence warranted finding that a bonus of $1,750 procured at time of a loan to plaintiff of $10,000 at 10% interest, related to and was an additional charge for such loan, and was not a bonus applicable to a prior loan of $40,000 at 6% interest, with result that bonus was usurious.

Judgment affirmed.

1. Usury ⚷114

Courts will not permit an evasion of the usury law by any subterfuge, and it is always permissible to show that a transaction, ostensibly lawful, actually constituted a usurious loan and was made with intent to evade the statute. Const. art. 20, § 22.

2. Usury ⚷52, 114

The prohibitions against exaction of usurious interest are violated if the lender provides for a lawful rate of interest in the note itself, but requires additional and excessive interest by the terms of a collateral agreement, and the test is whether there was intent to evade the law, and the circumstances and negotiations which preceded the transaction may be considered in determining such intent. Const. art. 20, § 22.

3. Usury ⚷117

In action to recover moneys alleged to have been paid by plaintiff to defendant in violation of the usury law, wherein it appeared that plaintiff had procured a loan of $40,000 at 6 percent interest, and that he had thereafter procured a loan of $10,000 at ten percent interest, and that a bonus of $1,750, had been exacted purportedly to apply to the first loan, evidence warranted finding that the bonus was an additional charge for the $10,000 loan, thereby making it usurious. Const. art. 20, § 22.

4. Appeal and Error ⚷931(1, 3)

Reviewing court can only consider the evidence most favorable to the findings of fact, together with every inference to be reasonably drawn therefrom, and it will not hold unsupported the trial court's finding merely because it might reasonably draw different inferences from those the trial court reasonably drew.

5. Appeal and Error ⚷994(3), 995, 1012(1)

Questions as to the credibility of plaintiff in action to recover moneys paid to defendant in violation of the usury law, and of the weight of the evidence, were for trial court, and reviewing court was not authorized to reject plaintiff's testimony unless it was a physical impossibility that it was true, or its falsity was apparent without resorting to inferences or deductions.

6. Evidence ⚷588

Testimony which merely discloses unusual circumstances is not inherently improbable, but in order for there to be inherent probability, it must appear that what was related or described could not have occurred.

7. Appeal and Error ⚷931(1)
Evidence ⚷588

The trier of fact may believe and accept a part of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effect, and on appeal that part which supports the judgment must be accepted, and not that part which would defeat, or tend to defeat the judgment.

8. Appeal and Error ⚷995

Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal.

◆

Lewis M. Andrews, Los Angeles, for appellant.

Porter C. Blackburn and Paul E. Gervais, Burbank, for respondent.

VALLÉE, Justice.

Plaintiff brought this action against A. Ablow, referred to as defendant, to recover moneys alleged to have been paid by him to defendant in violation of the usury law.

On March 29, 1950, defendant, through a broker, agreed to loan plaintiff $40,000, to be evidenced by two promissory notes: one for $35,000, due three years after date with interest at 6%, principal and interest payable in monthly installments, the note to be secured by a first deed of trust on a parcel of realty; the other for $5,000, due three years after date with interest at 10%, principal and interest payable in monthly installments, the note to be secured by a second deed of trust on the same property. On April 12, 1950, defendant agreed to loan plaintiff $10,000, to be evidenced by a promissory note due five years after date with interest at 10%, the note to be secured by a second deed of trust on a different parcel of realty.

The loans were effected through separate escrows with the same escrow holder. The escrow with respect to the $40,000 loan was opened on March 29, 1950; that with respect to the $10,000 loan, on April 13, 1950. On April 13, 1950, defendant demanded of plaintiff that he pay him a bonus of $1,750; plaintiff agreed to pay it. The parties executed an instrument directed to the escrow holder, which reads: "You are hereby authorized and instructed to pay A. Ablow the sum of $1,750.00 as a prepaid bonus or consideration for the granting of the $35,000.00 First Trust Deed Loan as described in original escrow instructions dated March 29, 1950." Defendant then paid $38,250 into the escrow with respect to the $40,000 loan, thus taking a credit for the $1,750 bonus. The $1,750 was deducted from the $35,000 loan. The two loans were then consummated.

Plaintiff sued for treble the $1,750 bonus and claimed below that it was an additional charge to obtain the $10,000 loan, and that it was usurious. Defendant claimed it was paid for the $35,000 loan, and that it was not usurious. If the bonus was an additional charge for the $10,000 loan, its exaction was usurious. If it was paid to obtain the $35,000 loan, it was not usurious. No person shall, by charging any fee, bonus, discount, or other compensation, receive from a borrower more than 10% per annum upon any loan of money. Const. art. XX, § 22.

The court found that on April 13, 1950, defendant, in order to complete the $10,000 loan and as a bonus for its completion, demanded and required from plaintiff the payment of the further sum of $1,750 and caused it to be added as a purported bonus for the $35,000 loan; that in truth and fact, defendant intended the $1,750 to be charged and claimed as a bonus and extra charge to plaintiff as compensation for the $10,000 loan; that the purported allocation and charge to the $35,000 loan was a subterfuge created and used by defendant for the purpose of evading and circumventing the usury law, and it was a simulated transaction. Judgment for plaintiff for $1,750 and interest followed. Treble damages were not allowed since the action was not brought within one year after payment of the bonus. 2 Deering's Gen. Laws, Act 3757, § 3. Defendant appealed. Defendant died since the taking of the appeal, and the administratrix of his estate has been substituted in his stead.

Defendant's only point is that there is no substantial evidence to support the findings. His argument is punctuated by such comments as the testimony of plaintiff "beyond any question" is false and improbable; there is no evidence in support of the findings "worthy of belief"; plaintiff contradicted himself; "it is not possible to swallow" the testimony of plaintiff and one of his witnesses; the decision "is based upon evidence which under no conceivable theory could be true"; the conclusion of the trial court is one no "reasonable man could have reached." Defendant's contention is untenable.

At the time of the transaction, plaintiff had received confirmation of a contract to build a dam for the Government and was in the process of raising cash required by a bonding company. He was fearful the Government would withdraw from the contract and charge him the difference between his bid and the next higher bid; he needed the money "quite badly." Defendant was in the business of loaning money. Prior to April 12, 1950, the $40,000 loan had been arranged through a broker and escrow instructions had been signed calling for 6% interest on $35,000 and 10% interest on $5,000. Plaintiff had agreed to pay the broker 3% of the loan as a commission.

Plaintiff first met defendant on April 12, 1950. He asked for the $10,000 loan. Defendant said he would make it at 10% interest. The next day the parties met at the office of the escrow holder. Prior to that time, defendant had not said anything about changing the terms of the escrow relative to the $40,000 loan. At the escrow office, plaintiff told defendant it was very urgent he have the money, that he felt he would lose the contract with the Government if he did not get the money in the bank that day. Defendant then said to plaintiff, "If I make this loan I will have to have $1750.00 more." Plaintiff said he had to have the money. Defendant replied, "Well, you are going to make a lot of money up there; you can pay more." Plaintiff said, "I don't want to. A deal is a deal." Defendant countered, "I won't give you the money unless you do it." Plaintiff testified the $1,750 was to be secured by the property which was to secure the $10,000 loan; while the escrow officer was writing the instructions relative to the $10,000 loan, defendant said, "I want the $1750.00," and the escrow officer said, "You don't want it on this, do you?"; the escrow officer, the broker, and defendant then did some figuring; the escrow officer then had the instructions, which we have quoted above, written, charging the $1,750 as a bonus against the $35,000 loan, and he (plaintiff) signed them. Plaintiff further testified that his purpose in going to the office of the escrow holder on April 13 was "To get $10,000 on that loan that we were talking about"; he did not go there to amend the escrow instructions in the escrow in which he was going to borrow $40,000; he signed the amendment "under verbal protest * * * because it was a necessity for me to have this money and I was in a squeeze"; he knew the intent of the amendment, "to subterfuge."

Plaintiff's secretary, who was present at the office of the escrow holder on April 13, testified plaintiff went there "for a loan of $10,000 that day," and "during our meeting a paper was submitted to Mr. Murphy for signature on which—which indicated an additional amount over and above what Mr. Murphy had indicated to me that he was to pay, other than what he had indicated to me, and I asked him about it, and he seemed surprised concerning it, and seemed very hesitant in signing it. And I asked Mr. Ablow what was the reason for this additional charge, and he said it was for the money, and I said, 'Well, isn't Mr. Murphy paying you interest on it, and why is this tacked on at this late date?' And he—I don't recall his exact words, but Mr. Murphy did hesitate, and I objected, and I did say to Mr. Ablow that I have never seen such high-handed tactics in taking advantage of a circumstance. And I did say that I thought it was rotten, and soon after I left the room"; that defendant told her to "shut up"; and, "Q. You thought the

$1750 bonus was too much? A. Extra. Yes, I thought that was extra. I thought it was taking advantage of a situation, because Mr. Murphy did have to have the money, and had to have it right away. And that's what I told Mr. Ablow, that I did feel that he was being very high-handed in taking advantage of that circumstance at that particular time"; that prior to her leaving the room, nothing had been said about any loan other than the $10,000 loan.

Defendant knew that plaintiff was desperately in need of money.

Defendant deposited the $10,000 in the escrow on April 13. The next day plaintiff received $9,300 from that escrow and $36,500 from the prior escrow.

[1, 2] "The courts will not permit an evasion of the Usury Law by any subterfuge, and it is always permissible to show that a transaction, ostensibly lawful, actually constituted a usurious loan and was made with intent to evade the statute. Haines v. Commercial Mortgage Co., 200 Cal. 609, 616, 254 P. 956, 255 P. 805, 53 A.L.R. 725. * * * [T]he law would be violated if the lender provided for a lawful rate of interest in the note itself, but required additional and excessive interest by the terms of a collateral agreement. * * * The test is whether there was the intent to evade the law, and the circumstances and negotiations which preceded the transaction may be material in determining such intent." Terry Trading Corp. v. Barsky, 210 Cal. 428, 432, 292 P. 474, 475. Whether a transaction is usurious is a question of fact. Middlekauf v. Vinson, 106 Cal.App.2d 204, 207, 234 P.2d 742.

[3, 4] It is quite apparent, we think, that the findings are adequately supported. We can only consider the evidence most favorable to the findings, together with every inference to be reasonably drawn therefrom. As Mr. Justice McComb stated in Marson v. Rand, 107 Cal.App.2d 466, 468, 237 P.2d 18, 20: " 'It is not the province of a reviewing court to present, by way of opinion, a detailed argument on the sufficiency of the evidence to support the judgment, where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled.' "

[5–8] Questions as to the credibility of plaintiff and the weight of the evidence were for the trial court. A reviewing court will not hold unsupported the trial court's findings merely because it might reasonably draw different inferences from those the trial court reasonably drew. A reviewing court cannot reject testimony of a witness that has been believed by the trier of the fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions. In order to say that testimony is inherently improbable, it must appear that what was related or described could not have occurred. Testimony which merely discloses unusual circumstances is not inherently improbable. Testimony which is subject to justifiable suspicion does not justify reversal of a judgment. The trier of fact may believe and accept a part of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effect. On appeal that part which supports the judgment must be accepted, not that part which would defeat, or tend to defeat, the judgment. Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal. Chan v. Title Ins. & Trust Co., 39 Cal.2d 253, 258, 246 P.2d 632; Industrial Indem. Co. v. Industrial Accident Comm., 115 Cal.App.2d 684, 692, 252 P.2d 649; Postier v. Landau, 121 Cal.App.2d 98, 262 P.2d 565.

The question in this case was factual. No question of law was involved. There is evidence, argued at length here by defendant, that would have supported contrary findings. We may not reject the findings of the trial court and substitute findings of our own, even though we might arrive at a different conclusion. The trial court having found the evidence to weigh more heavily for plaintiff, the case is closed. We are impelled to repeat what we said in Riesenberg v. Riesenberg, 97 Cal.App.2d 714, 716, 218 P.2d 577, 578, defendant "has failed to establish any greater grievance here than [he] might in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the opposite party. Such a choice between two permissible views of the weight of the evidence is not error."

Affirmed.

PARKER WOOD, J., concurs.

SHINN, P. J., concurs in the judgment.

124 Cal.App.2d 64

TIDWELL v. HENRICKS.

Civ. 19925.

District Court of Appeal, Second District, Division 1, California.

March 23, 1954.

Action for negligence in an automobile accident. From an order of the Superior Court of Los Angeles County, Ellsworth Meyer, J., which denied defendant's motion to vacate judgment, and to set aside the default the defendant appeals. The District Court of Appeal, Doran, J., held that where only a copy of the amended complaint was served on defendant default was void and required to be set aside.

Judgment vacated and the default set aside.

1. Judgment ⊂⇒102

Where, after default of defendant has been entered, complaint is amended in a matter of substance as distinguished from matter of form, the amendment opens the default and unless amended pleadings be served on defaulting defendant, no judgment can properly be entered.

2. Judgment ⊂⇒102

The filing of an amended complaint, not only vacates a defendant's default but supersedes the original complaint which is dropped out of the case, and ceases to have any effect as a pleading or as a basis for a judgment.

3. Pleading ⊂⇒252(2)

An amended complaint supersedes the original complaint, and it furnishes the sole basis of the cause of action.

4. Judgment ⊂⇒102

Where a default had been entered against defendant and thereafter the complaint was amended in substance, the amendment opened the default and where only a copy of the amendment was served on the defendant, default taken thereon against the defendant was void, and was required to be vacated. Code Civ.Proc. §§ 410, 472.

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Juaneita M. Veron, Huntington Park, for appellant.

Walleck, Olstyn & Johnson, Robert F. Johnson, Van Nuys, for respondent.

DORAN, Justice.

This is an appeal from the order denying the defendant's motion to vacate judgment, and to set aside the default.

As recited in appellant's brief, "On or about July 18, 1952, the adult married son of appellant was operating an automobile on a certain boulevard in the City of Maywood, State of California, and while so operating an automobile became involved in an accident in which the respondent herein was injured. The respondent was a pedestrian. The automobile operated by the son of appellant was owned by and registered in his name.

"On November 19, 1952, the respondent filed a complaint for damages in the Superior Court, naming said son as a defendant and naming several defendants by fictitious names. The complaint sets forth a cause of action for negligence against the son and does not purport to state a cause of action against any defendant named by fictitious names therein. On December 3, 1952, appellant was served with a copy of the complaint and summons. On December 23, 1952, respondent requested entry of default against appellant, who had not filed an answer to the complaint, and said entry was made on December 31, 1952. On December 31, 1952, the respondent filed an amendment to the complaint under Section 472 of the California Code of Civil Procedure. The amendment contained nothing more than allegations that in 1949 the appellant had signed the application for a driver's license for her said son, who was then an unmarried minor, under the age of 18 years; that a driver's license was issued to said son and that said son was operating his automobile on the 17th day of July, 1952, by virtue of the privilege so to do granted by the aforementioned driver's license. The amendment contains no other allegations and does not contain a prayer for any kind or form of damages. Thereafter, and on or about January 3, 1953, a copy of the amendment alone was served upon appellant. On January 19, 1953, the respondent requested entry of default upon said amendment and thereupon said default was entered. Thereafter judgment was entered against appellant as aforesaid."

It is contended on appeal that:

"(1) A default judgment rendered upon an entry of default which is wholly unauthorized is a void judgment.

"(2) To authorize the entry of a default the Court must have obtained jurisdiction of the defendant.

"(3) Where a default has been entered and thereafter the complaint is amended in substance the amendment opens the default and unless amended pleadings are served upon the defaulting defendant no judgment can be entered."

It should be noted at the outset that only the copy of the amendment was served on appellant.

[1] As argued by appellant, "It is settled that where, after the default of a defendant has been entered, a complaint is amended in a matter of substance as distinguished from a matter of form the amendment *opens the default,* and unless *amended pleadings* be served on the defaulting defendant no judgment can properly be entered on the default * * * is not such a matter of substances as to require *republication of summons:* "Stack v. Welder, 3 Cal.2d 71, 43 P.2d 270; 14 Cal. Jur. p. 890; Woodward v. Brown, 119 Cal. 283, 51 P.2d 542; Cole v. Roebling Const. Co., 156 Cal. 443, 105 P. 255, and many cases therein cited: Sheehy v. Roman Catholic Archbishop of San Francisco, (1942), 49 Cal.App.2d 537, 122 P.2d 60.

[2] "The filing of an amended complaint * * *, not only vacated a defendant's default, but superseded the original complaint, and the original complaint is dropped out of the case and ceased to have any effect as a pleading or as a *basis for a judgment.* Where an original complaint had dropped out of existence as such when a second default was entered against a defendant, and an amended complaint had not yet been served on defendant, the second default stood as a nullity and was properly vacated by the trial court: "Sheehy v. Roman Catholic Archbishop of San Francisco, see supra.

[3] "An amended complaint supersedes the original complaint, and it furnishes the sole basis of the cause of action. "Morehead v. Turner, 41 Cal.App.2d 414, 106 P.2d 969; Riverside County v. Stockman, 124 Cal. 222, 56 P. 1027; Linott v. Rowland, 119 Cal. 452, 51 P. 687."

Section 410, Code of Civil Procedure, provides that "A copy of the complaint must be served, with the summons, upon each of the defendants."

[4] The authorities support appellant's contentions. Appellant has been denied the proverbial day in court and in the light of the record the judgment must be vacated and the default set aside. It is so ordered.

WHITE, P. J., and DRAPEAU, J., concur.

CONTRA COSTA COUNTY v. LASKY.*

Civ. 15896.

District Court of Appeal, First District, Division 2, California.
March 25, 1954.

Hearing Granted May 24, 1954.

County brought action against adult child of mother, to whom county had furnished aid, for reimbursement under the Old Age Security Law. The Superior Court of the State of California in and for the County of Contra Costa, Norman A. Gregg, J., entered judgment for county, and adult child appealed. The District Court of Appeal, Kaufman, J., held that county was entitled to reimbursement, though income of adult child was support and alimony payment from former husband.

Judgment affirmed.

Dooling, J., dissented.

1. Social Security and Public Welfare ⚷94

Right of county to reimbursement from spouse or adult child under the Old Age Security Law for aid furnished to the spouse's spouse or adult child's parent is based on ability of spouse or adult child to pay and not on source of income. Welfare and Institutions Code, §§ 2000 et seq., 2181, 2224; Civ.Code, § 206.

2. Social Security and Public Welfare ⚷94

County, which had furnished aid to mother of adult child, was entitled to reimbursement from adult child, who received net monthly income of $666.67, though income was support and alimony payment from former husband. Welfare and Institutions Code, §§ 2000 et seq., 2181, 2224; Civ.Code, § 206.

3. Social Security and Public Welfare ⚷94

Adult child of mother, to whom county had furnished aid, could not relieve herself of responsibility to reimburse county under the Old Age Security Law merely by spending all of her income and by making loans to third person. Welfare and Institutions Code, §§ 2000 et seq., 2181, 2224; Civ.Code, § 206.

Gendel & Raskoff, Los Angeles, for appellant.

Francis W. Collins, Dist. Atty., David J. Levy, Deputy Dist. Atty., Martinez, for respondent.

KAUFMAN, Justice.

Appeal from a judgment of the Superior Court based on the Old Age Security Law.

The County of Contra Costa, through the action of its Board of Supervisors, granted and gave $75 a month for the months of May, June and July, 1951, to the defendant's mother, Alta Hachenberger, under the provisions of the Old Age Security Law. Div. 3, Chapter 1, Welfare and Institutions Code. Defendant resides in this State and is the adult child of the recipient of Old Age Security benefits. Plaintiff contributed a total of $225 to the recipient. Pursuant to Section 2224 of the Welfare and Institutions Code, the Board of Supervisors of plaintiff county directed the District Attorney to proceed against the defendant.

Trial was held on December 29, 1952, with the court sitting without a jury. The court found, among other things, that on the 28th day of May, 1951, the Board of Supervisors of plaintiff county found that the net monthly income of defendant was $666.67 and that said Board found that defendant was pecuniarily able to pay for the support of recipient, Alta Hachenberger, an amount of $75 a month. The court found that during the months of May, June and July, 1951, the defendant had a monthly income of $660 a month consisting of support and alimony payments from a former husband. Out of this income she was purchasing a home, buying a 1950 Chrysler automobile, employing a gardener at $20 a month, and accumulating surplus money sufficient to loan her ex-husband in excess of $1,000. At the time of the trial, the defendant was still receiving the same income of approximately $660 a month. On the 18th day of February, 1953, judgment in the amount of $225 was ordered, which judgment was duly made and entered on the 3rd day of March, 1953. This appeal is taken from that judgment.

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* Subsequent opinion 275 P.2d 452.

The parties stipulated to the formal allegations of the complaint to the effect that the law had been complied with and the money had been paid by the plaintiff. Defendant took issue as to defendant's liability on her ability to pay and whether the funds that she had were legally liable or subject to being ordered paid.

The facts stipulated to are as follows: Defendant, Frances Lasky, is the adult child of Alta Hachenberger. During the months of June, July and August of 1951, after due application had been made by Alta Hachenberger for benefits under the Old Age Security Law, aid was granted pursuant to this law by the County of Contra Costa to Mrs. Alta Hachenberger in the amount of $75 a month for said months of June, July and August. After August 1951, recipient Alta Hachenberger moved to the County of Alameda. The total amount of funds provided by plaintiff, County of Contra Costa, to the recipient, Alta Hachenberger, amounted to $225. On May 28, 1951, the Board of Supervisors of plaintiff county ordered defendant to contribute an amount of $75 a month to recipient. A statement of responsible relative of applicant under Old Age Security Law was properly made and filed by defendant, Frances Lasky, with the Board of Supervisors of the plaintiff county.

Defendant showed that she had no separate income other than the alimony that she received from her former husband. During the year 1951, the defendant had income of $9,637.81. As stipulated by the parties, such figure is correct. Defendant has one child. On September 1, 1951, defendant loaned $1,292.19 to her former husband for which she received a three-year note. During the year 1951 defendant paid income tax in the amount of $2,115.50. Defendant was lending money to her former husband to aid in the payment of premiums on insurance policies that had a maturity value of $38,000. Defendant sent her minor child to a private school at a cost of $800. Effective in September of 1952, defendant terminated sending the child to private school and started sending her to public school. Automobile installment payments of $88.75 a month on an original loan of $2,662 have been paid up to the time of the trial. In November and December of 1951 defendant paid medical expenses in excess of $1,700.

Appellant contends that alimony and support money received from a former husband can not be considered in connection with the daughter's ability to support her mother and that the evidence is insufficient to show that she had the ability to contribute to the support of her mother in the sum of $75 a month for June, July and August of 1951.

It is our view that the source of income has no relation to a child's duty to support an indigent parent. This duty arises from § 206 of the Civil Code and is based on ability, not necessarily on income. In the basic law, as stated in § 206 of the Civil Code, there is no reference to income and the duty of the child is based solely on the extent of ability.

Section 2181 of the Welfare and Institutions Code applies the responsibility fixed by the Civil Code to adult children of old age security recipients and § 2224 of the same code sets out the procedure to be followed by a county to recover from a proper responsible relative who has the ability to contribute. See Garcia v. Superior Court, 45 Cal.App.2d 31, 113 P.2d 470; Kelley v. State Board of Social Welfare, 82 Cal.App.2d 627, 186 P.2d 429.

Section 2224 of the Welfare and Institutions Code gives a right of action to the county if the person receiving aid has within the state a spouse or adult child pecuniarily able to support him. Upon the direction of the designated authorities, recovery may be had of such portion of the aid advanced as the relative is able to pay. Los Angeles County v. La Fuente, 20 Cal.2d 870, 129 P.2d 378.

[1, 2] This present action was brought pursuant to § 2224 of the Welfare and Institutions Code. As we have already stated, the question of pecuniary ability to pay is the deciding factor of responsibility. In our opinion the evidence before the trial court was ample to support the findings of fact and conclusions of law of the court.

Appellant relies on the New York case of Application of Dunaway, 174 Misc. 735, 22 N.Y.S.2d 69. That case is not here in point. There the parties were still husband and wife and the question determined under the New York law was whether alimony was income within the meaning of their Public Welfare Law. The question of ability to support was not there considered and no statute such as our § 206 of the Civil Code was involved.

[3] We conclude that the evidence before the trial court supports its finding that appellant had the ability to contribute to the support of her mother in the amount of $75 a month for June, July and August, 1951. Appellant's contention that loans made by her, sending her child to a private school and buying a late model car, created a deficit and showed that she did not have ability to support her mother, are without merit. A person can not relieve himself of responsibility under the statute merely by spending all of his income and by making loans. It is sufficient to fasten responsibility if the evidence discloses ability to contribute to the support of the parent.

In view of the foregoing we find no prejudicial error in the record and the judgment of the trial court under the law and evidence must be affirmed.

Judgment affirmed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I dissent. This case is not as simple as the opinion of this court would make it appear. The testimony shows without contradiction that the former husband of the defendant and appellant is required by the divorce decree to pay to appellant for her support and that of their minor child an amount which varies with the ex-husband's earnings. The court found that during the period of June, July and August, 1951 (the three months in which the payments were made by the respondent county to appellant's mother) appellant had a monthly income of approximately $660 as support for herself and the minor child consisting solely of alimony, and support and maintenance payments made to appellant pursuant to the decree of divorce. The court further found that with this income appellant was purchasing a home, a 1950 Chrysler automobile, sending her child to a private school, employing a gardener at $20 per month, and during this same period she accumulated surplus money in the amount of $1,400 which she loaned to her ex-husband on a three-year note.

The finding that she accumulated the $1,400 during the three-month period is not supported by the evidence. It is obvious that with her scale of living she did not save $1,400 out of $1,980 in three months.

The critical question is whether the fact that she had accumulated $1,400 out of the alimony and support payments made by her ex-husband of which she was able to lend him $1,292.12 on September 1, 1951 (the balance had been lent to him previously) supports the court's finding that in June, July and August 1951 she had the ability to pay $75 per month for the support of her mother. Admittedly she had not quite enough money at the time of trial to pay her anticipated income tax and there is no evidence that after lending her ex-husband the $1,292.12 on September 1, 1951 she had any balance available for her mother's support.

In awarding alimony and support money the divorce court must consider the needs of the wife and child and the ability of the husband to pay. Section 139, Civ.Code; Bowman v. Bowman, 29 Cal.2d 808, 811, 178 P.2d 751, 170 A.L.R. 246. The divorced husband may be compelled to pay for the reasonable support of his divorced wife and child, but he is under no legal duty to support his divorced wife's mother. No such duty is cast on a husband even while the marriage relation continues. Grace v. Carpenter, 42 Cal.App.2d 301, 108 P.2d 701.

It seems equally clear that the divorced wife is legally entitled to expend for those purposes the entire amount awarded her for the support of herself and her minor child. If she is compelled by another court to get along on less so as to contribute to the support of her mother not only is the court which compels her to do so redetermining the question of the amount reasonably necessary for her and her child's support and thereby, *pro tanto*, setting aside the judicial determination of the divorce court that such amounts are reasonably necessary for her support and that of her child, but her ex-husband is by indirection being compelled to contribute to the support of his ex-wife's mother, something that the law cannot compel him to do.

This brings me back to the $1,292.12 which appellant had accumulated and was able to lend her former husband on September 1, 1951. Appellant testified that the former husband's payments under the divorce decree varied with his income and that there were times when he received no income because he is a free lance writer and not constantly working. This was not contradicted in any way. The accumulation of so small an amount as less than $1,300 against such a contingency cannot be held to be unreasonable and it must still be regarded as earmarked for the appellant's and her child's support. Furthermore the $1,292.12 was lent to the ex-husband to enable him to pay the premiums on $38,000 of insurance on his life with their child as the beneficiary. The payments were required of the husband by the divorce decree partly for the maintenance and support of the child. If he dies those payments will cease entirely. $38,000 invested at 4%, which is a high yield in these days for a safe investment, would only bring an annual income of $1,520 per year. As a prudent mother appellant cannot be criticized for an expenditure to secure this amount of protection for her child in the event of the father's death.

It is clear that one court in one decree could not legally compel appellant's ex-husband to support her mother. We are now holding that two courts in two decrees are doing what one court in one decree cannot do. The next logical step would be for some other court to find that the appellant has the ability to support her mother in the future and thus compel her ex-husband to support his ex-wife's mother indefinitely.

On the whole case I am satisfied that the evidence does not support the judgment. The only decided case which at all touches this question supports this conclusion. Application of Dunaway, 174 Misc. 735, 22 N.Y.S.2d 69.

We need not determine in this case whether an unreasonably large accumulation of money or property from past alimony and support payments would render an ex-wife liable for her mother's support. A prudent accumulation, sufficient to meet only a few months' future living expenses or some unexpected contingency (e. g., the appellant testified that her child had had an appendectomy and there was still danger of adhesions) should not be held to do so.

SANTA CLARA COUNTY
v.
HAYES CO.*
No. 15741.

District Court of Appeal, First District, Division 1, California.
March 18, 1954.

Rehearing Denied April 16, 1954.
Hearing Granted May 11, 1954.

Action by county against plaintiff who negligently published in its newspaper the contents of a proposed county charter, with result that the charter was declared invalid, to recover resultant damages. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., entered judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Bray, J., held that in view of fact that the only way the validity of a county charter, in connection with which defendant had negligently printed publications of proposed charter in its newspaper in such manner that portions thereof were transposed could be attacked was by quo warranto after approval by legislature to which charter was certified as last legislative step following publication, limitations period for commencement of action against plaintiff for damages resulting from the negligent publication did not commence to run until Supreme Court decision holding charter invalid because of such negligent publication, which was the first time the fact of any damages could be ascertained.

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* Subsequent opinion 275 P.2d 456.

Judgment reversed as to count one, and affirmed as to other two counts.

1. Limitation of Actions ⚷**24(2)**

A bill for prior publication of proposed county charter was not an "instrument in writing" within contemplation of statute requiring an action upon any obligation or liability founded upon an instrument in writing to be brought within four years, since it is required that the obligation for which suit is brought be founded upon the written instrument itself. Code Civ.Proc. § 337.

See publication Words and Phrases, for other judicial constructions and definitions of "Instrument in Writing".

2. Limitation of Actions ⚷**46(6)**

In view of fact that the only way the validity of a county charter, in connection with which defendant had negligently printed publications of proposed charter in its newspaper in such manner that portions thereof were transposed, could be attacked was by quo warranto after approval by legislature to which charter was certified as last legislative step following publication, limitations period for commencement of action against plaintiff for damages resulting from the negligent publication did not commence to run until Supreme Court decision holding charter invalid because of such negligent publication, which was the first time the fact of any damages could be ascertained. Code Civ.Proc. §§ 339, subd. 1, 343.

3. Limitation of Actions ⚷**104½**

The running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights.

Howard W. Campen, County Counsel, Santa Clara County, Donald K. Currlin, Asst. County Counsel, San Jose, for appellant.

Campbell, Custer, Warburton & Britton, Edwin J. Owens, San Jose, of counsel, for respondent.

BRAY, Justice.

After demurrer sustained to its first amended complaint, plaintiff elected not to amend. From a judgment of dismissal because of failure to amend, plaintiff appeals.

Question Presented.

Is the action barred by section 339, subdivision 1, Code of Civil Procedure?

Record.

The amended complaint contains three counts. All three counts allege that in connection with statutory proceedings brought to adopt a charter form of government, defendant orally agreed with plaintiff to publish in its newspaper for the time prescribed by law, the contents of a proposed county charter; that the publications were so carelessly and negligently printed as to cause a transposition of certain sections of the charter, which transposition was held in People by Howser ex rel. Levin v. Santa Clara County, 37 Cal.2d 335, 231 P.2d 826, to invalidate the entire charter adoption proceedings. The county, prior to this decision, had concluded the proceedings and had been acting under the invalid charter. The complaint then asked for damages for certain out of pocket costs incurred in said charter proceedings. Count 2 attempted to set up a cause of action upon a written contract, based upon a bill for the cost of publishing the transposed charter rendered by defendant to plaintiff subsequent to the completion of the erroneous publication. Count 3 alleged certain matters by way of estoppel of defendant to raise the statute of limitations. Defendant demurrer generally and specifically, including setting up the bar of section 339, subdivision 1.

Count 2—Written Instrument?

[1] This count is based upon the contention that the bill presented to plaintiff by defendant for printing the charter is the "instrument in writing" referred to in section 337 of the Code of Civil Procedure which allows four years to bring "An ac-

tion upon any * * * obligation or liability founded upon an instrument in writing * * *." In September, 1948, the oral contract to publish was made. The charter was published ten consecutive days from September 16th to 25th. The bill for such publication was rendered September 30th. It is a unique conception that a bill for services previously performed under an oral agreement constitutes the obligation of the person rendering that service. The section requires that the obligation for which suit is brought be *founded* upon the written instrument. While a bill is a written instrument it is obvious that the creditor's obligation to perform the services theretofore rendered is not founded upon the bill thereafter presented for those services. Count 2 did not state a cause of action for an obligation or liability founded on an instrument in writing. Hence the demurrer to this count was properly sustained.

Count 1.

The complaint alleges that plaintiff discovered the publication defects about November 10, 1948. The suit was not filed until August 31, 1951, more than the two years permitted by section 339, subdivision 1, for an action on a contract, obligation or liability not founded on an instrument in writing. To avoid the application of this section plaintiff makes two contentions: (1) that defendant negligently breached its duty under the oral contract and therefore this is a tort action and the applicable statute of limitations is section 343, "An action for relief not hereinbefore provided for * * * four years"; (2) that if section 339, subdivision 1, be applicable to this tort action, nevertheless plaintiff's cause of action did not accrue until May 28, 1951, the date of the decision in People by Howser ex rel. Levin v. Santa Clara County, supra, 37 Cal.2d 335, 231 P.2d 826, as it is claimed plaintiff was legally unable to bring suit until that time.

If plaintiff's contention that it was under a legal prohibition to sue prior to the decision of the Supreme Court be valid, then it becomes unnecessary to determine whether the cause of action sounds in tort or contract or whether section 343 applies. The action was filed within two years of that decision, and if the cause of action did not accrue prior thereto, section 339, subdivision 1 would not bar it.

The complaint shows that all the proceedings for the adoption of the charter up to and including the election took place before plaintiff discovered the defective publication. In Santa Clara County v. Superior Court, 33 Cal.2d 552, 203 P.2d 1, it was held that as the only step left in completion of the legislative process was the certification of the charter by plaintiff to the Legislature for its approval or rejection, the courts had no power to interfere with that process. This left the matter to await the action of the Legislature and if it approved the charter (as it did), the only way the validity of the charter could be attacked was by quo warranto. See Taylor v. Cole, 201 Cal. 327, 257 P. 40; American Distilling Co. v. City Council of City of Sausalito, 34 Cal.2d 660, 213 P.2d 704, 18 A.L.R.2d 1247.

Barnes v. City of Kirksville, 1915, 266 Mo. 270, 180 S.W. 545, 546, cited by defendant, was an action for salary by a person who claimed to have been illegally removed from the office of city marshal after the adoption by the voters of the city of an "alternative form of government". The only question involved was "the constitutional validity of the act empowering respondent to terminate appellant's term of office." 180 S.W. at page 546. In holding that that question could properly be determined in that action, the court said, 180 S. W. at page 546: "Before passing on the objections of appellant to this enabling act, it is well to note that none of the objections involved a disincorporation of defendant as a municipal body, nor its right to exist as a city of the third class; and hence we are not precluded from considering such objections by the rule that the corporate existence of a municipal corporation can only be attacked by the state through its proper officers." Defendant contends that in our case, Santa Clara County remained a county government even though without the charter form and hence the ruling in the Barnes case would apply to a collateral attack. If the Barnes case so holds it is contrary to the California rule as set forth in the above mentioned cases and in Santa Clara County v. Superior Court, supra, 33 Cal.2d 552, 203 P.2d 1. In the latter case, even though as claimed by defendant, the very irregularity later held void by the Supreme Court appeared upon the face of the charter adoption proceedings, it was flatly held that the only method of attacking those proceedings was by quo warranto.

The charter was filed with the Secretary of State after adoption by the Legislature on June 15, 1949, St.1949, p. 3294. It was recorded in the County Recorder's office of Santa Clara and became effective on July 1, 1949. Thus, the effect of the error in publication could not be determined by any one, including plaintiff, until at least that date. Obviously, had plaintiff theretofore attempted to sue defendant for the incorrect publication it would have been met with the absolute defense that no damage had occurred and the further contention (as was made by defendant prior to the Supreme Court decision) that the error did not invalidate the charter adoption proceedings.

But the suit was not brought within two years of the effective date of the statute. This brings us to the question of whether the starting of the running of the statute was delayed until the Supreme Court decision. Here again had suit been brought prior to that time, the defense would have been that no damage had occurred, that the error did not invalidate the proceedings, as this question could only be determined by quo warranto.

Defendant contends that the language in People v. City of San Buenaventura, 213 Cal. 637, 3 P.2d 3, 5—"As it appears on the face of the Assembly concurrent resolution approving the charter that one of the essential steps required by the Constitution * * * was not taken * * * we are compelled to hold that the freeholders' charter of San Buenaventura * * *" was not legally adopted,—justifies its claim that the validity of the charter in our case could have been collaterally attacked at any time. That language, however, does not justify such conclusion. First, that was a quo warranto proceeding and not a collateral attack. Secondly, that language was used because of the rule that a legislative resolution adopting a freeholders' charter is conclusive as to facts recited in the preamble, to show that the very facts recited showed noncompliance with the law and hence the resolution could not be conclusive against the contestants. It was not a holding that if irregularities appear on the face of the legislative proceedings the adoption of a charter may be collaterally attacked. It is interesting to note on the question of whether a fatal irregularity appeared on the face of the proceeding that in the quo warranto proceeding of People by Howser ex rel. Levin v. Santa Clara County, supra, 37 Cal. 2d 335, 231 P.2d 826, three of the seven justices of the Supreme Court did not think the irregularity was fatal.

Defendant contends that plaintiff could have tested the error by itself applying to the attorney general to bring such a proceeding on its relation. The county at all times, as did defendant, took the position that the proceedings were regular, the error immaterial. It is difficult to understand how the county officials could take any other position, in view of the fact that the people of the county had passed the charter at the election. It was their duty to uphold the charter, if possible. But assuming they should have applied to the attorney general for a writ of quo warranto, the determination of the regularity of the proceedings would not have been obtained any sooner than it was by the quo warranto proceeding initiated by Levin, who on August 6, 1949, obtained a writ of quo warranto. Thus, it becomes immaterial that the county, if it could, did not start the action. The final determination of the action would have been approximately the same. As this suit was filed approximately three months after the date of the decision (less than that from the date when the decision became final) there was considerable leeway if the statute of limitations starts running from the decision.

In Miller v. Dunn, 72 Cal. 462, at page 469, 14 P. 27, at page 30, it was held: "There is at least an exception, viz., that an act duly passed or approved has the force of law to protect citizens dealing with public officers under its provisions up to the time that it is declared unconstitutional."

In our case, until determined otherwise by quo warranto, this principle of law would have given defendant a complete defense in an action brought by plaintiff against it. In Archer v. Edwards, 19 Cal.App.2d 253, 65 P.2d 115, the plaintiff purchased from defendant a promissory note secured by a deed of trust, which, in turn, had been assigned to the latter. The maker of the deed of trust served notice of rescission on all parties dealing with the deed of trust and then brought a quiet title action against them in which it was held that the deed of trust was void. Thereafter plaintiff sued defendant on a common count for the money paid for the note and deed of trust. Defendant raised the bar of the statute of limitations. The court held that the statute was tolled by the time taken in the trial court in the quiet title action together with the time taken by the Supreme Court, and that the statute did not begin to run until the date the Supreme Court decision became final. (It pointed out that until that time Archer had a lien by the deed of trust.) That situation is analogous to the one in our case.

[2, 3] Lattin v. Gillette, 95 Cal. 317, 30 P. 545, dealt with an entirely different situation. There, in an action brought against title searchers for error in a title certificate, the court held that the statute of limitations ran from the date of the certificate and not from either the date of discovery of the error or the date of the decision in a superior court action brought by the holders of an undivided one-half interest overlooked by the searchers. Had the error been discovered, suit could have been brought immediately for damages and as the error was shown of record the court in that action could have determined its effect. As said in Southern California Enterprises v. D. N. & E. Walter & Co., 78 Cal.App.2d 750, 178 P.2d 785, concerning the Lattin case, "* * * the incorrectness of the statements in the certificate could have been discovered by an examination of the public records at any time on and after the date of the certificate." 78 Cal.App.2d at pages 756–757, 178 P.2d at page 789. Whereas in our case the effect of the error could not have been determined in a damage suit. That, too, is the difference between the situation in the Archer and the Lattin cases, supra. In the Archer case, the invalidity of the deed of trust did not appear of record and hence could not be determined in the damage action. It must be remembered that in our case it is not a situation where the *amount* of the damage could not be ascertained prior to the Supreme Court decision, but the *fact of any damage at all,* which could not be ascertained. Such a situation must necessarily toll the statute or else plaintiff would be deprived of any right of action or redress whatever. "It is well recognized that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights." Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 431, 116 P.2d 37, 39, 136 A.L.R. 800.

Count 3.

Inasmuch as count 3 is the same as count 1 except as to allegations as to certain facts claimed to estop defendant from raising the statute of limitations, and inasmuch as we have hereinbefore shown that the statute is not applicable, no additional cause of action appears in this count and hence the demurrer to it was properly sustained.

The demurrer was properly sustained as to counts 2 and 3, but improperly sustained as to count 1. We find no ambiguity, uncertainty or unintelligibility in that count. The judgment is reversed as to count 1, and affirmed as to the other two counts. Plaintiff will recover costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

124 Cal.App.2d 144

CHUCK et al. v. ALVES et al.

Civ. 15701.

District Court of Appeal, First District, Division 1, California.

March 25, 1954.

Hearing Denied May 19, 1954.

Action by riparian landowners who charged that defendants, by increasing size of pipe through which waters of creek were diverted at a point above plaintiffs' lands, diverted more waters than they were entitled to divert under their water right. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Finley, J., pro tem., held that evidence sustained finding that the size and number of outlets or risers, through which water was taken from pipeline, had not been changed, and hence, that no more water was taken from larger pipe than was taken from smaller.

Judgment affirmed.

1. Appeal and Error ⚷989, 1010(1)

Where point of insufficiency of evidence is at issue, power of reviewing court begins and ends with determination as to whether there is any substantial evidence in record to support questioned finding, and if there is, reviewing court cannot substitute its conclusion for that of trial court, even though it might feel that if it had been the trier of fact it would have arrived at a different conclusion.

2. Evidence ⚷588

Evidence contrary to immutable physical laws lacks any substantiality whatsoever and must be disregarded.

3. Waters and Water Courses ⚷152(8)

In action by riparian landowners who charged that defendants, by increasing size of pipe through which waters of creek were diverted at a point above plaintiffs' land, diverted more waters than they were entitled to divert under their water right, evidence sustained finding that the size and number of outlets or risers, through which the water was taken from pipeline, had not been changed, and hence, that no more water was taken from the larger pipe than was taken from the smaller.

◆

Bohnett, Hill, Cottrell & Bohnett, L. D. Bohnett, San Francisco, for appellants.

John H. Machado, San Jose, for respondents.

FINLEY, Justice pro tem.

This action involves a dispute over water rights. Judgment was for defendants, the respondents here.

Appellants are riparian land owners along Stevens Creek in Santa Clara County. This stream rises in the Santa Cruz mountains and flows in a general northerly direction across Santa Clara Valley and empties into San Francisco Bay.

Respondents divert water from Stevens Creek at a point above the holdings of appellants and carry the water so diverted through a pipeline for a distance of over two miles to irrigate their own and other lands lying along the pipeline. Their water right dates back to an appropriation made by S. F. Lieb in the year 1894, at which time Lieb constructed a dam across the stream bed and diverted water through a pipeline which was twelve inches in diameter for the first two thousand feet, and eleven inches in diameter for its remaining length of approximately two miles. In the year 1936 the heirs of Lieb, who had inherited the water right and pipeline, constructed a new 16 inch line alongside the old at the same depth and on the same grade as the original. No change was made in the diversion works excepting that the box through which the diverted water passes from the stream to the pipeline was slightly extended. After construction of the new line the old pipeline was abandoned.

According to the statement in appellants' opening brief, the only fact in dispute is "whether respondents and their predecessors in interest have taken more water through the 16-inch pipe than they did through the 12–11 inch pipe * * *". The trial court found that they had not and that 1400 gallons per minute "has been used by defendants and their predecessors in interest since and prior to 1936 * * *".

Appellants claim that this finding is not supported by the evidence, and that it is not only "contrary to the overwhelming weight of the evidence disclosed by the record, but is absurd on its face."

After defining this single issue in their opening brief, respondents discuss at some length the question whether, after passage of the Water Commission Act in California, a water right may be gained through adverse use. This point we do not consider to be relevant under the circumstances here. If the finding of the trial court regarding the 1400 gallons per minute taken before and after 1936 is supported by the evidence, then the legal effect of the judgment is to confirm in respondents the Lieb appropriative right at 1400 gallons per minute and that is all. The effect would not be to engraft upon it an additional prescriptive right because, assuming prescriptive rights are still possible of acquisition since passage of the Water Commission Act, the court would have had to find an enlarged use for the prescriptive period over and above the Lieb appropriative right to confirm in respondents something in addition to it. This the trial court did not do. By stipulation at the beginning of the trial, appellants admitted the validity of the Lieb appropriative right and, from all that appears, do not question the 1400 gallon per minute figure in connection with this right. Appellants' point apparently is that more than 1400 gallons per minute have been used since 1936, and that the evidence is insufficient to support the finding that *only* 1400 gallons per minute have been and are being taken from the stream since that date.

[1] As has been held so many times where the point of insufficiency of the evidence is at issue, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence in the record to support the questioned finding. If there is, the appellate court cannot substitute its conclusion for that of the trial court, even though it might feel that if it had been the trier of fact it would have arrived at a different conclusion. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Estate of Meister, 77 Cal.App.2d 487, 175 P.2d 574; Estate of Teel, 25 Cal.2d 520, 154 P.2d 384; Dandini v. Dandini, 82 Cal.App.2d 263, 186 P.2d 41.

[2] It is true, of course, if it appears without question that a finding by a trial court is contrary to immutable physical laws, any evidence to the contrary would lack any substantiality whatsoever and would have to be disregarded. (10 Cal.Jur. 1170; Neilson v. Houle, 200 Cal. 726, 254 P. 891; Tobola v. Wholey, 75 Cal.App.2d 351, 170 P.2d 952; Ace Realty Co. v. Friedman, 106 Cal.App.2d 805, 236 P.2d 174. Appellants urge that this rule applies here; that because the new pipeline is larger than the old and on the same grade and is kept full, a finding that more water was not being carried through it would be contrary to the immutable laws of physics and absurd on its face. But this is not necessarily true for other factors enter into such a determination which have apparently not been considered by appellants.

[3] It is without question a law of physics that under the same conditions, and where the flow is unobstructed and with sufficient water to fill both pipes to their capacity, a larger pipe will carry and deliver more water than a smaller one. But unless we are considering unobstructed flow and water in sufficient quantity to keep both pipes supplied to their limit of carrying capacity, other factors enter. If only 1400 gallons of water per minute are fed into a pipe no more than that amount will flow out of it, no matter how large the pipe or how small, so long as it is large enough to carry 1400 gallons per minute. Taking two pipelines side by side of the sizes involved here, if 1400 gallons per minute are fed into each pipe and through valves but 100 gallons per minute are allowed to flow out of each, then before long both pipes would become full but each pipe would only be delivering 100 gallons per minute at the outlet. Appellants have interpreted a witness' testimony that the large pipe was "kept full" to mean that "respondents diverted water to the full capacity of the pipeline in use," which is erroneous. The line could have been "kept full" without a single drop of water being

taken out at delivery points, but if water was being diverted "to the full capacity of the pipe line" this would mean that all the water that the line could possibly carry was being diverted and allowed to flow through it without obstruction. The two are obviously quite different. The pipe would be "kept full" in both cases but in the instance first mentioned there would be no flow at all, while in the second there would be considerable.

We see then that the size of the pipe taken alone is not a complete index to the amount of water diverted by respondents. For all that has been called to our attention or that our review of the transcript discloses, there is no evidence of any measuring device at the diversion point which would restrict the flow of the creek into the pipeline. Apparently the waters from the creek drop through a screen into a pit or gallery and thence flow directly into the pipeline. The screen will permit the passage of more water than the pipe will carry so the limiting factor as to the quantity of water that could be diverted, if available for diversion, would be the unobstructed flow capacity of the pipeline. It is obvious then that if sufficient water were available a good deal more water could be carried through the 16-inch line than the old 12-11 inch line. Approximately two and one-half times more according to an engineer who testified. But according to substantial testimony and within the limits of the amount of water actually flowing in Stevens Creek, apparently the factor limiting the amount that has actually been used by respondents and their predecessors is the size and number of outlets or risers along the pipeline through which the water has been and is taken from it.

There is substantial testimony in the record that these have not been changed; that they are the same since the new 16-inch line was laid as before, and that not more than 1400 gallons of water per minute have been taken from the line through these risers either before or after the new line was laid. Apparently the trial court believed this testimony and since, as we have shown, it is substantial and not at all inconsistent with any law of nature or physics, this court is bound by it. The 1400 gallons per minute is well within the amount of the original appropriation by S. F. Lieb. His notice called for 225 inches under a four-inch pressure, which would be roughly equivalent to 2020 gallons per minute.

It appears then that appellants have appealed from a judgment which did not purport to enlarge upon the original appropriative right. It merely defined and confirmed that right unto respondents insofar as it had been perfected and kept alive by beneficial uses. Regardless of the size of the pipeline respondents are entitled to use only 1400 gallons per minute of the waters of Stevens Creek and no more.

In view of our conclusion that no question of prescriptive rights is involved here, it will not be necessary to discuss the other points referred to by counsel in their briefs.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

PETERSON v. ROBISON.*

Civ. 15705.

District Court of Appeal, First District,
Division 2, California.

March 19, 1954.

Hearing Granted May 11, 1954.

False imprisonment action predicated upon citizen's arrest. The Superior Court, County of San Mateo, Edward L. Kellas, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Kaufman, J., held, inter alia, that the arrest, purportedly for hit and run involving property damage only, was invalid where alleged offense was not committed in presence of arresting person, and could not be validated on theory that arrest was proper because plaintiff allegedly was intoxicated in public place at time of arrest, where no complaint charging such intoxication was presented to magistrate.

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* Subsequent opinion 277 P.2d 19.

Affirmed.

Nourse, P. J., dissented.

1. False Imprisonment ⚿26, 30

In action against citizen for false imprisonment on charge of hit and run involving property damage only, wherein citizen contended that plaintiff's arrest was justified because plaintiff had been driving his automobile on public street while intoxicated in presence of police officer, evidence as to plaintiff's intoxication was material, in view of fact that if plaintiff at time of false arrest and imprisonment on hit and run charge was also legally under arrest and in custody because of drunkenness, the false arrest and imprisonment for hit and run would probably have caused only nominal damage. Vehicle Code, § 481.

2. Arrest ⚿64

Where alleged hit and run, involving property damage only, did not occur in presence of person making arrest therefor, arrest was illegal. Vehicle Code, § 481; Pen.Code, §§ 836, 837.

3. False Imprisonment ⚿8

Unreasonable delay in laying complaint, against person arrested without warrant, before magistrate, vitiates the arrest and makes the arresting party liable for false arrest and imprisonment. Pen. Code, § 849.

4. Torts ⚿22

Where two or more causes combine to produce single harmful result and are incapable of any logical division, each may be substantial factor in bringing about the harm, and if so, each may be charged with all of it.

5. Arrest ⚿68

Fact that person arrested is not informed as to ground for arrest does not vitiate the arrest. Pen.Code, § 841.

6. Arrest ⚿64

Arrest, purportedly made by citizen on charge of hit and run involving property damage only invalid because alleged offense did not occur in presence of arresting person, could not be validated on theory that arrest was made because person arrested was intoxicated at time of arrest in violation of ordinance, where no complaint for being intoxicated was filed with magistrate. Pen.Code, § 849.

7. False Imprisonment ⚿10

Alleged fact that citizen making arrest had acted under command of police department and had not asked police to arrest or imprison plaintiff and had not read form he signed but had only performed certain ritual at request of police to assist them in their arrest did not afford ground for arresting person's nonliability for false arrest and false imprisonment. Pen.Code, § 839.

8. False Imprisonment ⚿10, 14

Misunderstanding of the law, bad legal advice received, and acting under direction of others are no excuse for false arrest. Pen.Code, § 839.

9. Appeal and Error ⚿1004(1, 3)
Damages ⚿208(1)

The question of amount of damages is primarily for jury and for trial judge on motion for new trial.

10. False Imprisonment ⚿36

Evidence supported award of $700 for false imprisonment.

◆

Cosgriff, Carr, McClellan & Ingersoll, Burlingame, for appellant.

Roy W. Seagraves, Burlingame, for respondent.

KAUFMAN, Justice.

In an action for false imprisonment plaintiff had judgment for $200 special damages and $700 general damages (no exemplary damages). By consent, to avoid granting of a new trial, the total recovery was restricted to $700. Defendant appeals.

As the case turns mainly on by whom and for what cause Peterson was arrested or could be arrested, the facts must be stated in some detail. On the evening of July 20, 1951, plaintiff Peterson after having had four old fashioneds and dinner in a restaurant on Burlingame Avenue in

Burlingame in leaving with his car did not back up far enough and hit the car of defendant Robison parked nearby so that the Robison car was pushed on the sidewalk and over a parking meter. Peterson testified that he was not drunk and that he put a slip of paper with his name and address on the windshield of the Robison car before leaving. However, the witness Bowring, a bystander, was positive that Peterson did not put the slip there but that he gave the slip to the witness. Bowring added the license number and the make of the car. When Robison returned to his car Bowring gave him the slip and told him that it was the license number of the man who did it. He did not tell Robison that Peterson himself had written his name and address. Nobody saw a paper on the windshield.

Robison reported by telephone to the Burlingame police that an accident had happened to his car and a parking meter. Sergeant Todd, then in charge of the watch, testified that he received a report of a 481 California Vehicle Code (hit run involving property damage only) and detailed officer Watson to investigate. Watson gave Todd the description of Peterson's car and Todd gave to the main police station in Redwood City an all point radio bulletin for the car, which bulletin was broadcasted from Redwood City. The call was received by police officers Johnston and Bianchini of South San Francisco. They spotted the car and followed it. The car went much slower than the normal 55 miles and weaved a little over the white line between the fast and the slow lane. They stopped it. They told the driver that he was wanted for hit and run in Burlingame. They placed him under arrest for the Burlingame Police Department and so informed him. It was 9:43 p. m. when he was put under arrest. Bianchini took him in the police car to the South San Francisco Police Station and on the way informed the station of what they were doing and to notify the Burlingame police to pick the man up. Johnston drove the Peterson car which was impounded in South San Francisco. Both officers testified that Peterson was under the influence of liquor. His condition was bad enough to book him for 502 California Vehicle Code (driving under influence of liquor) but they did not book him for it and did not give him a sobreity test, because a more serious offense was committed in Burlingame and they did not want to harrass the man twice. At the station he was booked "en route to Burlingame 481 CVC" and searched.

In Burlingame Sergeant Todd received the communication and officer Watson then went to South San Francisco. He arrived at the police station when officer Bianchini was booking Peterson. Peterson was somewhat belligerent as to Watson. Bianchini had Watson sign the arrest log and turned Peterson over to him. The South San Francisco Arrest Report indicates that Peterson was released to Officer Watson at 9:57 p. m. Peterson testified that Watson picked him up at the South San Francisco station. When Peterson asked him what he was picking him up for, he told him on 481, hit run. Watson testified that he did not arrest Peterson. Watson suggested that Peterson come down to Burlingame to try an amicable agreement with the owners. Watson then took him to the Burlingame Police Station.

Watson had told the Robisons to come to the police station and they did so after having taken care of their car. When he received the communication from South San Francisco, Sergeant Todd told the Robisons that they had the man and that it would help the police if they made a citizen's arrest. He explained how a citizen's arrest was made. Robison asked why he should arrest the man, having no malice toward him, and Mrs. Robison asked whether they should not call their lawyer, but Todd said no, he knew how to handle this. It was unnecessary to bother the attorney at the late hour.

Todd also asked Mr. Robison to sign a printed form requesting assistance of the Burlingame police as to the citizen's arrest. There is a conflict in the evidence as to the time of the signing of the form although there is a stipulation as to the signing itself. The form contains a request to the police to assume custody and detention until a complaint is signed. Robison testified that he did not read the form before signing it at the instance of Sergeant Todd. All witnesses agree that Robison never orally asked that Peterson be arrested or locked up.

The actual citizen's arrest was made by Robison by laying his hand on Peterson's shoulder and saying "I arrest you in the name of the law." He did it only at the suggestion of the authorities and did not know specifically what he arrested him for. After the arrest was made Todd told Mr. and Mrs. Robison to leave; they (the police) would take care of the rest.

Peterson was then booked by Todd. The record states that he was arrested at 10:15 at South San Francisco, arresting Officer Watson; complainant Merritt Robison, charge "Sec. 1279 (In & About) 481 C.V.C." Officer Watson testified that section 1279 is a city ordinance and covers a person being intoxicated in a public place or in and about an automobile. Both he and Sargeant Todd testified that when Peterson was in the Burlingame Police Station he was under the influence of intoxicating liquor. Todd testified further that he had oral instruction from the Chief of Police not to release intoxicated persons until they sobered up. In the meantime they put them in the cell block. Peterson was placed in jail on the authority of Todd as in charge of the watch. His reason for jailing Peterson was that Peterson was intoxicated and therefore not admissible to bail. Before midnight when Todd went off duty he went to Peterson. Peterson was coming out of his intoxication. Todd asked him if he would like to be admitted to bail but Peterson did not want to. He was released the following morning by the day officers after $150 bail had been posted. It was Todd's understanding that the arrest by Robison was taking care of the 481 California Vehicle Code involving damage to Robison's car but that the police were taking care of the "1279 in an about". However no arrest by any officer for the 1279 was made; plaintiff was only booked for it. There was a hearing before a magistrate (in the Police Court) but no charge was there made for either offense. Robison was asked to sign a complaint but he refused. The case was dismissed on the record of the Burlingame police on July 31, 1951, for that reason. Todd would also have put Peterson in custody for being intoxicated if Robison had not made the arrest, but then the charge would have been 1279 in and about a car. He had Robison make and sign the citizen's arrest to get his cooperation in the prosecution of the 481 charge.

It must be noted that from the beginning plaintiff objected to the introduction of evidence as to anything that happened prior to the arrest by Mr. Robison. Defendant then amended his answer, which had consisted of denials only, so as to allege that the arrest was justified because plaintiff being intoxicated had been driving an automobile on the public street in the presence of the arresting officer. Nevertheless much prior matter was excluded; however, later the court decided to let such evidence go in "with the understanding that this entire line of testimony would be subject to a motion to strike in the event that no legal theory is established upon which to predicate it." Near the end of the trial plaintiff wished to introduce rebuttal evidence as to these prior events (intoxication, etc.) although he declared that he considered all evidence relating to matters prior to the arrest by Mr. Robison immaterial. He moved to strike it all out. If however it were not stricken he would need continuance to hear more rebuttal witnesses as to these points, especially witnesses to the fact that plaintiff was not drunk. It was then agreed with the court that if the court would rule that the whole line of evidence would *not* be excluded the court would grant a continuance. No continuance was granted and the record does not show any ruling as to the motion to strike.

[1] Appellant makes use of the evidence as to prior circumstances in his brief on appeal. However, respondent takes the position that the fact that no continuance was granted constitutes a striking of all such evidence by implication. It would seem that all such evidence was material and should not have been stricken. If

plaintiff at the time of a false arrest and imprisonment under 481 California Vehicle Code was also legally under arrest and in custody because of drunkenness the false arrest for hit-run would probably at most have caused nominal damage and at any rate all surrounding circumstances might be important with respect to exemplary damages claimed (but not granted).

[2, 3] It is indisputable that all offenses possibly involved are misdemeanors and that no warrant had issued. Under sections 836 and 837, Penal Code a legal arrest could therefore only be made by a peace officer or private person in whose presence one of the misdemeanors had been committed or attempted. The arrest for hit and run (481 California Vehicle Code) was therefore necessarily illegal as no part of it happened in the presence of either defendant or any officer. The South San Francisco officers could, if their testimony is believed, legally have arrested plaintiff for drunk driving but they expressly did not do so but arrested him only in behalf of the Burlingame Police for hit and run (481). Nobody in the Burlingame Police Office had been present when plaintiff was drunk in or about a car, and therefore nobody in Burlingame could legally make an arrest for this misdemeanor any more than for 481 California Vehicle Code. According to the testimony of Officer Watson, sec. 1279 of the Burlingame City Ordinance also covers a person being intoxicated in a public place, (the ordinance is not in the record) but all evidence as to the booking for 1279 relates to being drunk *in and about a car* and appellant's allegations in the amended answer were to the same effect. It must also be considered that section 849, Penal Code, reads: "When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint stating the charge against the person, must be laid before such magistrate." It has been held that where there is unreasonable delay in taking a person arrested without a warrant before a magistrate, the arresting party becomes a trespasser ab initio and liable for false arrest and imprisonment, Peckham v. Warner Bros. Pictures, Inc., 36 Cal.App.2d 214, 218, 97 P.2d 472. In our opinion the same rule applies to failure to lay a complaint before the magistrate, a requirement contained in the same section, therefore said failure would vitiate all arrests in this matter.

[4] Appellant contends first that he cannot be liable because plaintiff was deprived of his liberty by the arrest made in South San Francisco and even if appellant had not made the citizen's arrest, Todd would nevertheless have detained him in jail. Therefore appellant's acts were wholly ineffective to deprive respondent of his liberty. This reasoning can have some merit only if the other arrest under which respondent was detained was a valid arrest. If both the arrest by the police and by appellant were illegal, it would seem that all arresting parties would be equally liable. The rule must be the same as in negligence cases. Where two or more causes combine to produce a single harmful result, incapable of any logical division, each may be a substantial factor in bringing about the harm, and if so each may be charged with all of it. Prosser, Torts, p. 330; 19 Cal.Law Review 630 et seq. Appellant contends that the arrest was lawful because plaintiff Peterson was intoxicated in a public place, to wit, the Burlingame Police Office, in the presence of appellant (and of the police officers if any of them can be considered to have made any arrest at all in Burlingame). Respondent contends that he was not under arrest at all except for the citizen's arrest because Watson who, according to the booking by Todd, had arrested Peterson in South San Francisco denied that he had done so. Actually Peterson was arrested in South San Francisco by the two South San Francisco officers in behalf of the Burlingame Police Department and it seems that Peterson remained in custody when he was released by the South San Francisco Police to the Burlingame Police, although Watson in his testimony tries to keep away from any responsibility for false arrest. There is no doubt that if the arrest in South San Francisco is considered an

arrest for 481 California Vehicle Code, it is unlawful. Perhaps it could be said that although the arrest was intended to be made for 481 California Vehicle Code it was lawful because in the presence of the officers Peterson was guilty of drunk driving, 502 California Vehicle Code, for which they could have arrested him. But on that basis he could not have been sent to Burlingame when he wished to return to his home in San Francisco.

In Burlingame nobody, according to the evidence, had the intention to arrest respondent because he was drunk in the police station and the question is again whether the fact that they could have done so is a justification for the arrest. In People v. Young, 136 Cal.App. 699, 29 P.2d 440, police officers tried to arrest people who were forming a parade with banners emblematic of radical organizations, the police officers thinking that this violated a city ordinance against the display of emblems likely to provoke a riot or breach of the peace. The ordinance was held unconstitutional but the arrest nevertheless lawful because breach of the peace, fighting between the paraders and the public, was taking place in the presence of the officers. The court said: "It has been held that if a public offense has actually been committed in the presence of an officer, and he attempts to make an arrest, though at the time he mistakenly believes a different offense has been committed, he is justified in making the arrest." 136 Cal. App. at page 703, 29 P.2d at page 442. But see to the contrary 22 Am.Jur. 412; Annotation 64 A.L.R. 653.

[5, 6] The same reasoning might validate the arrest made by appellant in Burlingame provided the offense had been committed in his presence. The fact that respondent was not informed that he was arrested on that ground is without importance as section 841, Penal Code does not require notification of the cause of arrest where the person to be arrested is actually engaged in the commission of an offense. However, there remains the question mentioned before whether the arrest is not vitiated by the fact that no complaint for being drunk in a public place was ever filed. In our opinion the arrest was illegal for failure on the part of appellant to comply with section 849, Penal Code.

[7, 8] Appellant contends as another ground for his non-liability that he acted under the command of the Burlingame Police Department, that he never asked them to arrest or imprison plaintiff, that he did not read the form he signed and only performed a certain ritual at the request of the police to assist them in their arrest. This contention is without merit. The acts done by defendant were not of the character of assistance to police making an arrest, section 839, Penal Code. Neither did he give information only on which the officers acted illegally. He took active part. The cases cited by appellant as to persons giving information only or not taking part in such a manner as to be the cause of the arrest, or assisting an officer, are not in point. That the Robisons were aware that they were asked to do acts which might involve responsibility is shown by their wish to consult their attorney. Mr. Robison was not acting under duress. 22 C.J.S., Criminal Law, § 44, page 99. In such a case misunderstanding of the law, bad legal advice received, 22 C.J.S., Criminal Law, § 48, pages 114–115, and acting under direction of others are no excuse. 22 C.J.S., Criminal Law, § 39, page 96. Still less can it be considered an excuse that defendant signed the citizen's arrest form without reading it. If he had read it he would have received a clear warning from the words "a complaint *committed in my presence*" contained in it and from the request to the police "to assume custody and detention until such time as may be required by me to obtain a written and signed complaint."

It is finally argued that the damages granted are excessive. The trial judge after hearing the evidence made findings: 1. That plaintiff was compelled to pay $200 counsel fees to obtain his discharge; (finding III) 2. That plaintiff was injured in his good name and reputation, subjected to humiliation from the citizens of San Mateo County and among his friends and acquaintances (finding IV); 3. That by reason of his arrest and imprisonment a story appeared in the Burlingame Advance and plaintiff was injured irreparably with his employer and customers (finding V). The trial judge concluded from this that plaintiff had been damaged in the sum of $900. On motion for new trial he reduced this to $700.

Finding III is supported by plaintiff's testimony that when released on bail he was told to appear in court on Tuesday morning, that he hired an attorney who appeared with him on Tuesday at which time the charge was dismissed. There is no justification in the record for the statements that the attorney was hired to *prevent* an arrest or that when the attorney was employed the "hit and run" charge had been dismissed. The record is to the contrary.

Finding IV is supported by testimony that customers came into the store, brought up the subject of his arrest and left without making any purchases, "it was very embarrassing." Customers came in and asked him: "What's this I hear about you getting thrown in jail for hit and run?"

Finding V is supported by the evidence cited under Finding IV. Also by testimony that plaintiff's sales fell off in volume, while the business in which he was employed was better. Also his employer informed him that if anything like that happened again "I could consider myself finished."

[9] The question of the amount of damages is primarily for the jury and for the trial judge on motion for new trial. It is only by reweighing the evidence in this case that we can conclude that the judgment "is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment." Deevy v. Tassi, 21 Cal. 2d 109, 120–121, 130 P.2d 389, 396. The same case warns us at page 121 of 21 Cal. 2d, at page 396 of 130 P.2d that "in the cloistered detachment of our chambers, without view of the parties or their witnesses and in the absence of awards obviously disproportionate to the facts, we should not assume that we are better equipped than were the citizen-jurors (in this case the trial judge) * * * to appraise all those elements of damages entering into the case * * *."

[10] We cannot say as a matter of law that the evidence before the trial court does not justify the award as reduced by the trial court on the motion for a new trial.

In view of the foregoing, we conclude that the arrest of respondent by appellant was illegal and that there is no prejudicial error in the record.

Judgment affirmed.

DOOLING, J., concurs.

NOURSE, Presiding Justice.

I dissent.

This is a case of damages for "false imprisonment" which did not occur. Plaintiff was not imprisoned because of any act of the defendant. The pertinent facts are stated in the majority opinion from which I quote in part: "Peterson was then booked by Todd. The record states that he was arrested at 10:15 at South San Francisco, arresting Officer Watson; complainant Merritt Robison, charge 'Sec. 1279 (In & About) 481 C.V.C.' Officer Watson testified that section 1279 is a city ordinance and covers a person being intoxicated in a public place or in and about an automobile. Both he and Sergeant Todd testified that when Peterson was in the Burlingame Police Station he was under the influence of intoxicating liquor. Todd testified further that he had oral instruction from the Chief of Police not to release intoxicated persons until they sobered up. In the meantime they put them in the cell block. Peterson was placed in jail on the authority of Todd as in charge of the watch. His reason for jailing Peterson was that Peterson was intoxicated and therefore not admissible to bail. Before midnight when Todd went off duty he went to Peterson. Peterson was coming out of his intoxication. Todd asked him if he would like to be admitted to bail but Peterson did not want to."

Imprisonment on the "citizen's arrest" could not be made without a warrant. No warrant was issued, hence no damage from the "arrest", and no imprisonment resulted from the "citizen's arrest." Imprisonment for drunkenness was strictly in accord with the law since the plaintiff was intoxicated in the presence of the booking officer. All the officers who observed plaintiff at the time testified that he was then intoxicated. For that reason the South San Francisco police refused to let plaintiff drive his car and one of them took him in a police car to the Burlingame Station. The duty of the Burlingame police under such circumstances was to restrain the party until he became sober.

If the controversy over the admission of the evidence of plaintiff's intoxication implies that the trial court might have excluded it, such act would have been clear error. The undisputed evidence is that plaintiff was "booked" for intoxication. This booking constituted the only "false imprisonment", and it is on that act alone that the judgment for damages rest. But that imprisonment was the act of the police alone—the defendant herein did not suggest it.

Manifestly the citizen's arrest made by the defendant under order of the police caused no damage to the plaintiff. It was the imprisonment, and that only, upon which the cause of action, and the judgment, must rest. Though the complaint was one for "false arrest and imprisonment" the findings and judgment are based wholly on the issue of imprisonment. Plaintiff endeavored to show that his imprisonment was due to the false arrest, but all the evidence, both oral and documentary, was to the contrary. Plaintiff was imprisoned and restrained because he was drunk, and was told that he would be released when he became sober. If he had any case for damages it was against the Burlingame police who acted on their own volition in jailing him for "intoxication".

Furthermore the award of damages is excessive. The only actual damage proved was respondent's payment to his attorney of $200 to *prevent* an arrest, and to defend him against charges that had not been and never were filed. At that time the "hit and run" charge had been dismissed. What faced respondent then was the charge of drunken driving. With that charge appellant had nothing to do. When respondent's counsel succeeded in having him freed from the drunk driving charge it was a payment in relation to that charge only. The respondent remained through the night in the Burlingame jail of his own volition. He was offered his release, but refused. He did not have to pay counsel to obtain such release.

Four police officers who saw respondent's condition testified that he was intoxicated. He was not permitted to drive his car to the Burlingame Station for that reason. Manifestly his retention in the police station was for his own benefit, and through that act he suffered no injury. But if any injury could be implied, it did not come from the act of the appellant, but was confined solely to the acts of the Burlingame police in booking him and confining him for intoxication.

There is no sense at all in charging a private citizen with damages for reporting to the proper police officers that a drunken driver had crashed into his car on a public highway, when such charge is admittedly true and made without malice.

The rights of a private citizen in cases of this kind are well stated in the opinion of Justice Schauer, in Turner v. Mellon, 41 Cal.2d 45, 257 P.2d 15, 17, as follows: "We think it serves the public interest—and, hence, the line should be drawn here—that citizens who have been criminally wronged may, without fear of civil reprisal for an honest mistake, report to the police or public prosecutor the facts of the crime and in good faith, without malice, identify to the best of their ability to such public officers the perpetrator of the crime. Investigation and action from then on are the responsibility of the public employes who are skilled in that work and who are paid to perform it."

The judgments should be reversed.

123 Cal.App.2d 813

LAURSEN et ux.
v.
TIDEWATER ASSOCIATED OIL CO. et al.
LAURSEN
v.
TIDEWATER ASSOCIATED OIL CO. et al.

Civ. 19856.

District Court of Appeal, Second District,
Division 2, California.
March 15, 1954.

Action by motorist against drivers of two trucks for property damage and personal injuries sustained when vehicles collided. Owner of one truck filed cross-complaint for damage to truck. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment for truck drivers on original action, and for motorist on cross-complaint. Motorist appealed. The District Court of Appeal, Moore, P. J., held that testimony on rebuttal was material to issue in the case, and that objection to cross-examination on such testimony was properly overruled.

Judgment affirmed.

1. Automobiles 🔑243(1, 17)

In action for property damage and personal injuries sustained in automobile collision, the fact that there had been either a criminal or a civil proceeding based on the collision was not material to questions of negligence and contributory negligence.

2. Witnesses 🔑269(1), 270(1)

Legitimate cross-examination does not extend to matters improperly admitted on direct examination, and failure to object to improper questions on direct may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony.

3. Witnesses 🔑269(1)

Where question on direct examination is material to any element of the case, cross-examination thereon is proper. Code Civ.Proc. §§ 1854, 2048.

4. Witnesses 🔑269(1)

The fact that an inquiry on cross-examination may bring to light the criminal conduct of the witness does not render such cross-examination erroneous when it is relevant to the subject-matter of the direct examination. Code Civ.Proc. §§ 1854, 2048.

5. Witnesses 🔑275(5)

Testimony on direct examination that defendant had testified on a previous occasion in regard to same motor vehicle accident was material to issue of whether plaintiff had attempted to induce defendant to testify falsely by showing that plaintiff's conversation with defendant pertaining to defendant's testimony was occasioned by alleged false testimony given under oath at prior trial rather than by attempt to induce false testimony, and cross-examination on that subject was proper, though cross-examination disclosed that previous testimony occurred in criminal prosecution arising out of same accident. Code Civ.Proc. §§ 1854, 2048.

6. Appeal and Error 🔑231(3)

To preserve right to have question of admissibility of evidence considered on appeal, particular part of evidence objected to must be precisely designated at trial, and it must be stated specifically in what respect it is improper.

7. Appeal and Error 🔑231(3)

Where direct examination disclosed that defendant had testified in regard to same accident in a previous proceeding, and question on cross-examination, as to what proceeding that was, was objected to on ground that identification of the proceeding would be immaterial, it could not be argued for the first time on appeal that question was improper because entire matter of previous proceeding was immaterial.

8. Appeal and Error 🔑1067
Negligence 🔑138(2)

Instruction to jury permitting inference of negligence or untruthful testimony when there is evidence that one did look, but did not see that which was in plain sight, is applicable only where there is evidence to the effect that one did look but did not see, and where question of what was in plain sight was the conflict confronting jury, refusal of the instruction was not prejudicial.

9. Trial ⚬240, 260(8)

Instruction on "to look is to see" is within the knowledge of all jurors, and is argumentative, rather than a statement of law, and where jury has been adequately instructed as to duties of parties, failure to give such an instruction is not error.

◆

A. J. Blackman, Norman Dale Kull, Los Angeles, for appellant.

Betts, Ely & Loomis, Los Angeles, for Tidewater Associated and Frank J. Kintz.

Crider, Tilson & Ruppé, Los Angeles, for J. P. Rowen and Howard T. Kirsop.

MOORE, Presiding Justice.

Appellant's recovery was denied by a jury in his action for property damage and personal injuries resulting from a tri-vehicular collision on a public highway. His grounds of appeal are errors in the admission of certain testimony and in refusing to give a requested instruction.

About four o'clock in the afternoon while appellant was driving east on Anaheim-Telegraph Road in a small station wagon, he was followed by respondent Kintz at a distance of about 25 feet. The latter, as employee of the Tidewater Associated Oil Company, herein referred to as Tidewater, was driving a large flatbed truck. Both men were proceeding at approximately 20 miles per hour in the lane adjacent to the double white line in the center of the highway. Respondent Kirsop was traveling west on the same road in a small truck of respondent Rowen Electric Company and was in the pursuit of his employment. He, also, was in the lane adjoining the center stripes and, immediately preceding the accident, was moving at about 15 miles per hour. There is a conflict in the evidence as to how the accident occurred, but it is established that in a fleeting moment, the Rowen truck received some damage, the station wagon was wrecked and Mr. Laursen was so severely injured as to be incapacited for a time.

In response to appellant's demand against all respondents, respondent Rowen Electric Company entered a cross-complaint for damage to its truck. The court found for respondents on the original action, and for appellant on the cross-complaint.

According to appellant's version: he was slowing down because of the slower traffic ahead; Mr. Kintz failed to reduce his speed accordingly and "bumped" the rear of appellant's station wagon. Immediately thereafter Mr. Kirsop in the small truck swerved across the center line and "sideswiped" the station wagon which was again hit on the rear end by the Tidewater truck. According to respondents' evidence: appellant had a large piece of plyboard attached to the top of his vehicle and as he reached out of his window to touch the plyboard, his station wagon moved across the center line and struck Kirsop's truck back of its door. The station wagon bounced back into the eastbound lane and was then struck for the first time by the Tidewater truck.

During appellant's rebuttal he gave the following testimony on direct examination:

> "Q. Had he [Kirsop] testified on a previous occasion in regard to this accident? A. Yes."

[1, 2] Cross-examination of appellant elicited the fact that such previous testimony occurred when he had been the defendant in a criminal prosecution based on the facts above related. The result of the prosecution was not introduced. Appellant's counsel objected to the cross-examination on the ground that it was immaterial as to what the prior proceeding was, but the objection was overruled. Certainly the fact that there had been either a criminal or a civil proceeding based on the accident here in issue was not material to the questions of negligence and contributory negligence presented in the instant action. Moreover, legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct may not be taken advantage of on cross-examination to elicit im-

material or irrelevant testimony. The so-called "open the gates" argument is a popular fallacy. Dastagir v. Dastagir, 109 Cal.App.2d 809, 815, 241 P.2d 656; Agalianos v. American Central Insurance Co., 62 Cal.App. 349, 362, 217 P. 109.

[3, 4] This leads to the inquiry whether there was any other element of the case to which the question addressed to appellant on direct examination was material? If so, cross-examination on the facts stated was proper. Code Civ. Proc. §§ 1854, 2048. The fact that an inquiry on cross-examination may bring to light the criminal conduct of the witness does not render such cross-examination erroneous when it is relevant to the subject matter of the direct examination. People v. Bigelow, 104 Cal.App.2d 380, 387, 231 P.2d 881.

The question objected to appears to be the climax of a series of questions put by both sides for the purpose of impeachment and counter-impeachment of witnesses in regard to a conversation between appellant and respondent Kirsop. The first reference to the conversation was in the cross-examination of appellant:

> "Q. And do you recall what you said and what Mr. Kirsop said? A. I asked him why he had not told the truth in place of what he was telling. He said, 'I am going to tell the truth when we come into court again.'"

Then on direct examination, Mr. Kirsop testified as follows:

> "Q. And can you tell in substance what was said? A. Mr. Laursen asked me to be a witness for him against the Tidewater Oil Company.
>
> "Q. What did you say in response to that? A. I told him I can't be, because I didn't see the Tidewater Oil Company truck until after the accident.
>
> "Q. Was anything said about your being at fault in this accident at that time? A. He said I wasn't at fault.
>
> "Q. Was anything else said at that time? A. That's about all—well, he told me that he was pretty bad off financially.
>
> "Q. Did he say anything, what he would do if you would be a witness? A. Well, he said he would make it right for me."

The above testimony was substantially repeated by Mr. Kirsop on cross-examination by counsel for respondent Tidewater. In addition he testified as follows:

> "Q. Am I hearing you correctly: That he [Laursen] then said to you, 'Well, the Tidewater Associated can stand it,' or words to that effect? A. Words to that effect, yes."

In rebuttal, appellant amplified his previous testimony on the contents of the conversation:

> "Q. What was the occasion for going out there? A. It was my wife's idea. She want to go up there.
>
> "Q. Do you know what the purpose of going up there was? A. She want to go up there and see—ask him to tell the truth, because he was not telling the truth.
>
> "Q. Had he testified on a previous occasion in regard to this accident? A. Yes.
>
> "Q. And what was said by you and what was said by Mrs. Laursen, and what was said by Mr. Kirsop on this occasion? A. You mean out by his home?
>
> "Q. Yes, sir. A. We went out there asking him why he don't tell the truth—well, he was going to tell the truth, and when it came up for trial he was going to tell the truth, as he promised."

[5] This testimony on rebuttal was material to the issue of whether appellant had attempted to induce Mr. Kirsop to testify falsely in the present action by showing that the conversation was occasioned by the alleged false testimony given under oath in a prior trial rather than by any idea born in the mind of appellant to change the course of the present litigation through the means of purchased evidence. Since the testimony was material, the objection to cross-examination on it was properly overruled.

[6] Moreover, in order to preserve the right to have the question of admissibility of evidence considered on appeal, one must at the trial precisely designate the particular part of the evidence to which he objects and state specifically in what respect it is improper. Estate of Pierce, 32 Cal.2d 265, 273, 196 P.2d 1; People v. Agajanian, 97 Cal.App.2d 399, 405, 218 P.2d 114; Soares v. Ghisletta, 1 Cal.App.2d 402, 404, 36 P.2d 668.

[7] The question asked on cross-examination was, "What court proceeding was that?" The objection made at that time was: "It would be immaterial here what court proceeding it was." The court ruled that the question was proper cross-examination. On appeal, it is argued that the question was improper because it was cross-examination on an immaterial matter raised on direct examination, i. e., the fact that any prior proceeding had occurred. This objection was not mentioned in the trial and now comes too late.

[8] Appellant submitted an instruction, No. 140[1] from the Book of Approved Jury Instructions, Civil, which was refused. For the instruction to be applicable it is necessary that there be "evidence to the effect that one did look, but did not see that which was in plain sight." From the record it is manifest that Mr. Kintz, driver of the Tidewater truck following appellant, was looking ahead and that he saw appellant's truck. The conflict presented to the jury was—what was in plain sight—was appellant slowing down when he was hit by Kintz, or did appellant swerve across the center line, hit Kirsop and carom into Kintz's path? The instruction was not applicable to the issues presented and no prejudice resulted from its refusal.

[9] Futhermore, it is the rule that the instruction on "to look is to see" is a mere commonplace, within the knowledge of all the jurors, and is argumentative, rather than a statement of the law. A failure to give such an instruction is not error when the jury has been adequately instructed as to the duties of respondents. Cooper v. Smith, 209 Cal. 562, 566, 289 P. 614; Rickey v. Kardassakis, 110 Cal.App.2d 291, 295, 242 P.2d 384; Schwenger v. Gaither, 87 Cal.App.2d 913, 914, 198 P.2d 108.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

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123 Cal.App.2d 787

In re McSWEENEY'S ESTATE.

SWEENEY et al. v. WELTE et ux.

Civ. 15825.

District Court of Appeal, First District,
Division 1, California.
March 15, 1954.

Petition for final distribution. The Superior Court, San Mateo County, A. R. Cotton, J., confirmed order of referee settling account and heirs appealed. The District Court of Appeal, Peters, P. J., held that award of gross rentals on specifically devised realty to devisees, without deduction for moneys spent by executors for repairs, improvements, taxes, insurance, and for public utilities on such property, and charging of such expenses against residuary estate as expenses of administration, was improper.

Reversed with directions.

1. Wills 🔑736

Award of gross rentals on specifically devised realty to devisees, without deduction of money spent by executors for repairs, improvements, taxes, insurance, and for public utilities on such property, and charging of such expenses against residuary estate as expenses of administration, was improper.

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[1] B.A.J.I. No. 140: "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either some part of such evidence is untrue or the person was negligently inattentive."

2. Executors and Administrators ⚷292

Executors, who were devisees of specific real property, and who did not claim rent money on such property in their petition for partial distribution, and who did not list rent for distribution until final accounting, had not waived the right to any of rent money and were entitled to all the net rentals on final distribution.

3. Executors and Administrators ⚷292

When an executor is also a devisee, the law recognizes as distinct, his individual and offical capacities.

4. Executors and Administrators ⚷292

An executor, who is also a devisee, cannot use funds of the estate available to him in his official capacity for his individual needs.

5. Executors and Administrators ⚷104(3)

Where executors, who were also devisees, improperly used estate funds to pay attorneys' fees which were allowed by probate court, but which were for services rendered to executors, as devisees, inheritance taxes and litigation expenses not chargeable against estate, executors were chargeable with interest on such funds, although executors were entitled distribution of funds in excess of funds improperly expended. Civil Code, § 2262.

6. Executors and Administrators ⚷507(2)

Whether executors, who had improperly expended estate funds for their benefit as devisees on allowance of such claims by probate court, and who had not repaid funds to estate, were chargeable with compound or simple interest on such funds, was a question of fact for probate court. Civil Code, § 2262.

7. Executors and Administrators ⚷102

An executor's primary duty is to preserve and protect assets of estate until distribution, and he has no statutory duty to invest money belonging to the estate.

8. Executors and Administrators ⚷104(2)

Rule that an executor should deposit funds, held by him for long periods, in a savings bank in order to earn interest, is permissive and not mandatory.

9. Executors and Administrators ⚷104(2)

Refusal of probate court to assess executors for interest on funds, which belonged to estate, and which had been deposited by executors in non-interest paying commercial account and kept there for over six years, was within its discretion.

10. Judgment ⚷515

Where property, which had been listed in inventory of estate as estate property in 1946, and on which executors had paid the taxes and collected the rent, etc., to 1950, was adjudged property of another in quiet title action, and judgment had become final, heirs were entitled to show, on objections to petition for final distribution and to account, whether executors had been derelict in their duty to defend quiet title action, and whether the estate had lost property because of such dereliction of duty.

11. Judgment ⚷515

Heirs may go behind a judgment against estate to show that such judgment was secured by fraud or collusion on the part of the executors or administrators.

12. Executors and Administrators ⚷504(7)

Introduction of evidence by heirs, on objections to petition for final distribution, and to account, to show that estate had had a valid defense to quiet title action which had been determined against estate, was proper to establish executors' dereliction of duty to preserve and to protect the estate, and was not objectionable as an improper attempt to try title in the probate court.

13. Gifts ⚷49(1)

In proceedings for final distribution, wherein alleged donee, who had previously listed alleged gift as asset of estate, and who had previously asserted under oath that alleged gift belonged to estate, sought to claim gift from testator, finding that there had been an executed gift to alleged donee, was not supported by the evidence.

14. Gifts ⚷49(1)

When the claim of a gift is not asserted until after the death of the claimed donor, the burden is on the donee to show, by clear and satisfactory evidence, every element necessary to constitute a gift.

15. Gifts ⚷18(2)

When dominion and control over a gift is retained by the donor until his death, it becomes merely an unexecuted and unenforceable promise to make a future gift.

16. Executors and Administrators ⚷456(2)

Where award of attorneys' fees, which had been for services rendered to executors in their individual capacities as devisees, was reversed on appeal, and where executors had defended appeal in their capacity as executors, allowance of the costs of the appeal against the estate, was not an abuse of the probate court's discretion. Rules on Appeal, rule 26.

17. Executors and Administrators ⚷216(1)

Allowance of $450 for services of accountant, whose report covered years 1946–1952 and involved many transactions, and whose testimony displayed his complete knowledge of the financial affairs of the estate, was not excessive.

18. Executors and Administrators ⚷216(2)

Allowance of $750 attorneys' fees for extraordinary services, which had been mostly rendered in connection with sale of three parcels of real property belonging to the estate, was not an abuse of probate court's discretion.

19. Executors and Administrators ⚷497

Allowance of $750 to executors for extraordinary services, which included services rendered in sale of three parcels of real property belonging to the estate, and other services, was not an abuse of probate court's discretion.

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Edwin H. Williams, Donald B. Richardson, San Jose, for appellants.

Dolwig & Miller, South San Francisco, for respondents.

PETERS, Presiding Justice.

Daniel McSweeney died on February 22, 1946, leaving an estate valued at $53,197.92. His will disposed of only a portion of his property. In April of 1946, Alexander and Eleanor Welte, husband and wife, were appointed joint executors of the estate, and have so served ever since. On May 29, 1950, a decree of partial distribution was rendered, ordering distribution of property valued at $36,446.97, and awarding the attorneys for the executors $8,175 as fees for extraordinary services. The order allowing these fees was reversed. Estate of McSweeney, 107 Cal.App.2d 140, 236 P.2d 846. Two other appeals taken during the course of probate are not here relevant. They are to be found in Ryan v. Welte, 87 Cal.App.2d 888, 198 P.2d 351, and in the same volumes at pages 897 and 357 respectively.

The petition for final distribution was filed September 22, 1952. The heirs at law of the deceased filed objections to the petition and to the account. The probate court appointed a referee to hear the matters in controversy. The referee overruled all of the objections filed by the heirs. The probate court adopted the findings of the referee without change, and made its order settling the account, and allowing the attorneys and the executors, and their accountant, certain fees. The heirs at law appeal from this decree confirming the report of the referee and settling the account. The points raised will be considered separately.

Did the probate court improperly allow the gross rent from the specifically devised real property to be paid to the devisees?

[1] The referee and court found that $5,178.48 had been collected in rent on certain real property specifically devised to the executors; that $1,790.83 had been spent by the executors for repairs, improvements, taxes, insurance, and for public utilities on these properties, and that all these expenses were chargeable against the residuary estate as expenses of administration. Thus, the probate court awarded to the executors, as devisees, the gross rentals

collected, without deductions. This was clearly error. Estate of De Bernal, 165 Cal. 223, 131 P. 375; Estate of Coberly, 90 Cal. App.2d 46, 202 P.2d 306. Respondents frankly concede that this was error, and admit that they were only entitled to the net rentals. The parties are in dispute, however, over the amount that should be deducted because of this error. It is impossible from the account to tell the precise amount that should be deducted from the gross rentals. In view of the necessity of a reversal, for this and other errors, this matter can be clarified on the retrial.

Did the respondents waive their right to any part of the rent money?

[2] Appellants urge that the respondents have waived all claims to any part of the rent money, and are estopped from now claiming it, for the reason that in their petition for partial distribution filed May 29, 1950, the executors, who are also the devisees of the property involved, failed to claim the rent on this property that otherwise would have been due to them. Estate of Coberly, 90 Cal.App.2d 46, 202 P.2d 306, is cited in support of this contention. In that case the executor, who was also a specific devisee of a life interest in the realty, filed an accounting and petition for partial distribution in which the rent was listed as part of the residue. Then on final distribution the executor, as devisee, claimed all of the rent money. The court properly held that there had been a waiver of all rent accruing up until the time of partial distribution, but that there was no waiver as to rent subsequently accruing. The rule of that case is not here applicable. Here the rent was not mentioned at all in the petition for partial distribution. The rent was not listed for distribution until the final accounting. The basis of the Coberly rule is that the decree of partial distribution had finally allocated the accrued rents to the residue. Here there is no basis for a waiver. No distribution of the rents was made until final distribution. The executors, as devisees, are entitled to the net rentals.

Should the executors have been charged interest on certain sums of money?

The final account listed $11,383.34 for certain expenditures claimed to have been expended for estate purposes. The referee and probate court found that these items were not chargeable against the estate and should be refunded to the estate. All the parties to this appeal accept that finding. But the referee and probate court also found that on other claims of the executors $10,409.10 was due to them by way of distribution, and that this should be offset against the $11,383.34, leaving $974.24 to be paid to the estate by the executors.

The $11,383.34 includes $8,175 allowed by the probate court at the time of the hearing on the petition for partial distribution for attorneys' fees for extraordinary services.[1] This allowance was reversed on appeal on the ground that the services rendered were in fact rendered for respondents as devisees and not for them in their representative capacities, and so, of course, they were not a proper charge against the estate. Estate of McSweeney, 107 Cal.App.2d 140, 236 P.2d 846. The fee was paid over by respondents after the probate court had made its order but while the propriety of that order was being tested by the appeal. It was never repaid to the estate after the reversal. Appellants, citing section 2262 of the Civil Code, and Estate of Piercy, 168 Cal. 755, 145 P. 91; Estate of Guglielmi, 138 Cal.App. 80, 31 P.2d 1078; Estate of McCabe, 98 Cal.App.2d 503, 220 P.2d 614; and Estate of Prior, 111 Cal.App.2d 464, 244 P.2d 697, contend that the executors should be charged compound interest on the $11,383.34 from the date each portion of it was improperly expended.

Respondents contend that the above authorities are not here applicable because, although they improperly expended $11,383.34, they had other legitimate claims against the estate in the amount of $10,409.10. In addition, the executors were entitled to sums for ordinary and extraordinary services which, when added to the $10,409.10, exceeds the $11,383.34 improperly expended.

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[1] The balance consisted of inheritance taxes and litigation expenses paid for with estate funds but not chargeable against the estate.

Therefore, say respondents, the residuary heirs were not injured because the executors could have properly paid themselves sums in excess of those improperly expended. It is contended that to compel respondents, as executors, to pay interest on moneys in which the heirs had no lawful interest, when the executors were entitled to sums in excess of those unlawfully expended, would be to make the executors pay interest to themselves on money they legally owned.

[3, 4] These arguments are unsound. When an executor is also a devisee the law necessarily recognizes as distinct his individual and official capacities. So far as sums due him as devisee are concerned, he is in no better position than any other devisee. He is not entitled to use such sums until they are distributed to him in the manner provided by law. Of course, he cannot use funds of the estate available to him in his official capacity for his individual needs. If he does, under the authorities above cited, he is liable for the moneys thus used, and for interest thereon. If respondents' argument were correct it would give an executor who is a devisee an unfair advantage over other devisees. He would be entitled, before distribution, to use the money of the estate for his own benefit without liability for interest, a privilege denied other devisees. It is clear that the probate court should have required that the executors pay interest on the amounts unlawfully expended by them. Such interest payments, obviously, will become a part of the general assets of the estate. Thus, the executors will not be paying interest to themselves on money owing to themselves.

[5, 6] The problem as to whether this interest should be simple or compound is a matter for the trial court to determine under the facts on the retrial. All of the cases cited by appellants where compound interest was charged involved strict trustees, and involved deliberate misappropriations by the trustees. Here it would appear that the unlawful expenditures were negligent rather than willful. It will be noted that section 2262 of the Civil Code provides as to trustees who improperly fail to invest money, that compound interest shall be charged if the failure is willful, but that simple interest should be charged if the failure is found to be negligent. The same rule should be here applicable. This is a question of fact. On the retrial the probate court can ascertain the true facts and make appropriate findings.

Appellants also contend that respondents should be compelled to pay simple interest on cash belonging to the estate deposited by the executors in a non-interest paying commercial account and kept there by them for over six years, claiming that this was negligence under section 2262 of the Civil Code. Most of the period involved is before the date of the decree of partial distribution, because on that date most of the cash was distributed.

[7–9] The executor, in many respects, has the same duties and responsibilities as a trustee, but in some respects they differ. In Estate of Smith, 112 Cal.App. 680, 297 P. 927, the court pointed out that, unlike a strict trustee, an executor has no statutory duty to invest money belonging to the estate, it being his primary duty to preserve and protect the assets until distribution. The court recognized the rule that an executor should deposit funds, held by him for long periods, in a savings bank in order to earn interest. But the rule is permissive and not mandatory. Inasmuch as it is the primary duty of an executor to protect rather than to invest the funds in the estate, and in view of the facts here involved, it is our opinion that the probate court acted within its discretion in refusing to assess interest on these funds.

Did the executors properly account for the Loretta Koen property?

[10] The dispute here revolves around a parcel of real property referred to as the Loretta Koen property. From the inception of the probate until 1950 the executors treated this property as if it were estate property. The inventory filed in 1946 listed it as such with an appraised value of $2,500, and thereafter the executors paid the taxes, collected the rents, etc. In 1950, shortly after the appellants here had filed their objections to the petition for partial dis-

tribution, Loretta Koen brought an action to quiet her title to this property. Judgment was entered in that action quieting her title against the estate, which judgment has become final. That judgment was admitted into evidence in the instant case. Appellants sought to attack the accounting insofar as it did not list this property as property of the estate. The referee and the probate court were of the opinion that the judgment in the quiet title action was conclusive in this proceeding, that appellants were trying to attack the judgment collaterally, and were improperly attempting to try title in a probate proceeding. All evidence aimed at attacking the actions of the executors in the quiet title action was excluded. Appellants offered to prove that in the quiet title action the executors had not contested the suit but had entered into a stipulation waiving notice of trial, written findings and conclusions and notice of entry of judgment. Objections were also sustained to questions directed to respondents as to whether they knew that the deed from decedent to Loretta Koen had in fact never been delivered. Counsel for appellants offered to prove that the deed had not been delivered.

The evidence should have been admitted. The appellants were not attacking the quiet title decree as such. They were attacking the accounting proposed by the executors by trying to show that the executors had been derelict in their duty to preserve and to protect the estate by failing to defend the quiet title suit. If they can show that the estate lost property because of the derelictions of the executors, they should be permitted to do so.

[11, 12] The case of Jordan v. Clausen, 13 Cal.App.2d 16, 56 P.2d 240, demonstrates that, in a proper case, the heirs may go behind a judgment against the estate to show that such judgment was secured by fraud or collusion. While such holding was an alternative ground of the decision, it is well settled law that "where two independent reasons are given for a decision, neither one is to be considered mere *dictum,* since here is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court, and each is of equal validity." Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 650, 20 P.2d 940, 942. While that was not a proceeding in the probate court, and so does not answer the argument that such an attack is an improper attempt to try title in such court, the answer to that contention is that appellants are not attempting to try title at all but simply challenging the account. Respondents, in arguing to the contrary, are in effect contending that they can default or confess judgment in an action against the estate, even though the estate has a valid defense, and then set the judgment up not only in support of their accounting, but as conclusive evidence of its correctness. That is not the law. If appellants can show that, in fact, the estate had a valid defense to the quiet title action known to respondents which they failed or refused to make, they should be permitted to make such a showing. It was error to have excluded the proffered testimony.

Was the $1,000 found in the safe deposit box property of the estate?

After decedent's death $1,000 was found in his safe deposit box in the First National Bank of San Mateo County located in Redwood City. The executors deposited this in their names as executors. At all stages of the probate proceedings, up until the final accounting, this $1,000 was listed by the executors as an asset of the estate. Among other things, it was included in the inventory verified by the executors. The will of the decedent had left one-half of the money in two named South San Francisco banks to the executors in equal shares. There was nearly $7,000 on deposit in these two banks. But the $1,000 here involved was found in a bank located in Redwood City. Nevertheless, the executors, in the request for partial distribution, listed this money as part of the money specifically left to them to the extent of one-half, added it to the amounts found in the South San Francisco banks, and requested that one-half of the total be distributed to them in equal shares. This was erroneous because the $1,000 was clearly not part of the bequest of the South San Francisco bank accounts.

The respondents have abandoned, quite properly, the claim that any portion of the money was included in the bequest of the South San Francisco bank accounts, but on this petition, for the first time, contended that this $1,000 had been given to Mrs. Welte as a gift by decedent prior to his death. This was accomplished by subtracting the $1,000 from the total assets available for distribution under the caption "Gift to Eleanor Welte included in inventory, now claimed by her."

In support of the position that there had been a gift of the $1,000 to Mrs. Welte, she testified that in December, 1940, she accompanied decedent, at his request, to the Redwood City bank; that there he opened his safe deposit box and showed her his will and had her read it; that then he handed her an unsealed envelope and asked her to open it, which she did, and found therein $1,000; that decedent told her it was hers; that she told him that she did not need it at that time; that he replied: "Well, I want you to know that it is here and it is yours"; that she replied that she was negotiating for a job and if it was secured she would not need the money; that he replied: "Well, it's still yours. If you don't have any occasion to use it save it for Buddy's [her son's] education"; that the envelope was then sealed and put back in the safe deposit box. The envelope, after decedent's death, was found in that box and then bore the caption, in decedent's handwriting "Mrs. Eleanor C. Ryan [Mrs. Welte's former name] from Dan McSweeney." There was also admitted a photostat of a safe deposit card for this box, undated, bearing the names of decedent and Mrs. Welte. There was no evidence that Mrs. Welte ever had any access to this box, or the right of access to it.

Mrs. Welte filed no claim against the estate for this sum but, to the contrary, listed the money as an asset of the estate. Respondents argue that Mrs. Welte at all times believed that the money was hers, but, out of an abundance of caution, and on advice of counsel, listed it as an estate asset. The referee and court found an executed gift.

[13–15] Not only would there seem to be some basis for appellants' contention that there exists a waiver and estoppel as a result of the listing of the property as an asset of the estate until the petition for final distribution, but it is equally clear that the evidence does not support the finding of an executed gift. The evidence does not show a completed delivery. It is the law that when the claim of gift is not asserted until after the death of the claimed donor,[2] the burden is on the donee to show by clear and satisfactory evidence every element necessary to constitute a gift. Denigan v. Hibernia, etc., Society, 127 Cal. 137, 59 P. 389; Mutual Ben. Life Ins. Co. v. Clark, 81 Cal.App. 546, 254 P. 306. It is well settled that in such cases "it is necessary that there shall be an immediate surrender of the article which is the subject of the gift, together with all dominion and control over it. If dominion and control over the gift is retained by the donor until his death, it becomes merely an unexecuted and unenforceable promise to make a future gift." Morehead v. Turner, 41 Cal.App.2d 414, 422, 106 P.2d 969, 973; see, also, Estate of Alberts, 38 Cal.App.2d 42, 47, 100 P.2d 538. In the instant case the evidence does not meet these tests. The $1,000 should, under the evidence, have been listed as an asset of the estate.

Should the costs of appeal in Estate of McSweeney, 107 Cal.App.2d 140, 236 P.2d 846, have been charged to the respondents individually?

The probate court allowed the costs in that appeal as a charge against the estate. Appellants urge that such costs should have been borne by respondents individually and not allowed as an estate charge.

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[2] Here there is not only no evidence that the claim of gift was made prior to death, but all during probate, up until 1952 when the petition for partial distribution was filed, it was asserted under oath by the alleged donee that the $1,000 belonged to the estate.

[16] In the case in question the probate court had approved an accounting and ordered a partial distribution. Included therein was an award of $8,175 to counsel for the executors for extraordinary services. It was this accounting and decree of partial distribution that the executors were seeking to uphold on that appeal. It was held that the award of attorneys' fees should be reversed because most of the services for which they were awarded were rendered to respondents in their individual and not their representative capacities. The order for fees was reversed. Respondents defended that appeal as executors. Appellants argue that as prevailing parties on that appeal they were entitled to their costs on appeal, and that if such costs are charged against the estate, as was here done, they will in fact be borne by appellants, who there prevailed, rather than by respondents.

The awarding of the costs against the estate was within the discretion of the lower court. Rule 26 of the Rules on Appeal expressly provides: "In probate cases, in the absence of an express direction for costs by the reviewing court [there was no such direction here], costs on appeal shall be awarded to the prevailing party, but the superior court shall decide against whom such award shall be made." It was not an abuse of this power to charge such costs against the estate. Since respondents were acting as executors in defending that appeal, the probate court was authorized to allow costs of that appeal as a charge against the estate.

Were the fees allowed the accountant, the attorneys, or the executors excessive?

[17] The court allowed the accountant $450 for his services to the estate. The appellants argue that the services rendered by him were unnecessary and unproductive, and therefore that the allowance is excessive. It is argued that most of the work had been included in prior accounts rendered before this accountant was hired. These were fact matters. It appears that the accountant's report covered the years 1946 to 1952, and this involved many transactions. As a witness the accountant displayed a complete knowledge of the financial affairs of the estate, which indicated careful preparation. We cannot hold, as a matter of law, that the $450 award was excessive. It was properly allowed.

[18] The court allowed $750 as a fee to the attorneys for extraordinary services. Most of these services were rendered in connection with the sales of three parcels of real property belonging to the estate. There is no dispute but that these services were rendered, and that the attorneys were entitled to some amount for these services in addition to their regular fee. While the amount of extra work here shown was not impressive, the amount of the allowance for such services was within the discretion of the probate court. §§ 910 and 911, Probate Code; Estate of Keith, 16 Cal.App.2d 67, 60 P.2d 171; see cases collected 11B Cal. Jur. p. 499, § 1051. We cannot hold that such discretion was here abused.

[19] The lower court also allowed the executors $750 for extraordinary services. These too included services in connection with the three sales mentioned above, and some other claimed services, some of which were ordinary and some extraordinary in character. It is not necessary to enumerate them. The services were rendered the estate. The amount of the allowance to be made for them was in the discretion of the probate court. We cannot say that such discretion was here abused.

The decree appealed from is reversed, with directions to the lower court to reconsider those matters held in this opinion to have been erroneously decided, and to then enter a new decree in conformity with the views herein expressed.

BRAY, and FRED B. WOOD, JJ., concur.

124 Cal.App.2d 91

HARPER
v.
SUPERIOR AIR PARTS, Inc.

Civ. 19771.

District Court of Appeal, Second District,
Division 3, California.
March 23, 1954.

Action for damages for personal injuries resulting from an automobile accident. Verdict for plaintiff for $12,500 in the Superior Court of Los Angeles County, Samuel R. Blake, J., and from an order granting plaintiff's motion for new trial on the ground of inadequacy of the damages awarded the defendant appeals. The District Court of Appeal, Parker Wood, J., held that the evidence established that the defendant was negligent and that the plaintiff was not contributorily negligent and that the damages awarded were inadequate so that the trial court properly granted plaintiff's motion for new trial.

Order affirmed.

1. New Trial ⚿75(1)

A new trial may be granted upon ground of insufficiency of evidence because the damages awarded are inadequate. Code Civ.Proc. § 657.

2. New Trial ⚿157

Upon a motion for new trial because damages are inadequate the trial court should review the evidence not only with respect to the issue of damages but also with respect to the issue of liability. Code Civ.Proc. § 657.

3. Automobiles ⚿244(6, 36, 58)

In action for injuries sustained by truck driver who was standing on left side of the truck searching for a tool when struck by defendant's truck, evidence supported finding that defendant was negligent which negligence was the proximate cause of plaintiff's injuries and that plaintiff was not guilty of negligence proximately contributing to his injuries.

4. Appeal and Error ⚿977(1)

Granting of a motion for new trial rests in the discretion of the trial judge to such an extent that appellate court will not interfere unless an abuse of discretion clearly appears. Code Civ.Proc. § 657.

5. New Trial ⚿72, 75(1)

In passing on a motion for new trial the trial judge is entitled to reweigh the evidence and exercise his independent judgment thereon and if he concludes that damages awarded do not adequately compensate for injuries sustained, he may grant a new trial. Code Civ.Proc. § 657.

6. Damages ⚿130(4)

Damages of $12,500 awarded for serious injuries to the back and shoulder of plaintiff was inadequate where special damages were considerably more than the amount awarded and hence the trial court properly granted a motion for new trial on the ground of inadequacy of damages awarded. Code Civ.Proc. § 657.

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Robert A. Cushman, Los Angeles, and T. Guy Cornyn, Arcadia, for appellant.

Wm. C. Wetherbee and Herbert G. Staples, Los Angeles, for respondent.

PARKER WOOD, Justice.

Appeal by defendant from an order granting plaintiff's motion for a new trial. The action was for damages for personal injuries allegedly resulting from negligence of defendant DeLange while he was operating a truck owned by his employer, the defendant corporation. Plaintiff dismissed the action as to defendant DeLange. Trial was by jury, and the verdict was for plaintiff for $12,500. Plaintiff made a motion for a new trial on the ground that "inadequate damages" were given under the influence of passion or prejudice; and on all the grounds stated in section 657 of the Code of Civil Procedure, except the ground of excessive damages. The court granted said motion "upon all issues" on the grounds of inadequate damages awarded under the influence of passion and prejudice, insufficiency of the evidence to sustain the verdict, and that the verdict is against the law.

Appellant contends that the court, in granting a new trial on the ground of inadequate damages, abused its discretion.

Appellant argues that the evidence establishes that DeLange was not negligent, that plaintiff was negligent as a matter of law, that plaintiff's conduct was the sole and proximate cause of the accident, and that the damages awarded were adequate.

[1, 2] Section 657 of the Code of Civil Procedure, which states the grounds upon which a motion for a new trial may be granted, does not expressly include the alleged ground of "inadequacy of damages". A new trial may be granted upon the ground of insufficiency of the evidence for the reason that the damages awarded are inadequate. Franklin v. Bettencourt, 16 Cal.App.2d 511, 514, 60 P.2d 1017. Upon a motion for a new trial based upon the contention that damages are inadequate the trial court should review the evidence, not only with respect to the issue of damages but also with respect to the issue of liability. See Bakurjian v. Pugh, 4 Cal.App.2d 450, 454, 41 P.2d 175.

Plaintiff testified that on March 25, 1949, he was driving a tractor with a semi-trailer (referred to as a truck); he was proceeding north on Alameda Street, and while he was shifting gears the gears stuck; he coasted over to the curb, and came to a stop against the curb and about 200 feet south of Olympic Boulevard; previously when gears on other trucks were that way, he found that by getting under the truck he could pry the shifting lever back into neutral position with a metal bar; he thought there was a bar with the tools in the sleeper cab (at the rear of the driver's cab); there was a door on each side of the sleeper cab—one on the left or street side and the other on the right side; the tools were customarily kept on the left side of the cab; plaintiff got out of the truck on the left or street side and went to the sleeper cab to search for the bar; he opened the left door of the cab, but there were no tools on that side of the cab; as he was closing the door, he glanced over his shoulder and saw a truck (defendant's) approaching; it was at the back end of plaintiff's truck—"just coming alongside of it"—about 25 feet from where plaintiff was standing and about 6 inches from the left side of plaintiff's trailer; plaintiff slammed the cab door, and he took 3 or 4 rapid steps toward the front of his truck—with his clothes almost brushing his truck; the hood of defendant's truck went past him and then something struck him on the head, back and side; when he "came to" he was lying on the street about 6 feet from the front of his truck.

DeLange, the driver of defendant's truck, testified that at the time of the accident he was proceeding north on Alameda Street, and was driving about 15 miles an hour in a straight line about 30 feet behind another truck (a third truck—not plaintiff's) which was approximately the same width as defendant's truck; he first saw the rear of plaintiff's truck when he was approximately 50 feet behind it; he noticed that the truck was stopped and he continued looking in that direction; he first saw plaintiff when defendant's truck was about 20 feet from the rear end of plaintiff's truck; plaintiff was by the side of, and facing, plaintiff's truck at a place just back of the cab; the third truck, which was traveling in front of him (witness), "cleared" plaintiff's truck about 5 feet; he (witness) kept his eye on plaintiff until the bumper of defendant's truck was about even with plaintiff, and he didn't see plaintiff move; when about half of his truck had "cleared" plaintiff, he felt and heard an impact; he then slowed down and came to a stop in front of plaintiff's truck.

A police officer, called as a witness by defendant, testified that when he arrived at the scene of the accident, about 1:45 p. m., plaintiff's truck was parked a few inches from the curb; and plaintiff was lying on the ground.

[3] The evidence was legally sufficient to support findings that defendant was guilty of negligence which was a proximate cause of the injuries; and that plaintiff was not guilty of negligence which proximately contributed to the injuries.

Appellant also argues, as above stated, that it was an abuse of discretion to grant a new trial on the ground that the damages ($12,500) were inadequate. Plaintiff sustained a compound comminuted fracture of the left mid-humerus, and injuries to his back and shoulders. A closed reduction of the fracture was attempted, with the use of a hanging (plaster) cast, but, after six months, it proved to be unsuccessful. Thereafter an open reduction was made, with a bone graft and a steel plate, which also was unsuccessful. Further operations were performed and, by October, 1952, the bone had united. Also, there was an operation in which a part of his shoulder tip was removed. One of plaintiff's arms was strapped to his body for the period of one year. He was in the hospital about 13 weeks, and the amount of his hospital and medical bills was $5,128.27. Plaintiff testified that he had been a truck driver about 24 years; at the time of the accident his "take-home" earnings averaged $80 a week; and that he had not worked since the accident (a period of more than 190 weeks). A doctor, called as a witness by plaintiff, testified regarding certain operations which he performed upon plaintiff after the accident. He also testified to the effect that, by reason of limitation of abduction and rotation at the shoulder, plaintiff would never be able to drive a truck; and that plaintiff would not be able to do any heavy manual work.

[4–6] "[T]he granting of a motion for a new trial rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears. All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground." Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465, 467. In passing on a motion for a new trial the trial judge is entitled to reweigh the evidence and exercise his independent judgment thereon and if he concludes that the damages awarded do not adequately compensate for the injuries sustained he may grant a new trial. See McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 17, 146 P.2d 34. There was evidence that the special damages (hospital and medical bills $5,128.27, and loss of earnings to time of trial about $15,200) were considerably more than the amount awarded ($12,500). As to general damages, there was evidence that several operations were performed upon plaintiff, he was in a hospital several weeks, and his arm was strapped against his body for a year. The judge did not abuse his discretion in granting the motion for a new trial.

The order granting the motion for a new trial is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

123 Cal.App.2d 925

PEOPLE by DEPARTMENT OF PUBLIC WORKS

v.

SCHULTZ CO.

Civ. 14748.

District Court of Appeal, First District,
Division 1, California.
March 18, 1954.

Action by the State to condemn a tract of land owned by defendant as part of a plan to convert a highway into a freeway. From a judgment of condemnation and an award of damages in the Superior Court for the County of Marin, Edward I. Butler, J., the defendant appealed. The District Court of Appeal, Peters, P. J., held that the condemnation was not improper as leaving the defendant with an isolated tract of land, in view of stipulation in the judgment and that the instructions respecting damages were not prejudicially erroneous and that an abuse of discretion in the condemnation was not shown.

Judgment affirmed.

1. Attorney and Client 🔑86
Eminent Domain 🔑106

Where right of access of owner was condemned for an automobile freeway but the condemnation resolution conditioned the taking upon the remaining land having access to the outer highway which was to be connected with the freeway, and the resolution authorized stipulation for changes in location in access openings, counsel for condemnor had authority to stipulate for a continuation of such opening, and where the judgment of condemnation contained such stipulation, the owner was not entitled to damages on the theory that the condemnation left him with an isolated tract of land. Streets and Highways Code, §§ 102, 103.

2. Eminent Domain 🔑140, 145(1)

Under the statute respecting the assessment of damages accruing to the proportion of property not condemned and the construction of the improvement in the manner proposed by plaintiff, and requiring the jury to assess separately the benefits to the uncondemned parcel caused by the improvement, as to severance damages and benefits, they must be based upon the assumption that the improvement is completed. Code Civ.Proc. §§ 1248, and subds. 2, 3, 1249; Streets and Highways Code, §§ 71, 72.

3. Eminent Domain 🔑127

Where highway commission adopted resolution to condemn parcel for highway purposes and drafted a proposed plan which was presented to the court as a plan drafted by the department for the highway, such plan was the "proposed plan" by the department within the statute respecting the assessment of damages by the jury from a construction of the improvement proposed by the plaintiff. Code Civ.Proc. § 1248, subds. 2, 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Proposed Plan".

4. Eminent Domain 🔑127

That plans and specifications for proposed automobile freeway were not officially approved by the department of public works by resolution until the contract for the improvement was let was immaterial as respects assessment of damages to owner of the property condemned, and hence the condemnation judgment properly fixed damages to the owner of the property based on the assumption that the plans would be carried out substantially as planned. Code Civ.Proc. § 1248; Government Code, §§ 14270–14272; Streets and Highways Code, §§ 90–92, 100.1.

5. Eminent Domain 🔑221

While a condemnation award must once and for all fix damages, present and prospective, that will accrue reasonably from the construction of the improvement, and the jury must consider the most injurious use of the property reasonably possible, such does not mean that the jury may speculate on the possibility of damage from some future abandonment of the improvement and remote, speculative, or conjectural elements of damage cannot be submitted to the jury.

6. Eminent Domain 🔑243(2)

In proceeding to condemn land for a proposed automobile freeway, provision of the condemnation judgment requiring improvement to be constructed substantially as proposed could not prevent the department of public utilities from making changes if it so desired.

7. Eminent Domain 🔑243(2)

In proceeding to condemn land for a proposed automobile freeway, provision in judgment requiring the improvement to be constructed substantially as proposed, established that damages awarded, were predicated on the construction of the improvement substantially as proposed, and did not include damages resulting from a change in the plans for which the owner would be entitled to maintain an action therefor, if the plans were changed, and severance damages to the retained parcel, occurred. Code Civ.Proc. § 1248, subds. 2, 3.

8. Eminent Domain 🔑205

In proceeding to condemn land for an automobile freeway evidence established that the condemnor's witnesses did not fail to segregate severance damages and benefits to the remaining land as required by the statute. Code Civ.Proc. § 1248, subds. 2, 3.

9. Eminent Domain 🔑205

In proceeding to condemn land for an automobile freeway, a finding of no severance damages because when condemnation started, there was a building foundation partly on the condemned and partly on the uncondemned land was not unsupported by evidence, where witnesses on both sides, without objection, treated the value of the foundation on the retained land as part of the condemned parcel and not as an item of severance damages. Code Civ.Proc. § 1248, subds. 2, 3.

10. Eminent Domain ⇨200

Where there is an easement on surface of condemned land, in absence of proof of some special value attaching to it, underlying fee is considered as only of nominal value.

11. Eminent Domain ⇨222(5)

In proceeding to condemn land for an automobile freeway, instructing jury that only nominal damages could be awarded for the taking of front 30 feet of condemned land was not error where such strip was impressed with an easement for roadway purposes and for utilities and there was no proof that the sub-surface of the strip had any special value. Code Civ. Proc. § 1248, subds. 2, 3.

12. Eminent Domain ⇨146

In proceeding to condemn land for a proposed automobile freeway the state was entitled to have severance damages, if any, reduced by value of special benefits to the retained land.

13. Eminent Domain ⇨222(6)

In proceeding to condemn land for a proposed automobile freeway, instructions with reference to the right of the state to offset severance damages by the benefits were not error as confusing to the jury.

14. Eminent Domain ⇨222(1)

In proceeding to condemn land for a proposed automobile freeway, instruction with respect to the right of the jury in weighing evidence, to use its personal knowledge was not erroneous, where the instruction when read alone or with other instructions, could only mean that in weighing evidence, the jury must exercise their judgment, in light of their own general knowledge of the subject.

15. Eminent Domain ⇨222(5)
Trial ⇨260(10)

In proceeding to condemn land for proposed automobile freeway, instruction requiring jury to exclude from its consideration speculative or conjectural uses or enterprises or profits that might reasonably result therefrom in estimating the owner's damages was proper, and justified refusal of owner's instructions, that in fixing compensation, the jury should consider the availability of the property to meet future demands fairly to be anticipated, through growth of the community.

16. Eminent Domain ⇨124

In condemnation proceeding, market value of the land condemned as of the date the claim is filed is a test, and not some speculative potential value that the future may or may not bring.

17. Eminent Domain ⇨134

In considering value of property condemned, all the purposes to which the land is adapted should be considered, and that value is determined, by considering the highest use to which the land may reasonably be put, within the reasonably near future, and by what a purchaser would now pay for such land considering such prospective uses.

18. Eminent Domain ⇨65

A resolution of condemnation may be attacked for fraud, bad faith, or abuse of discretion. Streets and Highways Code, § 103.

19. Eminent Domain ⇨192, 196

In condemnation proceedings, a defense attacking the resolution of condemnation for fraud, bad faith or abuse of discretion is an affirmative one, must be pleaded and the burden of establishing it is on the defendant. Streets and Highways Code, § 103.

20. Eminent Domain ⇨195

In condemnation proceedings, a mere general denial of allegation of public necessity in the complaint for condemnation is not sufficient to raise issues of fraud, bad faith or abuse of discretion in the condemnation resolution. Streets and Highways Code, § 103.

21. Eminent Domain ⇨169

In proceeding to condemn land for an automobile freeway, resolution of condemnation was not assailable as an abuse of discretion because directed only at the strip of land owned by the defendant, where resolutions showed that a freeway was to be constructed and the evidence showed a proposed plan of construction of the entire project. Streets and Highways Code, § 103.

22. Eminent Domain ⚷196

In proceeding to condemn a strip of land for an automobile freeway, record did not establish an abuse of discretion by the Department of Public Utilities in taking the strip on the ground that the public necessity therefor was shown. Streets and Highways Code, § 103.

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Gaylord & Gaylord, San Francisco, Gardiner & Riede, San Rafael, Robert B. Gaylord, San Francisco, for appellant.

Robert E. Reed, Sacramento, Holloway Jones, Jack M. Howard, John P. Horgan, Thomas F. Vizzard, San Francisco, for respondent.

PETERS, Presiding Justice.

This action was brought by the State, through its Department of Public Works, to condemn the front 96 feet of a tract of land having a 300-foot frontage owned by the Schultz Co. The land abuts Highway 101 in Marin County and was condemned as part of a plan to convert the highway into a freeway, with certain outer highways as feeders. The jury fixed the value of the condemned parcel at $5,700, and found that there were no severance damages or special benefits to the uncondemned parcel. The trial court ordered the parcel in question condemned, including any abutter's or access rights appurtenant to the remaining land. Schultz Co. appeals.

Schultz Co. owned about five acres of land, acquired by it in 1946 for $15,000. Since then it has expended about $12,000 in filling the property. The complaint in this action was filed January 24, 1949. This five-acre plot has a 300-foot frontage abutting the present highway. The State seeks to condemn a strip averaging 96 feet in depth along this 300-foot frontage, and so seeks to take about 6/10 of an acre, leaving the Schultz Co. with about 4¼ acres. For the 6/10 of an acre condemned Schultz Co. has been awarded $5,700. Computed on an acreage basis and apportioning the filling costs, this 6/10 of an acre cost Schultz Co. about $3,240 which was expended within the three years prior to the filing of the action.

The front thirty feet of the 96-foot strip sought to be condemned was impressed with an easement for the purpose of a road, which easement existed when the Schultz Co. acquired the land. There were reciprocal thirty-foot easements in favor of the Schultz property over the property on both sides of it, these contiguous thirty-foot strips forming a side road parallel to the existing highway, and used by the abutting landowners. In addition, the Schultz Co., directly in front of its property, had a twenty-foot right of limited access to Highway 101. Access rights to the remainder of the 300-foot strip had been conveyed to the State prior to the time Schultz Co. acquired the area.

The judgment here involved provided that the proposed freeway and outer highway were to be so constructed that the uncondemned portion of the Schultz Co. property would abut the proposed outer highway, and that the outer highway should be connected with the freeway at such points as should be determined by public authority. The judgment condemned not only the fee to the 300′ x 96′ strip, but also all abutter's access rights appurtenant to the uncondemned land.

The evidence showed that the front ten feet of the thirty-foot strip that was impressed with an easement for road purposes, was also impressed with an easement in favor of the Pacific Telephone & Telegraph Company for the purpose of maintaining an underground cable. The Pacific Gas & Electric Company had the right to maintain electric wires over a portion of the uncondemned land. The evidence also showed that when the action was filed Schultz Co. had just completed construction of a foundation for a proposed building, and that such foundation was partly on condemned and partly on uncondemned land. The condemnation rendered this foundation valueless.

The respondent made out its case through the testimony of Sidney Silver, an engineer in the Department of Public Works, and through the introduction of certain exhibits prepared by that Department showing the proposed improvement. During Silver's testimony it developed that this proposed plan, as disclosed by an exhibit, had not been officially approved by resolution of the State Highway Commission, but probably would be so approved substantially as proposed. Over appellant's objections the exhibit was admitted into evidence. On this appeal appellant argues at length that, since the unapproved plan is subject to changes, appellant may suffer many items of damage not disclosed by the unapproved plan, but that the jury was not allowed to consider these items in fixing damages. It should be mentioned that the judgment requires the respondent to construct the improvement "substantially" as shown by the proposed plan.

[1] On this appeal many of the numerous points raised relate to the giving or refusing of particular instructions. All of the objections, however, can be related to several theories advanced by appellant. These theories will be separately considered.

Does the Condemnation Leave Appellant with an Isolated Tract of Land?

Appellant correctly points out that the resolution of the Highway Commission authorizing this condemnation proceeding required the condemnation of the fee in the condemned strip, including abutter's and existing access rights. This access right was to a twenty-foot opening leading to the existing highway. The balance of the access rights to the 300-foot strip had been conveyed to the State by appellant's predecessor in interest, and appellant purchased the strip with the right of access being limited to the twenty-foot opening. The judgment condemned the fee and the abutter's and access rights of appellant as provided in the resolution. The judgment also provided that appellant's uncondemned parcel is granted a right of access to the outer highway when it is constructed, and that such outer highway shall connect with the proposed freeway in such places as shall be determined by public authority. Appellant contends that until the freeway is constructed, which may be years in the future, his remaining parcel has been deprived of all access rights to the existing highway, and that it is left with an isolated landlocked parcel that possesses no legal right of access to the existing highway. If this were true it would constitute a major item of damage. But the trial court refused to submit this issue to the jury because, during the trial, counsel for respondent offered to stipulate that Schultz Co. could retain the legal right to its existing twenty-foot access to the highway until the freeway was constructed. This stipulation was refused by appellant, but the judgment contains an express provision conferring this right on the uncondemned parcel.[1]

Appellant strenuously contends that counsel for respondent and the trial court had no legal right to grant this limited right of access to appellant, and that the provision in the judgment so providing is void as beyond the court's power. Based on these premises it is urged that the failure to award damages based on the theory that the uncondemned parcel would be completely landlocked until the freeway was built was prejudicial and requires a reversal.

Appellant's argument proceeds as follows: By section 102 of the Streets and Highways Code the power to condemn property for roadway purposes, and to determine the extent of the condemnation, is vested in the Department of Public Works, it determining such matters by resolution. Section 103 makes the resolution conclusive evidence of the fact that the interest described in the resolution was necessary. Here the resolution was for the condemnation of the fee, and of the abutter's and access rights to the existing highway. It is argued that neither counsel nor the court had the legal right to condemn less. In the absence of an amendment to the resolution of the department of Public Works, so it is claimed, the court had no legal right to provide in its judgment that existing access rights should be preserved until the freeway was constructed. Such a provision, it is urged, is not binding on the State, and is not enforceable by appellant, so that in the future the State may properly deny to it the right to use the condemned parcel to reach the existing highway. The so-called reservation of access rights amounted to no more than an ineffective promise to use the condemned parcel in a particular manner.

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[1] Thus the judgment provides "that until said improvement shall have been constructed, said remaining property shall have access over said Parcel 1 [the condemned area] to the existing highway through the existing 20 foot opening."

Appellant predicates these arguments upon the cases that draw a distinction between a right reserved to the owner of property and an attempted promissory limitation on the use of property unqualifiedly condemned. Mere promises by the condemner are ineffective and cannot operate to reduce damages. See exhaustive annotation and collection of cases in 7 A.L.R.2d, starting at p. 392.

In the instant case we are not concerned with a mere promise of the Department of Public Works. Under the judgment, reasonably interpreted, there has been reserved to appellant the legal right to use the twenty-foot opening on the condemned parcel as a means of access to the existing highway, until the improvement is constructed. That being so, the real question is not whether this was a mere ineffective promise, but whether the reservation of this right to appellant was within the power of the court.

If appellant were correct that the resolution and the judgment were in conflict, there might be considerable merit in its contentions that the reservation in the judgment was void. This is so because under sections 102 and 103 of the Streets and Highways Code it would appear that, as contended by appellant, any attempt by a court to condemn less of an interest than is provided in the resolution of the Department is void. By section 103 the Legislature has provided that the Department and not the court shall determine the extent of the interest necessary to be condemned to construct the improvement. The Department's resolution is made "conclusive evidence" of that fact. It would seem to follow that the purpose of this enactment would be defeated if a court could determine, validly, that a lessor interest should be condemned than is provided in the resolution. A judgment purporting to condemn a lessor interest would be contrary to the evidence that is made conclusive. It therefore may be assumed that if the judgment and resolution are in conflict the judgment would have to be reversed.

The difficulty with appellant's argument is that the resolution, reasonably interpreted, is not only not in conflict with the judgment, but is entirely consistent with its purpose and intent. Before the resolution was passed the appellant had a limited right of access to the highway. This right of access, among other things, was condemned. But the condemnation resolution conditions the taking of the existing abutter's rights of Schultz Co. upon the remaining land having access to an outer highway which shall be connected with the freeway.[2] Until that freeway is constructed, it is necessarily implied that the existing conditions will continue. That is precisely what the judgment provides. Thus, no stipulation was necessary to enforce what was necessarily implied in the resolution.

Moreover, the resolution expressly conferred on the counsel for the Department the power to enter into stipulations for changes in location in the access opening.[3] It necessarily follows that if counsel had this authority to agree to changes in the location of the existing access opening, he necessarily had the power and authority to stipulate for a continuation of such opening.

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[2] The resolution provides for the condemnation of the fee and abutter's and access rights and then provides "provided, however, that such remaining portion shall abut upon and have access to said outer highway which will be connected to the freeway * * *."

[3] The resolution conferred on the counsel for the Department the power "to stipulate in any condemnation proceeding

Was it Error to Instruct the Jury that Severance Damages Must Be Computed on the Assumption That the Freeway Was a Completed Project?

The appellant offered, and the trial court refused, to give an instruction to the effect that damages must be based on conditions as they existed on January 24, 1949, when the complaint was filed, and without assuming when or whether a freeway would ever be constructed as proposed. The court not only refused this instruction, but specifically instructed that the jury was not to speculate upon whether the freeway will be constructed but should assume that such freeway will be constructed as proposed, and that in considering severance damages, or benefits "you are to assume that the improvement has been constructed in the manner proposed." Appellant claims that this was error.

The precise nature of appellant's objection is somewhat obscure. In its opening brief appellant seems to urge that under section 1249 of the Code of Civil Procedure values had to be fixed and severance damages had to be determined on the basis of conditions as they actually existed at the commencement of the action. Appellant seeks to fortify his argument by a reference to section 71 of the Streets and Highways Code under which the commission may alter or change the location of a state highway, and to section 72 under which it may abandon any easement acquired for highway purposes. It is true that section 1249 of the Code of Civil Procedure provides that the date upon which the damages shall be deemed to have accrued is the date of the summons, and that values shall be fixed as of that date. But it is section 1248 that provides what factors must be considered in ascertaining the damages. That section provides, in subd. 2, that the jury must assess "the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, *and the construction of the improvement in the manner proposed by the plaintiff.*" (Italics added.) Subdivision 3 requires the jury to assess separately benefits to the uncondemned parcel caused "by the construction of the improvement proposed by the plaintiffs".

[2] It is this section of the code that fixes the factors that must be considered in ascertaining damages. It clearly provides as to severance damages and benefits that they must be based on the assumption that the improvement is completed. Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 414, 104 P. 979; People v. Ricciardi, 23 Cal. 2d 390, 401, 144 P.2d 799; see, generally, East Peoria Sanitary District v. Toledo, P. & W. R. Co., 353 Ill. 296, 187 N.E. 512, 89 A.L.R. 879.

[3] In its reply brief appellant seems to have abandoned the above argument, but there argues that the Department of Public Works has not officially approved the improvement. This contention is predicated on the fact that the proposed plan had not been officially approved by resolution of that Department. Section 1248 of the Code of Civil Procedure, in subd. 2, refers to "the improvement in the manner *proposed* by the plaintiff" and in subd. 3 to "the improvement *proposed* by the plaintiffs". It seems to be appellant's present contention that an improvement does not become a "proposed" improvement until specifically approved by resolution of the Department. The Highway Commission has adopted a resolution to condemn this parcel for highway purposes. Through its agents and employees the Department caused to be drafted a proposed plan. Through its engineer and its counsel it presented that plan to the court as the plan drafted by the Department for the proposed highway. It seems clear that such plan is a plan "proposed" by the Department within the meaning of section 1248 of the Code of Civil Procedure.

Based on these same erroneous arguments appellant contends that it was error to have admitted the proposed plan into

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brought under the authorization of this resolution for a change in the location of any access opening provided for in the description of any parcel hereinbefore described from one point in the boundary thereof to another," but no such stipulation "shall increase the width of any such opening to said highway."

evidence. The challenged exhibit was identified by the engineer of the Department as representing a picture of the proposed improvement drafted by Department engineers. The details for the plan were supplied by the district office and by the district engineer in charge of operations. It clearly showed how the proposed plan would affect appellant's property. Section 1248 of the Code of Civil Procedure, as already pointed out, refers not to final and binding plans, but to the severance damages caused by "the construction of the improvement in the manner *proposed* by the plaintiff". This was such a plan "proposed" by the Department within the meaning of that section.

[4] Under the pertinent statutes the Department is charged with the duty of planning construction of highway and freeway improvements. Streets and Highways Code, §§ 90–92; § 100.1. The plans and specifications are not officially approved by the Department by resolution until the contract for the improvement is let. Government Code, §§ 14270–14272. By necessity, planning for the improvement must take place, and in many cases the condemnation of the appropriate lands must be started, before moneys for the construction of the improvement are available, that is, before the State is ready to ask for bids for the construction. The fact that no resolution had been passed by the Department approving the proposal is wholly immaterial. The plans were those of the Department and the judgment fixes damages based on the assumption that such plans will be carried out substantially as planned. The judgment is correctly predicated on that assumption.

There was no error in the instructions relating to the proposed plan nor in its admission into evidence.

Did the Trial Court Properly Rule That Possible Future Changes in the Improvement That Might Result in Damage to the Retained Land Could Not Be Recovered in this Action but Could Be Recovered in a Future Action?

Several times during the trial the judge made statements to the effect that the damages had to be fixed on the theory that the proposed freeway would be completed substantially in accordance with the plan submitted by the Department, and also stated that if the plan were changed and if such change resulted in injury to the retained parcel, appellant could maintain a subsequent action for such damage. A proposed instruction to the effect that the State was not bound by the proposed plan, having the legal right to modify or change it, and that a final award had to be rendered in this action encompassing all possible damage that might arise out of any change or abandonment, was refused. In its judgment the court expressly provided "that said improvement shall be constructed in substantially the manner" as proposed.

[5] Appellant contends that in a condemnation action the damages must be awarded once and for all, that the judgment is final, and that in the future, in the event of a major modification or abandonment that might adversely damage the retained land, it would be without remedy. While it is true that a condemnation award must "once and for all" fix the damages, present and prospective, that will accrue reasonably from the construction of the improvement, and in this connection must consider the most injurious use of the property reasonably possible, East Bay Municipal Utility Dist. v. City of Lodi, 120 Cal.App. 740, 8 P.2d 532, that does not mean that the jury may speculate on the possibility of damage from some future abandonment of the improvement. Remote, speculative, or conjectural elements of damage cannot be submitted to or considered by the jury. Coast Counties Gas & Electric Co. v. Miller & Lux, Inc., 118 Cal.App. 140, 5 P.2d 34.

In People v. Adamson, 118 Cal.App.2d 714, at page 722, 258 P.2d 1020, at page 1025, the court, after first holding that the precise point here made was without merit because it involved purely speculative elements of damage, stated: "Appellant seems to fear that the point of connection between the outer highway and the freeway may be changed in the future, and that in that event she would be precluded by the instant action from bringing an inverse condemnation proceeding to recover additional severance damages to her remaining property. However, it is the law of this state that damages not necessarily included in the issues in a condemnation action may be recovered in a subsequent action. [Citing cases and other authorities.]" This case disposes adversely to appellant's argument on this point.

[6, 7] Of course, the provision of the judgment requiring the improvement to be constructed substantially as proposed cannot operate so as to prevent the Department from making changes if it so desires. The law, as appellant correctly points out, confers the power to make such determinations on the Department and the court has no power to deprive the Department of that power. The provision was obviously inserted in the judgment to protect the appellant. If, in the future, the plans are changed and severance damage to the retained parcel occurs, and appellant brings an action to recover such damage, such provision will conclusively establish that the damages awarded were predicated on the construction of the improvement substantially as proposed, and did not include damage resulting from a change in the plans.

Did Plaintiff's Witnesses Fail to Segregate Severance Damages and Benefits as Required by Section 1248, Subdivisions 2 and 3, of the Code of Civil Procedure?

[8] Section 1248, subdivision 3, of the Code of Civil Procedure, expressly requires severance damages and benefits to be assessed separately. The jury brought in separate verdicts. It found that the value of the land taken was $5,700 and that there would be no severance damages and no special benefits. The real question is whether the testimony of plaintiff's witnesses so segregated these items that the jury had evidence upon which to base these findings.

All three of plaintiff's experts testified that when the freeway is constructed there will be no severance damages at all, and that when so constructed there will be material benefits to the remaining land, valued by them at $1800, $2000 and $3600. When asked to explain their opinions each witness testified that, in his opinion, construction of the freeway and outer highway would more than offset the loss of the present means of access to the highway. Thus, while they did testify that there would be no severance damages, and separately fixed their estimates of benefits, their conclusions were predicated on the fact that the completed project would provide benefits as great or greater than those lost by the severance. That evidence was sufficient upon which to predicate the separate verdicts here made on severance and benefits. As to both items, as already pointed out, section 1248, in subdivisions 2 and 3, requires the jury to consider the effect of the proposed improvement. This, plaintiff's witnesses did. They testified that with the improvement there would be no severance damages, and would be some benefits. When they testified that severance damages would be more than offset by benefits, they were testifying precisely as required by the section.

Is the Finding of No Severance Damage Supported by Evidence?

[9] Appellant claims that it is not. Of course appellant must and does admit that respondent's experts so testified, and respondent relies on this evidence to support the challenged finding. But appellant correctly points out that all the witnesses admitted, and the exhibits demonstrated, that when the condemnation started there was a building foundation constructed partly on the condemned and partly on the uncondemned land. During the trial respondent admitted that the entire foundation, because of the condemnation, was a total loss, and that appellant should be reimbursed for its total value. These are admitted facts. Based upon them, appellant argues that the value of the foundation on the retained land could only be assessed as severance damages. Therefore, so it is claimed, the finding of no severance damage is demonstrably unsupported. While this argument may appear to possess some logic, the difficulty with it is that it is contrary to the theory upon which the case was tried. The experts on both sides, without objection,

treated the value of the foundation on the retained land as part and parcel of the value of the condemned parcel and not as an item of severance damages. In other words, the value of the foundation on the retained land was included in the estimates of the experts as to the value of the land taken. It was therefore included in the $5,700 award. Under such circumstances, appellant is in no legal position to complain of the method of assessing this portion of the damage, having invited and participated in the error, if error it be. Realty Bonds & Finance Co. v. Point Richmond Canal & Land Co., 171 Cal. 238, 152 P. 433; Jentick v. Pacific Gas & Electric Co., 18 Cal. 2d 117, 114 P.2d 343.

Was it Error to Instruct the Jury that Nominal Damages Only Could Be Awarded for the Taking of the Front Thirty Feet of the Condemned Land?

The front thirty feet of the condemned strip was impressed with an easement for roadway purposes, and, in addition, the telephone company had an easement for an underground cable in the front ten feet of the thirty-foot strip. There was no proof that the sub-surface of this thirty feet had any special value.

[10] It is undoubtedly the law that when there is an easement on the surface of condemned land, in the absence of proof of some special value attaching to it, the underlying fee is to be considered as only of nominal value. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961, 70 L.R.A. 221; Romero v. Department of Public Works, 17 Cal.2d 189, 109 P.2d 662; Eachus v. Los Angeles Consolidated Electric Ry. Co., 103 Cal. 614, 37 P. 750. While here there was no evidence of any special value attaching to the underlying fee, appellant claims that the thirty-foot strip had more than a nominal value because this strip provided access to the highway and because it was connected with reciprocal easements in Schultz Co's. favor in similar strips on the adjoining lands. The challenged instruction, according to appellant, deprived it of compensation for the loss of these reciprocal easements and the access right.

[11] So far as the loss of the access right is concerned, that problem has already been considered. Appellant will not lose, but will keep its present access right until the improvement is constructed, at which time it will gain a new access right as good or better than the one it now possesses. So far as the loss of the reciprocal easements are concerned, the jury properly considered this problem in passing on severance damages. The jury's finding that such loss did not create any severance damage is amply supported by the evidence that the completion of the proposed outer highway would afford an adequate substitute for the present roadway. Thus, the challenged instruction was correct and did not have the effect claimed for it by appellant.

Were the Instructions in Reference to the Right of the State to Offset Severance Damage by Benefits Erroneous?

[12] Appellant objects to portions of two instructions to the effect that the State is entitled to have severance damages, if any, reduced by the value of the special benefits to the retained land. This is a correct statement of the law, but appellant correctly points out that the jury assesses severance damages and benefits separately, and the offsetting, if any, is to be done by the court. It is therefore urged that the two challenged instructions could not help but confuse the jury.

[13] This contention is without merit. The portion of the instruction appearing on page 498 of the Reporter's Transcript challenged by appellant merely correctly declares that the State is entitled to the offset. It does not state that the jury is to make the offset. In fact, the challenged excerpt is part of a general instruction clearly telling the jury that it should make separate assessments of damages and benefits. The portion of the instruction appearing on page 491 of the Reporter's Transcript challenged by appellant has also been lifted from context. The very next sentence after the challenged portion expressly states that the court will make the necessary deduction or offset. In addition, the court, on page 499 of the Reporter's Tran-

script, clearly and at length told the jury what its functions were and stated that it was the court's function to make the deduction or offset. There was no error in these instructions.

Was the Instruction on the Right of the Jury in Weighing the Evidence to use its Personal Knowledge Erroneous?

[14] The court properly and at length instructed that the jury was to decide the case solely upon the evidence before it, the reasonable inferences to be drawn therefrom, and the presumptions allowed by law. But in the course of many detailed instructions on how to ascertain market value, and the elements to be considered in fixing it, the court gave the following general instruction: "In estimating the market value of the property, the jury, in weighing the evidence, is permitted to exercise their own individual judgment as to the values, upon subjects within their own knowledge, which they have acquired through experience and observation."

Appellant urges that this instruction erroneously told the jury that it could place a valuation on the condemned parcel based upon its own estimates rather than upon the evidence in the case, and contends that this was highly prejudicial.

While not a model of clarity, and somewhat ambiguous, the giving of the instruction was not prejudicial error. Either when read alone or with the other instructions it could only mean that "in weighing the evidence" the members of the jury may exercise their judgments in the light of their own general knowledge of the subject. It does not state that the jury members may close their eyes to the evidence and decide the case in accordance with their own ideas. It simply tells the jury, in effect, that the jury members may judge the weight and force of the evidence introduced by their own general knowledge of the subject to be considered. That is a self-evident fact.

Appellant makes much of the fact that the challenged instruction was apparently taken from the dissenting opinion in Beveridge v. Lewis, 137 Cal. 619, 628, 67 P. 1040, 70 P. 1083, 59 L.R.A. 581. It is true that the instruction is discussed in the dissenting opinion. That opinion contains a good discussion of this instruction, and many cases are cited to show that it merely states a commonplace truism. The majority opinion in that case does not mention the instruction. There is nothing in the majority opinion contrary to what was said by the dissent on this point. That the reasoning of the dissenting opinion on this point was correct is amply demonstrated by the later cases upholding similar instructions. Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 576, 147 P. 238; People v. Broome, 120 Cal.App. 267, 273, 7 P.2d 757.

Were the Instructions on Market Value Erroneous?

[15] The court instructed that the jury must exclude from its considerations "speculative or conjectural uses or enterprises or the profits which might reasonably result therefrom." It refused an instruction offered by appellant to the effect that in fixing compensation the jury should "take into consideration the availability and adaptability of the property to meet the future demands that may fairly be anticipated, through growth of the community, and it [if] by reason of the strategic location of the property in respect to such future growth, there is potential competition for the property, you may also take such strategic location and such potential competition into consideration in fixing the value of the property." Appellant objects to both rulings.

[16, 17] We have read the numerous instructions given on the subject of the applicable rules to be followed in arriving at market value. The court fully and fairly instructed on the issue in accordance with the rules established by the case of Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979, and the cases following it. It properly instructed that market value as of the date the complaint was filed is the test, and not some speculative potential value that the future may or may not bring. It properly instructed that in considering value all the purposes to which the land is adapted should be considered.

that the value is determined by considering the highest use to which the land may reasonably be put within the reasonably near future, and by what a purchaser would now pay for such land considering such prospective uses. The instructions given covered the subject. The portion of the refused instruction that should have been submitted to the jury was covered by the other instructions. The challenged instruction that "speculative" or "conjectural" uses should be disregarded was correct when read with the other instructions. Long Beach City High School Dist. v. Stewart, 30 Cal.2d 763, 769, 185 P.2d 585, 173 A.L.R. 249; Joint Highway Dist. No. 9 v. Ocean Shore Railroad Co., 128 Cal. App. 743, 763, 18 P.2d 413.

Was Public Necessity for the Taking Shown?

[18–22] Appellant attacks the resolution of the Highway Commission authorizing the condemnation. That resolution declares that "public interest and necessity require the acquisition, construction and completion * * * of a public improvement, namely a State Highway," and "public interest and necessity require the acquisition for said public improvement of the real property * * * hereinafter described." The appellant's property is described in the resolution. Section 103 of the Streets and Highways Code provides that such a resolution "shall be conclusive evidence:

"(a) Of the public necessity of such proposed public improvement.

"(b) That such real property or interest therein is necessary therefor.

"(c) That such proposed public improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury."

Although this section makes the resolution "conclusive evidence" of the facts set forth in the section, appellant urges that it may be attacked on the ground of abuse of discretion. It is true that the resolution may be attacked for fraud, bad faith or abuse of discretion. San Benito County v. Copper Mountain Mining Co., 7 Cal.App. 2d 82, 87, 45 P.2d 428; People v. Milton, 35 Cal.App.2d 549, 96 P.2d 159. But as was said in the Milton case, 35 Cal.App.2d at page 552, 96 P.2d at page 160: "that resolution becomes conclusive of such facts recited therein, and the same may not be disputed in the absence of fraud, bad faith, or an abuse of discretion. [Citing cases.] But to raise these issues it is necessary to specifically charge fraud, bad faith, or an abuse of discretion on the part of the Highway Commission * * *. This was not done in the case before us, either by way of pleadings or evidence, and the issue cannot be raised for the first time on appeal." In other words, such a defense is an affirmative defense, must be pleaded, and the burden to establish it is on defendant. Admittedly, appellant did not affirmatively allege fraud, abuse of discretion or bad faith in its answer, and the mere general denial of the allegation of public necessity found in the complaint is not sufficient to raise these issues. But appellant urges that the complaint itself shows an abuse of discretion because the resolution is directed only at the strip of land 300′ x 96′ owned by appellant. It is contended that it obviously is an abuse of discretion to take this isolated strip for the purpose of building a highway, and that there is no proper evidence that this strip was to be connected with other strips. Thus, it is urged, an abuse of discretion necessarily appears from the face of the complaint. Obviously, the resolution could and should be directed at only the land involved in the proposed action. The resolution shows that a freeway is to be constructed and the evidence shows the proposed plan of construction of the entire project. Basically, appellant's contention is predicated upon its erroneous belief that no valid plan of improvement has been adopted by the State. The invalidity of that contention has already been considered. There is no merit in the point under discussion.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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SPEKA v. SPEKA.

Civ. 15752.

District Court of Appeal, First District, Division 2, California.

March 26, 1954.

Hearing Denied May 19, 1954.

Action by partner against copartner for dissolution of partnership, for an accounting, and for contribution. Copartner cross-complained against partner. The Superior Court, County of Alameda, Chris B. Fox, J., entered judgment in favor of partner, and copartner appealed. The District Court of Appeal, Kaufman, J., held that, in accounting had after dissolution of partnership having two partners, copartner, who was forced to pay $2,582.86 taxes for partnership by levy upon his bank account, was entitled to full credit for such tax payment instead of the half credit given.

Judgment affirmed as modified.

1. Partnership ⚿333

In accounting had after dissolution of partnership having two partners, partner, who was forced to pay $2,582.86 taxes for partnership by levy upon his bank account, was entitled to full credit for such tax payment instead of the half credit given.

2. Partnership ⚿308

If there is not any unnecessary delay in dissolution of partnership, delay necessary or incidental to winding up of partnership affairs cannot be ascribed to one partner more than to other, and interest on judgment for amount due one partner from other from date of dissolution is not ordinarily allowable.

3. Partnership ⚿308

In action by partner against copartner for dissolution of partnership, for an accounting, and for contribution, evidence was not sufficient to establish that trial court abused its discretion in penalizing copartner with interest on amount found due partner from date of dissolution of partnership.

4. Partnership ⚿346

Where, in action by partner against copartner for dissolution of partnership, for an accounting, and for contribution, it was not an abuse of discretion for trial court to award interest to partner upon amount found due partner from copartner, it was not an abuse of discretion to award costs to partner.

5. Partnership ⚿305

Where improvements purchased with partnership funds are placed on realty owned by one partner, who is compensated by partnership for use thereof, and contract is not entered into between partners concerning disposition of improvements in event of dissolution of partnership, improvements become a partnership asset, and non-land-owning partner is entitled to his proportionate share of their value.

6. Partnership ⚿68(1)

Where lease between partnership and land-owning partner provided that all improvements to demised premises, except for trade fixtures, should become property of land-owning partner and be surrendered with premises as part thereof upon termination of lease, any interest of non-land-owning partner in improvements placed on realty was eliminated after termination of lease, and such agreement was valid.

7. Partnership ⚿300

Provision of lease executed by land-owning partner and partnership that improvements, except for trade fixtures, should become property of land-owning partner and be surrendered with leased premises upon termination of lease prevented land-owning partner from being unjustly enriched upon termination of lease and from being required to account for value of improvements. Corporations Code, § 15021.

8. Partnership ⚿336(3)

In action by partner against copartner for dissolution of partnership, for an accounting, and for contribution, evidence was not sufficient to sustain copartner's charge that partner had taken advantage of copartner because partner was more familiar with English language and more experienced in business affairs.

9. Partnership ⚿300

Where realty, upon which partnership business was conducted, had been purchased by partner with his separate funds and not with partnership funds, value of realty was properly excluded from accounting had following dissolution of partnership.

10. Partnership ⚷310

Upon dissolution of partnership engaged in bakery business, surviving partner had right to continue such business under the partnership firm name.

11. Partnership ⚷342

In action by partner against copartner for dissolution of commercial partnership, for an accounting, and for contribution, judgment giving surviving partner right to continue partnership business under firm name but not necessarily forbidding copartner to use name, did not constitute an allocation of partnership good will to partner without allowance for its value.

◆

Young, Ryan & Whitton, Joseph J. Yovino-Young, Albert K. Whitton, Oakland, Ivan C. Sperbeck, Oakland, for appellant.

Albert Kessler, Kessler & Kessler, Oakland, Ralph Nathanson, Oakland, for respondent.

KAUFMAN, Justice.

This is an appeal by defendant and cross-complainant John Speka from a judgment in favor of plaintiff and cross-defendant Bob Speka in a suit for dissolution of a partnership, an accounting and contribution. Judgment was in favor of plaintiff Bob Speka for a contribution in the amount of $6,083.30. The suit was filed on November 7, 1949. The court began hearing of the matter on January 22, 1951, and on January 26, 1951 a referee was appointed to render an accounting. He made his report on October 15, 1951.

Plaintiff and defendant herein are brothers. Plaintiff and respondent Bob Speka had been a partner in the Golden Krust Baking Company from 1928 until 1936 when he bought out his partners. He was sole owner of the business until January 1944 when he gave his brother John a half interest therein. In 1941 plaintiff had brought defendant and his family from South America to this country, took them into his home and gave John a job in the bakery. Defendant's duties were menial tasks, and even after he became a partner he never took an active part in management of the business. When plaintiff took John in as a partner a partnership agreement was drawn up and he paid out of his own funds a gift tax to the state on the half interest valued at $10,000. At this time defendant did not have much knowledge of the English language.

The bakery had been operated on rented premises in Oakland, but shortly after the partnership agreement was entered into, plaintiff bought the property and executed a lease from himself as lessor to the partnership as lessee. Defendant was one of the parties executing the lease for the partnership. The source of the funds with which the property was purchased was disputed, but the Referee found, and the trial court confirmed his finding that the purchase money came from the plaintiff's separate funds and that no partnership funds were used.

After the lease was entered into, extensive improvements were made to the plant which were paid for out of partnership funds. These were set up on the book to be amortized in five years, the period for which the lease had been drawn. Defendant knew of these improvements, agreed to them, and designed some of them.

The partnership under plaintiff's management made sizeable profits for a few years. In 1949 there was a profit of $44,009.71; in 1945, $33,083.05; in 1946, $18,607.16; in 1947, $1,718.81. In 1948 there was a loss of $9,009.54, and in the first half of 1949, a loss of $8,245.95. During the years when there was a profit, it was equally divided between the brothers.

When the business began losing money, plaintiff informed defendant of this fact from time to time, but got no response.

In July 1949 plaintiff called defendant in to a meeting at the bakery office. The company accountant was present. The business situation was discussed, and plaintiff suggested that in order to save it each partner should contribute additional capital of about $15,000, or that either of the partners buy out the other. Defendant would not consider the proposals, but flew into a rage, accused plaintiff of dishonesty and threatened to kill plaintiff. Defendant denied that he had threatened violence, but the accountant also testified that defendant threatened to kill both him and plaintiff.

The business obligations then amounted to $15,926.38, which plaintiff paid by borrowing on the security of other real property which he owned. Later he borrowed $15,000 more to pay off further losses. During the time when the business was in a precarious condition, plaintiff drew no money out, but defendant continued to draw one hundred dollars each week.

No rent had been paid to plaintiff as lessor for more than a year. Therefore, after the stormy conference in July 1949, plaintiff notified defendant that in accordance with the terms of the partnership agreement he was terminating the partnership as of July 15, 1949, and gave notice to the partnership that the lease was terminated as of July 15, 1949 for nonpayment of rent. No question is raised herein as to legal sufficiency of these notices. Plaintiff continued to operate the business for the benefit of the creditors after the termination of the partnership, but his transactions thereafter are not pertinent here, as nothing subsequent to the termination was considered in the accounting.

Appellant contends that the judgment is erroneous from an accounting standpoint in that appellant was not allowed full credit for the item of $2,582.86 taxes which he was forced to pay for the partnership by a levy on his bank account. (Finding 8.) In Finding 10 the court found the liabilities of the partnership (including the $2,582.86 taxes paid by appellant) to be $26,482.28; the assets, $9,269.11, and the net loss of the partnership to have been $17,213.17, of which one-half due from each partner amounted to $8,606.58. Appellant John Speka was then given credit for one-half the amount of taxes paid by him or $1,291.43 plus half the excess of an overdraft of $2,463.69 of partnership funds by Bob Speka or $1,231.85, a total credit of $2,523.28. This credit was subtracted from $8,606.58, and judgment rendered for the balance of $6,083.30 due to respondent Bob Speka.

[1] Appellant is correct in his contention that full credit for the tax payment should have been allowed. He has discharged his own half of the firm's liability for taxes, and it therefore being paid, it was proper to deduct half the taxes from his half of the liabilities. But it is to be remembered that he has also discharged his partner's half of the tax liability, reducing his partner's net loss by the sum of $1,291.43. If he is not given credit for this sum he has in effect been held liable for the partnership's total liability for taxes. Appellant shows that his net loss will be the judgment of $6,083.30 plus $2,582.86 paid for the taxes or a total of $8,666.16, whereas respondent will pay out a total of $23,899.42 (accounts payable as shown above, less the tax item) and will receive the excess overdrafts of $2,463.69, assets of the business of $9,269.11, and judgment against appellant for $6,083.30, or total receipts of $17,816.10. Subtracting receipts from disbursements, there results a net loss of $6,083.32, whereas appellant's net loss is $8,666.16. The difference between these figures is $2,582.86, the tax item. If the whole of $2,582.86 had been credited to appellant instead of half in arriving at the amount of the judgment, then the net losses would have been equal, as respondent's receipts would have been $1,291.43 less and appellant's disbursements $1,291.43 less, thus cancelling the difference of $2,582.86 between the net losses of each partner.

Respondent does not answer this contention satisfactorily, stating only that the liabilities are $17,213.17 and one half that amount of $8,606.58 is the contribution due from each partner. The subject of credits due appellant is passed over by saying that appellant has not referred to transcript references which might provide pertinent information. However, the calculations here involved are all based on data used by the trial court in the findings. Respondent says that "as to what taxes John may have paid in addition to those set forth in these findings * * * we cannot determine", as there are no transcript references. It is quite obvious that the only item of taxes listed in the Accounts Payable by the trial court is the same item of taxes which the court in Finding 8 determined had been paid in its entirety by appellant and which in Finding 10 it erroneously credited to appellant the half thereof instead of the whole.

The judgment is therefore excessive in the amount of $1,291.43 and it must be modified to that extent if it can be upheld as against the remainder of appellant's contentions. Judgment should have been rendered in the amount of $4,791.87.

[2] It is next urged that interest on the judgment from the date of dissolution of the partnership was improperly allowed by the court, from the date when the partnership was dissolved. Appellant states that there appears to be no California authority on the subject, but cites 40 Am.Jur. 381, to the effect that whether or not interest should be allowed in such cases depends largely upon the circumstances of the case, but that ordinarily interest should not be allowed until after a balance is struck unless there is a different agreement between the partners "or unless under the peculiar facts and circumstances the equities demand that interest be charged." If there is no unnecessary delay, the delay necessarily or incidental to the winding up of partnership affairs cannot be ascribed to one partner more than to the other and interest is not ordinarily allowable. 40 Am.Jur. 383, 386, §§ 362, 364.

In the present case, there was evidence that appellant made it impossible to settle the partnership affairs amicably, making it necessary for respondent to sue for an accounting. Appellant's conduct in threatening to kill his brother and accusing him of dishonesty no doubt weighed against him when the trial court considered the equities of the situation. Appellant cites Axell v. Axell, 114 Cal.App.2d 248, 256, 250 P.2d 182 and Lineman v. Schmid, 32 Cal.2d 204, 195 P.2d 408, 4 A.L.R.2d 1380, as authority that interest is not allowable until the amount due has been determined by judicial process. These cases are concerned with the subject of liquidated and unliquidated damages in actions on contract and are not applicable to a suit in equity.

In Watson v. Kellogg, 129 Cal.App. 592, 19 P.2d 253, an action for an accounting between partners, interest on the amount found due was held to have been properly allowed, since the money was not turned over to plaintiff when it should have been, hence the withholding was wrongful. In Bowman v. Carroll, 120 Cal.App. 309, 7 P.2d 734, the court, citing 47 C.J. p. 1182, § 876, 68 C.J.S., Partnership, § 397, as authority, held that although ordinarily interest is not allowed on unascertained balances remaining in one partner's hands after dissolution, where circumstances are such as equitably demand the payment of interest, it will be allowed from the time when the accounts should have been settled, as where one partner retains money an unreasonable time or where he wrongfully withholds it. In Freese v. Smith, 114 Cal.App.2d 283, 250 P.2d 261, a partnership accounting case, the trial court awarded interest from the time the partners decided to liquidate. They reached no agreement on the accounts and it was not until the judgment of the trial court was rendered that the amount was finally determined. This court held that it was error to award interest, and that the usual rule as stated in 47 C.J. 1182, § 876, 68 C.J.S., Partnership, § 397, should apply. The court cited Bowman v. Carroll, supra, but pointed out that in that case interest was awarded only from the date the complaint was filed, and noted the reprehensible conduct of the partner against whom interest was awarded, a factor missing from the Freese case.

[3] In the instant case the amount owing by appellant was undetermined at the termination of the partnership. But in view of the conduct of appellant, it cannot be said that the trial court abused its discretion in penalizing him with interest from the date of the dissolution of the partnership.

[4] It is argued that costs should not have been awarded to respondent, but it has been held in Owen v. Cohen, 19 Cal.2d 147, 119 P.2d 713, that costs may be allowed in a partnership proceeding, and that in a proceeding in equity such as this, the

disposition of costs rests in the discretion of the trial court. See, also, Estrin v. Fromsky, 53 Cal.App.2d 253, 127 P.2d 603; People's Ditch Co. v. Foothill Irrigation District, 112 Cal.App. 273, 297 P. 71. If it was not an abuse of discretion to award the interest as above noted, then it was not an abuse of discretion to award the costs in this manner.

[5] Appellant maintains that it was error not to take the costs of the improvements into consideration. In the accounting no allowance was made for value of the improvements, and respondent was not charged nor was appellant credited with any amount by which the value of the realty was enhanced thereby. It is appellant's contention that since the improvements, which were of substantial value, were made with partnership funds, appellant was entitled to be credited with half their value. The rule stated in Minikin v. Hendrix, 15 Cal.2d 338, 101 P.2d 473, is that where improvements purchased with partnership funds are placed on realty owned by one of the partners who is compensated by the partnership for the use thereof, *and no contract has been entered into by the partners respecting the disposition of said improvements in event of dissolution,* the improvements become a partnership asset, and the non-land-owning partner is entitled to his proportionate share of their value. (Emphasis ours.)

[6] Respondent admits that appellant has stated the correct rule, and notes that in the present case, however, the parties had entered into a contract for disposition of the improvements in event of dissolution. The lease provided as follows: "Nevertheless, no additions, alterations or repairs shall be made to said demised premises without the written consent of the lessor, and all locks, bolts, repairs or alterations and/or improvements affixed to or made upon said demised premises by either of the parties hereto, except counters, shelving, movable partitions and other trade fixtures placed thereon by the lessee, shall be and become the property of lessor, and shall remain upon and be surrendered with the premises as part thereof upon the termination of this lease." It is respondent's contention that this is an agreement providing for disposition of the improvements. Appellant cites Swarthout v. Gentry, 62 Cal.App.2d 68, 144 P.2d 38, a case which he says is the converse of the rule in the Minikin case, wherein the partnership was held bound to compensate one partner for improvements made by him on partnership realty. The court in its opinion noted that the house was built by one partner with the knowledge and consent of the other *without any agreement other than that one partner should have the use of it.* (Emphasis ours.) Appellant argues that the clause in the lease is not an agreement taking the case out of the general rule, declaring that it adds nothing to the rule of law that title to improvements attached to the realty pass to the owner of the realty. It is our view that the clause in the lease eliminated any interest of the partnership in the improvements placed on the real estate. It was a valid agreement between the parties to the lease who are also the partners here.

[7] Appellant argues that respondent was unjustly enriched and that the failure to account for the value of improvements is a violation of his duty to his partner, citing § 15021, Corporations Code, to the effect that a partner is accountable to the partnership for any benefit and holds as a trustee for it any profits derived by him without the consent of the other partners, from any transaction connected with formation, conduct or liquidation of the partnership or from any use of its property. The significant phrase is "without the consent of the other partners." If a written contract has been entered into, such as the lease herein, this contention is disposed of.

[8] Appellant has stressed the fiduciary relationship, and the advantage taken of him by his brother who was more familiar with the English language and more experienced in business affairs. Nevertheless, appellant demonstrated that he was not without some business acumen. When his brother advised him that the lot adjoining the bakery was for sale, appellant bought it for $1,850, and less than a year later proposed to sell it to purchasers whom respondent regarded as undesirable neighbors for the bakery. To prevent appellant

from going through with the deal respondent purchased it from his brother for $3,800, a profit to appellant of $1,950. Appellant was always on hand to take his profits from the business, but never parted with money when it was in difficulties, even though the partnership interest had been a gift to him from his brother. The trial judge who listened to him testify most probably concluded that he was well able to take care of himself in the business world.

Appellant says that the trial judge may have concluded that because the improvements were written off the books by being amortized at the rate of 20% per year, that they were valueless, but points out that on the date the partnership ended there was still $1,441.79 that had not been amortized even though at the time of the trial it had been completely amortized. There is no finding to show that the court proceeded on this theory, although there is a finding that the lease was cancelled and terminated on July 15, 1949, hence it is entirely probable that the court concluded that no accounting was required for the improvements because of the terms of the lease.

[9] It is contended that the value of the realty was improperly excluded from the accounting, but this is disposed of by the trial court's finding which appellant has not attacked as unsupported, that the property was purchased with separate funds of respondent and not with partnership funds.

[10, 11] The final contention is that the good will of the business was improperly alloted to respondent with no allowance for its value. There is no finding as to good will. There is a finding that Bob Speka has the right to continue the bakery business under the name of "Golden Krust Baking Company". Appellant apparently confuses the partnership name with the good will of the business. In 40 Am.Jur. 314, § 268, it is said that as a general rule upon dissolution of a commercial partnership the succeeding partners have the right to carry on the business under the old name in the absence of a stipulation forbidding it. The judgment, therefore, merely reaffirms the general rule that respondent has the right to continue business under the firm name. Appellant does not contend that he advised the court that he intended to also go into the bakery business. The court's finding does not necessarily imply that appellant has no right to the use of the name.

In view of the foregoing the judgment must be modified by reducing the same to the sum of $4,791.87 and as so modified, affirmed.

Judgment affirmed as modified with each party to bear his own costs.

NOURSE, P. J., and DOOLING, J., concur.

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124 Cal.App.2d 165

GOLDMAN

v.

SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 20140.

District Court of Appeal, Second District,
Division 2, California.
March 25, 1954.

Proceeding on petition for writ of prohibition to restrain Superior Court from trying petitioner on an information charging him with withholding or concealing a stolen automobile. The District Court of Appeal, McComb, J., held that petitioner, as an innocent purchaser of automobile from conditional vendee thereof, was entitled to conditional possession of the automobile which he might make absolute by complying with terms of original contract with conditional vendor, and hence, under such circumstances, there was no reasonable or probable cause to hold petitioner for trial.

Alternative writ made peremptory.

1. Prohibition 🔑28

Where respondent did not file a demurrer or answer to petition for writ of prohibition or alternative writ of prohibition, facts as stated in petition would be deemed admitted. Code Civ.Proc. § 1094.

2. Criminal Law ⚷240

The "reasonable or probable cause", such as will warrant holding accused for trial, means such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of accused's guilt.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable or Probable Cause".

3. Sales ⚷473(1)

A bona fide purchaser for value, without notice, of property from a conditional vendee thereof may be permitted to retain the property bought on paying the conditional vendor the balance due under terms of original contract of sale.

4. Sales ⚷473(1)

Innocent purchaser from conditional vendee has a conditional right to possession of the property which he has obtained for value and without notice, i. e., the right to keep the property and comply with the terms of the original contract at which time his right of possession becomes absolute.

5. Criminal Law ⚷238

Innocent purchaser of automobile from conditional vendee thereof, for value and without notice of defect in title, was entitled to conditional possession of automobile which he might make absolute by complying with terms of original contract with conditional vendor, and hence, under such circumstances, there was no reasonable or probable cause to hold such purchaser for trial on charge of withholding or concealing a stolen automobile. Pen.Code, § 496.

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Armond M. Jewell, Los Angeles, for petitioner.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Robert Wheeler, Dep. Dist. Atty., Los Angeles, for respondent.

McCOMB, Justice.

This is a petition for a writ of prohibition to restrain respondent court from trying petitioner on an information charging him with violating section 496 of the Penal Code (withholding or concealing stolen property).

[1] Respondent has not filed a demurrer or answer to the petition or alternative writ of prohibition.[1] Therefore the facts as stated in the petition will be deemed admitted. (Kirby v. Superior Court, 68 Cal. 604, 606, 10 P. 119; Smith v. Superior Court, 124 Cal.App. 685, 13 P.2d 400; cf. Code of Civil Proc. § 1094.)

Applying this rule the facts are:

(1) Petitioner is an employee and general manager of the Muntz Car Company of California which is engaged in the retail sale of new and used cars in Los Angeles.

(2) In February, 1953, J. D. McCall purchased a 1953 Buick from the Chick Norton Buick Company at Tulsa, Oklahoma, under a conditional sales contract whereby the balance of the purchase price was payable in monthly installments.

(3) May 21, 1953, Mr. McCall sold the Buick to the Muntz Car Company of California at its place of business in Los Angeles. At the time of this sale Mr. McCall exhibited and delivered to the Muntz car company a State of Oklahoma certificate of title on the Buick which had been issued to him by the Oklahoma Tax Commission and which showed him to be the owner of the vehicle free and clear of any claims. Such purchase of the Buick automobile by the Muntz Car Company of California was in good faith for full value and without any notice by it or by petitioner that there was or might be any defect or impairment of title which Mr. McCall purported to convey. The purchase from Mr. McCall was transacted by a different employee of the Muntz car company than petitioner.

(4) June 12, 1953, the Muntz car company sold the Buick in the regular course of business to Lee Richman under a conditional contract of sale and without any notice of any defect or impairment of the clear title which it believed it had obtained from Mr. McCall.

(5) October 1, 1953, George Turner, an automobile repossession private detective

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[1] Respondent filed points and authorities and presented oral argument at the time of the hearing.

employed by the Chick Norton Buick Company of Tulsa, Oklahoma, came to the Los Angeles office of the Department of Motor Vehicles and claimed on behalf of his employer the right to possession of the Buick and requested that office to assist him. Officers of the Los Angeles office of the Department of Motor Vehicles made an investigation during the course of which they conferred with petitioner and informed him of the inquiry concerning the Buick and that they did not think it was a stolen car, but that the title to the Buick might be clouded.

(6) On Saturday, October 3, 1953, at the request of petitioner Mr. Richman brought the Buick back to the lot of the Muntz car company and took another car in place thereof, at which time petitioner told Mr. Richman that the title to the car was clouded and there might be a civil suit since the person the company had purchased the car from was in jail in Fresno charged with embezzlement.

(7) October 5, 1953, three persons came looking for the car at the residence of Mr. Richman. On the same day Officer C. K. Barnes of the police department of the City of Los Angeles came to the premises of the Muntz car company seeking the Buick. He was accompanied by Mr. Turner above mentioned. At such time Officer Barnes had a conversation with petitioner and asked him the whereabouts of the Buick to which petitioner replied that he knew nothing about the automobile and that if there was an official inquiry petitioner wanted to speak to his attorney first but could not reach him that evening.

(8) On Tuesday, October 6, 1953, Officer Barnes filed a complaint instituting criminal proceedings against petitioner alleging violation of section 496 of the Penal Code.

This is the sole question necessary for us to decide:

From the foregoing facts was the trial court justified in finding that there was reasonable and probable cause that petitioner was guilty of violating section 496 of the Penal Code?

No. The following rules are here applicable:

[2] 1. "Reasonable or probable cause" means such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the accused's guilt. (People v. Nagle, 25 Cal.2d 216, 222[2], 153 P.2d 344.)

[3, 4] 2. A bona fide purchaser for value, without notice, of property from a conditional vendee thereof may be permitted to retain the property bought from the conditional vendee on paying the conditional vendor the balance due under the terms of the original contract of sale. (Guerin v. Kirst, 33 Cal.2d 402, 411[5], 202 P.2d 10, 7 A.L.R.2d 922; Martin v. Hollins, 118 Cal. App. 561, 565[3], 5 P.2d 899, (hearing denied by the Supreme Court). Thus the innocent purchaser from the conditional vendee has a conditional right to possession of the property which he has obtained for value and without notice, to wit, he has the right to keep the property and comply with the terms of the original contract at which time his right of possession becomes absolute.

[5] Applying the foregoing rules to the facts of the instant case it is apparent that petitioner was a bona fide purchaser for value without notice of any defect in the title to the Buick automobile and as such was entitled to the conditional possession of the automobile which he might make absolute by complying with the terms of the original contract with the conditional vendor.

Therefore it is evident under rule 1, supra, that in the present case there was no evidence to lead a man of ordinary caution or prudence to believe or conscientiously entertain a strong suspicion of the guilt of the accused. There was thus no reasonable or probable cause to hold petitioner for trial.

People v. Scott, 108 Cal.App.2d 231, 238 P.2d 659, and Bice v. Harold L. Arnold, Inc., 75 Cal.App. 629, 243 P. 468, relied on by respondent, are factually distinguishable from the case at bar and therefore are not here applicable. A mere reading of the cases shows the factual difference.

It is ordered that the alternative writ heretofore issued, by order of this court, be and the same is made peremptory.

MOORE, P. J., and FOX, J., concur.

124 Cal.App.2d 169

PEOPLE v. GLASCOCK.

Cr. 5113.

District Court of Appeal, Second District,
Division 2, California.
March 25, 1954.

Prosecution for bookmaking. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, McComb, J., held, inter alia, that the evidence sustained the conviction.

Affirmed.

1. Criminal Law 🔑1144(13)

On defendant's appeal from judgment of conviction, evidence would be viewed in light most favorable to the people.

2. Criminal Law 🔑412(1)

The corpus delicti is established in bookmaking case, so as to render admissible evidence of defendant's extrajudical statements, where betting markers and owe sheets, some of the entries on which are shown to have been made by defendant, found in his establishment, are admitted in evidence. Pen.Code, § 337a.

3. Gaming 🔑98(3)

Evidence was sufficient to establish corpus delicti in prosecution for bookmaking. Pen.Code, § 337a.

4. Gaming 🔑98(3)

Evidence sustained conviction for bookmaking. Pen.Code, § 337a.

5. Criminal Law 🔑878(3)

Each count in an information or complaint which charges a separate and distinct offense must stand on its own merits and disposition of one count has no bearing or effect on judgment with respect to other counts contained in the information or complaint.

6. Criminal Law 🔑878(3)

Verdict of not guilty as to charge of keeping gambling paraphernalia did not require that defendant be acquitted on separate charge of bookmaking. Pen.Code, § 337a.

G. Vernon Brumbaugh, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before the court without a jury, defendant was found guilty as charged in count I of the information of violating section 337a, subdivision 1, of the Penal Code (bookmaking and poolselling). He was found not guilty as to count II of the same information which charged him with violating Penal Code, section 337a, subdivision 2. Defendant appeals from the judgment and also the order denying his motion for a new trial.

[1] Viewing the evidence as we must in the light most favorable to the people (respondent) the record discloses that on March 31, 1953, Officers Jewell and Adcock parked their car on the south side of Pico Boulevard about a quarter of a block west of defendant's cleaning establishment located at 2817 West Pico, Los Angeles. They observed the premises for two and one half hours. During this period approximately 20 persons entered defendant's establishment. A large number of them had nothing in their hands when they entered and nothing when they left.

Thereafter the officers entered the premises and searched it. On a table underneath a telephone, Officer Jewell observed many slips of paper, including a white piece of paper with numerals, symbols and lettering on it. Other pieces of paper were yellow with identification on the reverse side referring to Pride Cleaners at the above mentioned address. There was also found a copy of the Daily Mirror, dated March 31, 1953.

In the opinion of a handwriting expert the handwriting on the slips of paper was that of defendant. An officer who was qualified as an expert on bookmaking, book recording and poolselling in Los Angeles testified that bookmakers or poolsellers in the county commonly use telephones, radios, pieces of paper, slates and pencils; that the National Daily Reporter is normally used in bookmaking along with the sport section of daily newspapers; that bets are most commonly recorded by use of telephones or by use of papers. He further testified that in his opinion the white piece of paper found in defendant's establishment was what is known in bookmaking and poolselling vernacular as an "owe sheet," a document certifying or showing "that either the handbook owes to the bettor or the bettors owe to the handbook;" that the pieces of yellow paper were what is commonly known as betting markers; that on one of these betting markers there appeared on the first line the figure "5", then "B", then "Hash Pie" and the figure "2"; that the "5" meant the race, the "B" the track, "Hash Pie" was the name of a horse; that on the last line of this betting marker was the figure "7", then "G", then "Pale Pal", a dash, and "2–0–2."

According to the expert the "7" meant the race and the "G" the track, "2–0–2" meant two to win, nothing to place and two to show. Officer Adcock compared the words and figures on this betting marker with the printed material contained in the National Daily Reporter scratch sheet for that day and also the Daily Mirror newspaper. He found that "Hash Pie" was the name of a horse running at Bowie in the fifth race and that "Pale Pal" was the name of a horse running at Gulf Stream. He made similar comparisons with other portions of papers found at defendant's place of business and said they were names of horses running at various tracks throughout the country for that date.

On each of the betting markers there appeared a different name at the top. In the expert's opinion the name at the top indicated the name of the bettor for that particular horse on that date.

En route to the city jail, Officer Jewell had a conversation with defendant whose statements were freely and voluntarily made. The officer asked defendant whether he himself had bet on the races, and whether or not he did better than the people who laid bets with him. Defendant said that he did a lot better than they did; that they usually lost. He stated he would make about $80 to $90 a month betting. The officer then asked defendant how much money he made on every bet, that is what his percentage was, and defendant said he gained seven and one-half percent on every dollar bet. Officer Jewell then inquired as to how much money defendant made on bookmaking to which he answered that it did not amount to very much because most of the bets were for just one or two dollars. Defendant did not testify at the trial.

[2, 3] *Questions:* First: *Was the evidence sufficient to establish the corpus delicti?*

Yes. The corpus delicti is established in a bookmaking case so as to render admissible evidence of defendant's extrajudicial statements where betting markers and owe sheets, some of the entries on which are shown to have been made by defendant, and to have been found in his establishment, are received in evidence. It is a fair inference from such evidence that bookmaking has been carried on there. (People v. Cohen, 107 Cal.App.2d 334, 343 [10], 237 P.2d 301) (hearing denied by the Supreme Court.)

In the instant case the foregoing evidence establishes all of the elements necessary to meet the requirements of the stated rule.

[4] Second: *Is there substantial evidence to sustain the judgment of conviction?*

Yes. The evidence set forth above which established the corpus delicti, taken in connection with defendant's extrajudicial statements which were freely and voluntarily made, fully sustains the judgment of guilty of the offense with which he was charged.

People v. Coppla, 100 Cal.App.2d 766, 224 P.2d 828, relied on by defendant, is not here applicable. The case is factually distinguishable from the present case, for in the cited case the defendant was a messenger boy carrying envelopes, the contents of which were unknown to him. Clearly this is not the situation in the case at bar.

[5, 6] Third: *Since defendant was found not guilty on count II of the information charging him with violating section 337a, subdivision 2, of the Penal Code, did it follow that he should have been acquitted on count I of the information?*

No. Each count in an information or complaint which charges a separate and distinct offense must stand on its own merit and the disposition of one count has no bearing or effect on the judgment with respect to other counts contained in the information or complaint. (People v. Carothers, 77 Cal.App.2d 252, 254[1], 175 P.2d 30.)

The foregoing rule is applicable to the facts in the present case.

The judgment and order are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

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124 Cal.App.2d 149

SAUTTER
v.
CONTRACTORS' STATE LICENSE BOARD et al.

Civ. 15667.

District Court of Appeal, First District, Division 2, California.

March 25, 1954.

Plumber brought mandamus proceeding against Contractors' State License Board and others to compel board to set aside its decision revoking certain licenses of plumber. The Superior Court, County of Contra Costa, Hugh H. Donovan, J., entered judgment in favor of plumber, and board and others appealed. The District Court of Appeal, Kaufman, J., held that evidence sustained finding that board had notice more than two years before filing of accusations against plumber concerning certain of the alleged violations by the plumber of the Business and Professions Code, and that accusations as to those alleged violations were barred by section of the Business and Professions Code that all accusations against licensees shall be filed within two years after act or omission alleged as ground for disciplinary action.

Judgment affirmed as modified.

1. Mandamus 🔑173

Though plumber may not offer merely a skeleton defense before Contractors' State License Board on hearing for revocation of his licenses and later secure a trial de novo in an unlimited sense in superior court in mandamus proceeding to order board to set aside its decision, additional evidence may be admitted under statutory provision that court may admit relevant evidence, which was not produced at administrative hearing, if court finds that such evidence could not have been produced in exercise of reasonable diligence. Code Civ.Proc. § 1094.5(d).

2. Mandamus 🔑172

If credibility of witnesses before Contractors' State License Board in hearing to revoke plumber's licenses is brought into question in mandamus proceeding in superior court to compel board to set aside its decision, opportunity to contradict or impeach their testimony is to be afforded at the trial. Code Civ.Proc. § 1094.5(d).

3. Mandamus 🔑168(4)

In mandamus proceeding by plumber to compel Contractors' State License Board to set aside its decision revoking licenses of plumber because of alleged violations of the Business and Professions Code, evidence sustained finding that board had notice of some of the alleged violations more than two years before filing accusations against plumber and that plumber was not subject to disciplinary action as to those alleged violations because of provision of the Business and Professions Code that all accusations against licensees shall be filed within two years after act or omission alleged as ground for disciplinary action. Business and Professions Code, §§ 7091, 7112, 7114 to 7118.

4. Mandamus 🔑168(4)

In mandamus proceeding by plumber to compel Contractors' State License Board to set aside its decision revoking licenses of plumber because of alleged violations of the Business and Professions Code, evidence sustained finding that plumber was not guilty of intentionally misrepresenting his experience on application for supplemental sheet metal license and that he did not represent to his partner that a partnership license had been issued to them. Business and Professions Code, §§ 7112, 7116.

5. Mandamus 🔑**187(9)**

Findings and decision of superior court in mandamus proceeding to set aside decision of Contractors' State License Board were binding on District Court of Appeal on appeal, if supported by substantial evidence. Code Civ.Proc. § 1094.5(d).

6. Mandamus 🔑**172**

The superior court, in setting aside, in mandamus proceeding, decision of Contractors' State License Board revoking licenses of plumber was merely exercising its power under the Business and Professions Code in determining whether decision of board was just and proper, and was not assuming the functions of the board and was not giving plumber a status as a licentiate in a classification he was not qualified to hold. Code Civ.Proc. § 1094.5(d).

7. Licenses 🔑**38**

Sections of the Business and Professions Code providing for disciplinary action against a licensed plumber, forfeiture of licenses, etc., are penal in nature and must be strictly construed. Business and Professions Code, §§ 7112. 7114 to 7118.

8. Criminal Law 🔑**149**

Statutes of limitation in reference to criminal violations run from date of commission of crime and not from date of discovery of crime.

9. Licenses 🔑**38**

Section of the Business and Professions Code barring all accusations against licensees after two years commences to run from date of violations and not from date of discovery of violations by Contractors' State License Board. Business and Professions Code, § 7091.

10. Mandamus 🔑**15**

In mandamus proceeding by plumber to compel Contractors' State License Board to set aside its decision revoking licenses of plumber because of alleged violations of the Business and Professions Code, admission of plumber that he lacked qualifications to hold certain license, which board had revoked, barred superior court from ordering that such license be restored, even though license was improperly revoked by board. Code Civ.Proc. § 1094.5(d).

11. Mandamus 🔑**172**

In mandamus proceeding by plumber to compel Contractors' State License Board to set aside its decision revoking licenses of plumber because of alleged violations of the Business and Professions Code, wherein evidence sustained finding of superior court that plumber acted in utmost good faith and never intentionally concealed anything from board, superior court, in exercise of its independent judgment, was justified in concluding that severe disciplinary action taken by board was not warranted. Code Civ.Proc. § 1094.5(d).

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Edmund G. Brown, Atty. Gen., William M. Bennett, Deputy Atty. Gen., for appellants.

George C. Carmody, Pittsburg, for respondent.

KAUFMAN, Justice.

This is an appeal by the Contractor's State License Board, The Registrar of Contractors of said Board et al., from a judgment of the Superior Court of Contra Costa County issuing a writ of mandate ordering said Board to set aside its decision of January 21, 1952, revoking certain licenses of petitioner David G. Sautter, the respondent herein and ordering that these licenses be restored to him.

On February 19, 1946, David G. Sautter had been granted a license as a plumbing contractor. He operated his business as an individual until May 7, 1946, when he entered into a written partnership agreement with George M. Derenia under the name of Bella Vista Plumbing and Appliance Company. When this change took place respondent mailed his license to the Board. That office erased his name and substituted "Bella Vista Plumbing and Appliance Company." Respondent's attorney at that time advised him that all he needed to do was send in his license to the State Board and have the name changed. He also went to the State Board of Equalization to get a sales number and inquired of that office if there was anything further he had to do, but they indicated that they were satisfied that everything was in order.

Later respondent sent in his individual license to the State Board and asked that it be changed to D & S Plumbing and Appliance Company. The Board erased the name Bella Vista and inserted D & S Plumbing & Appliance Company and returned the license.

In April of 1948 the Master Plumbers Association advised respondent to apply for supplemental licenses. On April 14, 1948, he wrote to the Board seeking supplemental licenses in eight classifications. The letter was written on stationery of the D & S Plumbing and Appliance Co. on which appeared the name "George Derenia" in the upper left hand corner and the name "David G. Sautter" in the upper right hand corner. The letter was signed "D & S Plumbing & Appliance Company, David G. Sautter, Partner."

On one of the applications for a supplemental license for classification C43 incorrect information was given as to respondent's experience record. This experience record was completely different from respondent's record on his application for his plumbing contractor's license filed with the State Board in 1946. It developed that the experience record on the C43 application was that of George Derenia rather than respondent's. The experience record began in 1907, whereas respondent's application for his contractor's license showed that he was born in 1906.

At the trial in Superior Court, respondent produced letters which his wife had discovered after the administrative hearing. These letters were in the files of the D & S Plumbing & Appliance Co. which had been stored in respondent's garage. He did not know of their existence at the time of the hearing before the Board, as he had usually attended to the outside work while Derenia took care of office work. The letter of July 1, 1949, signed by George Derenia advised the Board as follows:

"Your form letter received June 10, relative to your records showing that David G. Sautter as doing business as an individual as D & S Plumbing and Appliance Company and that you believe that the firm is now a partnership due to fact that the new license application was signed by George M. Derenia.

"Please be advised this business has always been a partnership of David G. Sautter and George M. Derenia dba D & S Plumbing and Appliance Company.

"Our Contractors' License under classification C–36, plumbing was issued to D & S Plumbing & Appliance Company with the Partner David G. Sautter as the licensee.

"Mr. Derenia signed the renewal application in error which should have been signed by David G. Sautter. Your records should indicate that you originally issued the license as a partnership with David G. Sautter as licensee.

"Please check your records and advise the disposition of same."

In reply, N. J. Morrissey, assistant Registrar of the Board, wrote on July 8, 1949 that their records showed that License No. 84922 was originally issued to Sautter as an individual, that a request for change of name style was made on a renewal application and granted for D & S Plumbing and Appliance Co., but that the change in name was granted because no change in personnel or ownership was indicated. They were advised to secure a contractor's license for the copartnership of Derenia and Sautter, and an application form was enclosed. The letter in conclusion stated that "This matter should be given your immediate attention because the copartnership is unlicensed until an original license is secured."

No new license was obtained, and the partnership continued to operate until June, 1950, at which time it was dissolved. Respondent thereafter continued to operate the business under his own name.

On November 27, 1951, an accusation was filed with the Registrar of Contractors against David G. Sautter charging that he had violated §§ 7112, 7114, 7115, 7116, 7117 and 7118, Business & Professions Code. It was charged that he entered into a partnership with George M. Derenia an unlicensed person, conspired with him to evade the provisions of Chapter 9 of the Business & Professions Code, that he acted in the capacity of a contractor in a name other than that set forth on the license and with personnel other than as set forth in the application for said license thus violating §§ 7114, 7117 and 7118, Business & Professions Code; that he violated § 7116, Business & Professions Code, in that he wilfully represented to Derenia that a partnership license had been issued, that this representation was knowingly false and that Derenia had been substantially injured by respondent's deceit; that he misrepresented his experience on the application for the supplemental classification C–43 in violation of § 7112, Business & Professions Code.

After a brief hearing on January 2, 1952, at which Sautter appeared without an attorney, he was found guilty on all charges and an order was made revoking all of his licenses. On February 4, 1952, respondent petitioned for an alternative writ of mandate. At the hearing in the Superior Court the transcript of proceedings before the Hearing Officer was introduced and additional evidence was received. In the Findings of Fact the court found that Sautter had entered into a partnership on May 6, 1946, with Derenia, an unlicensed person, and operated under this partnership until May, 1950, but that Sautter did not conspire with Derenia to evade any provisions of the Business & Professions Code, and that he believed that the license which he held was one under which the partnership was authorized to contract; that petitioner did not operate as a contractor under a name other than that set forth in his license; that he did not operate with personnel other than as set forth in his application. It was also found that petitioner never represented to Derenia that a partnership license had been issued to Derenia and petitioner as partners, and that Derenia learned that no partnership license had been issued prior to July 1, 1949; that petitioner did not intentionally misrepresent his experience or any other fact to the Contractors Board in filing his application for a C–43 classification, but that such experience was inserted in the application without his knowledge. It was further found that the Board knew that the partnership was operating under a license issued to petitioner as an individual prior to July 8, 1949.

In the Conclusions of Law the Court stated that petitioner did not violate any of the provisions of §§ 7112, 7114, 7115, 7116, 7117 or 7118 of the Business & Professions Code, and that the following alleged violations were barred by Section 7091, Business & Professions Code (a 2 year statute of limitations): (a) Entering into the contract of partnership with Derenia; (b) the alleged representation to Derenia that a partnership license had been issued; (c) the filing of the application for the C–43 supplemental license; (d) making misrepresentations in said application.

[1, 2] Appellant contends that the complete and unlimited trial de novo violated the entire purpose of the legislation creating administrative agencies, and that the trial in the Superior Court was a useless repetition, not permitted in a case such as this. However, appellant admits that under Section 1094.5, Code of Civil Procedure, the Superior Court is empowered to receive additional testimony. Under Code of Civ. Proc. § 1094.5(d) the court may admit relevant evidence at the trial which was not produced at the administrative hearing if it finds that such evidence could not have been produced in the exercise of reasonable diligence. The trial court here expressly found that petitioner produced relevant evidence which he could not have with reasonable diligence produced at the hearing before the board. While it is true that one may not offer merely a skeleton defense before the administrative board hearing and later secure a trial de novo in an unlimited sense, additional evidence may be admitted if the showing required by Section 1094.5 (d) is made. And if the credibility of witnesses before the board is brought into question at the mandamus proceeding, opportunity to contradict or impeach their testimony is to be afforded at the trial. Dare v. Board of Medical Examiners, 21 Cal.2d 790, 799–800, 136 P.2d 304. The correspondence between Derenia and the State Board was admissible at the trial to impeach Derenia's testimony before the

Board that he did not know the partnership was not licensed and a reading of the transcript satisfies us that the trial judge had sufficient grounds for concluding that respondent could not have with reasonable diligence produced this evidence before the Board.

Appellant argues that section 7091 of the Bus. & Prof. Code does not bar the agency from disciplinary action against Sautter. That section provides that "All accusations against licensees shall be filed within two years after the act or omission alleged as the ground for disciplinary action." Appellant admits that it is clearly a two year statute of limitations but contends that it should be construed so that the two years run from and after the date of the discovery of the fraud.

[3–5] There was sufficient evidence before the trial court from which it could conclude, if appellant's construction of the statute be accepted, that as to some of the violations the Contractors' Board had notice thereof more than two years before filing the accusations. That is true of the accusation that respondent entered into a contract of partnership with Derenia, an unlicensed person, as the Board's correspondence shows that they were aware of this fact prior to July 8, 1949. And if respondent had misrepresented the facts about the licensing of the partnership to Derenia, Derenia was advised of the true state of affairs in his correspondence with the State Board in June and July 1949. There is also adequate support in the record for the trial court's findings that petitioner did not ententionally misrepresent his experience on the application for the supplemental C–43 sheet metal license, and that he did not represent to Derenia that a partnership license had been issued to petitioner and Derenia as partners. The findings and decision of the trial court are binding upon this court when supported by substantial evidence. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P. 2d 20; Manning v. Watson, 108 Cal.App.2d 705, 712, 239 P.2d 688.

[6–9] Appellant contends that the trial court in the instant case is assuming the functions of the licensing agency and is giving to respondent a status as a licentiate in a classification he admittedly is not qualified to hold. That is not true. The trial court merely is exercising its power under the law in determining whether the decision of the licensing agency is just and proper. If, as respondent contends, Section 7091, Business & Professions Code, bars all violations that have occurred prior to 2 years before filing the accusation, then respondent is not subject to disciplinary action for this offense. Although appellant argues that the general rule is codified in Section 338(4), Code of Civ.Proc., recognizing that an action for relief accrues only after discovery of fraud or mistake, it is to be noted that the statute of limitations in the Business & Professions Code contains no such subdivision. The statutes in the Business & Professions Code providing for disciplinary action, forfeiture of licenses, etc. appear to be penal in nature and must therefore be strictly construed. Oddo v. Hedde, 101 Cal.App.2d 375, 383, 225 P.2d 929. Statutes of limitation in reference to criminal violations run from the date of the commission of the crime and not from the date of its discovery. People v. Kinard, 14 Cal.App. 283, 111 P. 504. Section 7091 of the Business & Professions Code likewise commences to run from the date of the commission of the act complained of.

[10] Appellant points out that laws such as these governing the qualifications of persons in certain trades and professions are enacted for the safety of the public, and the safety of the public is not insured if the court licenses an unqualified person. See Fraenkel v. Bank of America National Trust & Savings Association, 40 Cal.2d 845, 256 P.2d 569; Schireson v. Schafer, 354 Pa. 458, 47 A.2d 665, 165 A.L.R. 1133. Even if the mistakes in Sautter's application for the C–43 license were made in good faith, he is not qualified to hold that license. The record at the administrative hearing shows that he admitted that he could not meet the qualifications for that particular supplementary license. Even if the statute had run on the misrepresentation in the application, in our opinion his admission that he lacked the qualifications to hold that license should bar the trial

court from ordering that particular license restored.

[11] It is admitted that Sautter and Derenia operated in partnership as contractors from May, 1946, to June, 1950. Obviously then, they operated in this relationship for a period not barred by section 7091, Business & Professions Code. The finding of the trial court that this particular accusation is barred by the statute of limitations is erroneous to that extent. However, the trial court also found that the lack of intention on respondent's part prevented a violation. Appellant states that the mere doing of the act is forbidden regardless of the state of mind of the wrongdoer, but cites no authority. Respondent maintains that in determining whether there is ground for disciplinary action, the matter of good faith is important. It was so held in State Bar of California v. Rollinson, 213 Cal. 36, 1 P.2d 428 and In re Jung, 13 Cal.2d 199, 88 P.2d 679. Not every failure to have a license is a violation of law. Oddo v. Hedde, 101 Cal.App.2d 375, 225 P.2d 929; Norwood v. Judd, 93 Cal.App.2d 276, 209 P.2d 24; Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265. There was sufficient evidence to support a finding that Sautter acted in the utmost good faith and never intentionally concealed anything from the Contractors' Board. The trial court in the exercise of its independent judgment was justified in concluding that the severe disciplinary action taken by the Board was not warranted after it had taken into consideration the evidence before the board together with the additional evidence produced at the trial. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20. It may be said here as was said in Norwood v. Judd [93 Cal.App.2d 276, 209 P.2d 28], a case wherein no partnership license had been obtained, but one partner was a licensed contractor, that "this is not a case where the parties engaged in a business prohibited by statute or public policy, or where a license would not have been issued had application been made." A partnership license may be secured if but one of the partners meets the qualifications, and here Sautter had already been licensed as a contractor. See Business & Professions Code, §§ 7068, 7069, 7071.

In view of the foregoing the judgment of the trial court should be modified so that the decision of respondent Board revoking the C–43 license be sustained and as so modified, the judgment should be affirmed.

Judgment affirmed as modified.

NOURSE, P. J., and DOOLING, J., concur.

KENNALEY
v.
SUPERIOR COURT OF SAN MATEO COUNTY et al.*

No. 16134.

District Court of Appeal, First District, Division 2, California.

March 25, 1954.

Hearing Granted May 24, 1954.

Original petition in prohibition against the Superior Court of San Mateo County to restrain further proceedings on cross-complaint against petitioner, on ground of failure of cross-complainant to file statutory bond required in actions for libel and slander. The District Court of Appeal, Kaufman, J., held that the statute requiring such bond was applicable to cross-complaints.

Writ issued.

Dooling, J., dissented.

1. Action ⚿16

Statutory definition of "action" includes a cross-complaint. Code Civ.Proc. § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Action".

2. Statutes ⚿174

Courts should construe the law as it is enacted.

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* Subsequent opinion 275 P.2d 1.

3. Libel and Slander ⚷129

The statute requiring undertaking for costs before issuing summons in "action" for libel or slander is applicable to cross-complaint for libel or slander. Code Civ. Proc. §§ 442, 830.

4. Prohibition ⚷9

Prohibition would lie to restrain trial court from taking further proceeding with respect to cross-complaint for slander where cross-complainant failed to file statutory bond. Code Civ.Proc. §§ 22, 830.

◆

Sidney L. Berlin, Redwood City, for petitioner.

Hancock, Elkington & Rothert, San Francisco, Frank V. Kington, Redwood City, for respondents.

KAUFMAN, Justice.

On November 2, 1953, petitioner Kennaley conmmenced an action against Frank D. Hill, et al., in the Superior Court of San Mateo County, based on the wrongful arrest, detention and prosecution of petitioner by said Hill and others, occurring on August 31, 1953. Petitioner's first amended complaint was filed on November 24, 1953; the answer and cross-complaint of defendant Hill was filed on January 6, 1954.

On January 7, 1954, petitioner filed a notice of motion to dismiss the cross-complaint on the ground that no surety bond had been deposited as required by § 830 et seq., Code of Civ.Proc. relating to actions for libel and slander. It is alleged that the cause of action stated in the cross-complaint is for slander, and on the face of it, it apparently is.

Sec. 830, Code of Civ.Proc. provides that "Before issuing the summons in an action for libel or slander, the clerk shall require a written undertaking on the part of the plaintiff in the sum of five hundred dollars ($500), with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action is dismissed or the defendant recovers judgment, they will pay the costs and charges awarded against the plaintiff by judgment, in the progress of the action, or on an appeal, not exceeding the sum specified. *An action brought without filing the required undertaking shall be dismissed.*" (Emphasis ours.)

On January 19, 1954, petitioner's motion to have the cross-complaint dismissed was denied. No undertaking has been filed. Petitioner alleges that he has no remedy by appeal and that unless prohibited, the Superior Court will proceed with the trial of the cause.

Petitioner relies chiefly on Shell Oil Co. v. Superior Court, 2 Cal.App.2d 348, 37 P. 2d 1078, 1081. In that case a writ of prohibition was issued restraining the court from proceeding until adequate bonds were filed in a libel suit against Shell Oil Co. It was there held that "While it is not necessary in order to vest jurisdiction in the trial court in the first instance that the plaintiff shall file a bond for costs in a libel suit, and it is true that the defendant may waive that undertaking (citation) after the defendant has duly moved the court to require the furnishing of bonds, it will be deemed to constitute an excess of authority for the court to proceed to try the cause without requiring an adequate undertaking to be first filed."

Petitioner does not show that he moved the court to require cross-complainant to furnish sureties, but simply moved to dismiss.

[1] If the Shell Oil Co. case is equally good authority for dismissal of a cross-complaint in slander as it is for an action in slander, then the writ should be granted. Petitioner quotes the definition of "action" in § 22, Code of Civ.Proc., as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." This definition is broad enough to include a cross-complaint.

Respondent points out that § 830, Code Civ.Proc. begins, *"Before issuing the summons in an action for libel or slander,* the clerk shall require a written undertaking on the part of the plaintiff * * *." No summons is to be issued by the clerk in the case of a cross-complaint against plaintiff. Under Code of Civ.Proc., § 442, a summons is issued only when new parties are brought in by cross-complaint.

[2] Respondent admits that there is a paucity of authority on this subject, but contends that petitioner is asking this court to add to and substitute words in § 830. Courts should construe the law as it is enacted. Pacific Coast, etc., Bank v. Roberts, 16 Cal.2d 800, 805, 108 P.2d 439; In re Estate of Hobart, 82 Cal.App.2d 502, 507, 187 P.2d 105; People v. Knowles, 35 Cal.2d 175, 183, 217 P.2d 1.

[3] This is evidently the first time the question has been raised in a state court as to whether § 830 applies to cross-complaints. However, the identical question arose in the United States District Court in California in Keller Research Corp. v. Roquerre, 1951, 99 F.Supp. 964. There cross-complaints for libel were filed against plaintiff. It was held that the statute was not merely a procedural device, that it was applicable in Federal Court, and cross-complainants were required to file undertakings in the sum of $500 within 5 days or the cross-complaints would be dismissed. Plaintiff's motion there was in the alternative, to require the bond to be filed or the action to be dismissed. The court did not discuss the language of the statute, but apparently assumed that it applied to cross-complaints as well as to complaints, and relied on the Shell Oil Co. case for authority, which of course, does not involve cross-complaints. The court does discuss the purpose of the statute—which is to prevent the indiscriminate filing of libel suits because of malice, or merely to embarrass a defendant. The same reasoning is applicable to cross-complaints.

[4] We conclude that a Peremptory Writ of Prohibition should issue herein restraining the lower court from taking any further proceeding in connection or with respect to said cross-complaint unless within 15 days from the date this decision becomes final the cross-complainant Frank Hill executes and files a surety bond as provided for by § 830 et seq., Code of Civ.Proc.

Let the writ issue as specified.

NOURSE, P. J., concurs.

DOOLING, Justice (dissenting).

I regret that I feel compelled to dissent. A reading of sections 830 and 832 of the Code of Civil Procedure satisfies me that the Legislature did not intend to require, and has not required, that the bond provided for in section 830 be furnished by a defendant who files a cross-complaint against the plaintiff for libel or slander.

Section 830 provides: "Before *issuing the summons* in an action for libel or slander, the clerk shall require a written undertaking on the part of the *plaintiff* * * * to the effect that if the action is dismissed or the *defendant* recovers judgment, they will pay the costs and charges awarded against the *plaintiff* * * *. (Emphasis mine.)

Section 832 provides: "Within 10 days *after the service of the summons,* any *defendant* may give to the *plaintiff* or his attorney notice that he excepts to the sureties * * *." (Emphasis mine.)

The emphasized language shows that the requirement of a bond is only placed on a plaintiff. The bond is required to be filed "Before issuing the summons". No summons issues on a cross-complaint against a plaintiff. The exception to the sureties may be made by any defendant, under sec. 832, "Within 10 days *after the service of the summons*". Where no summons is required this measure of time can have no application. It seems particularly significant that the whole procedure is tied to the issuance and service of summons.

In People v. White, 122 Cal.App.2d 551, 265 P.2d 115, we reiterated the settled rule that courts may not rewrite statutes to conform to an assumed intention of the legislature which cannot be found in the language of the statute.

Admittedly the U. S. District Judge in Keller Research Corp. v. Roquerre, D.C., 99 F.Supp. 964, did not discuss the language of the statute, but assumed that it applied to a cross-complaint for libel or slander. The language of the statute, as I have pointed out, does not support this assumption.

I would deny the writ of prohibition.

124 Cal.App.2d 107

BARRY v. BARRY.

No. 15706.

District Court of Appeal, First District,
Division 2, California.
March 24, 1954.

Action for divorce. From an order denying the motion of plaintiff to vacate an interlocutory judgment and decree of divorce in the Superior Court, City and County of San Francisco, Eustace Cullinan, J., the plaintiff appealed. The District Court of Appeal, Kaufman, J., held that a motion to vacate interlocutory decree was properly denied because it was not timely and that the record did not disclose any abuse of discretion in the award of community property.

Order affirmed.

1. Divorce 🔑313

When question of alimony is an issue in a divorce action, and decree expressly provides that there shall be no alimony, or where it neither awards alimony to wife nor reserves right thereafter to make an allowance for her support, husband is permanently relieved from the obligation.

2. Divorce 🔑165(4)

Where interlocutory divorce decree was entered February 26 and on August 26 the wife filed a notice of motion to vacate the judgment, stating that on September 4 the plaintiff would move the court to set aside the interlocutory decree and on September 19 the motion was actually made, the motion having been made more than six months after the entry of the interlocutory decree was too late. Code Civ. Proc. § 473.

3. Motions 🔑10

Where motion actually made to set aside an interlocutory decree of divorce was more than six months thereafter and hence was too late, the motion was not made timely because of amendment to the statute providing that a motion is deemed to have been made and to be pending upon due service and filing of the notice of motion, in view of the statute providing that no part of the statute is retroactive unless expressly so declared. Code Civ.Proc. §§ 3, 473, 1005.5.

4. Limitation of Actions 🔑6(9)

A change in the law extending the time in which a proceeding may be commenced will not operate to create a new right as to one where the time under the old law has already expired.

5. Appeal and Error 🔑837(9)

Generally, province of appellate court is to review judgment of an inferior court as of the time when it was rendered and to decide whether the judgment made by the court below was correct at the time it was made or rendered.

6. Statutes 🔑263

Generally, the courts do not give statutes a retroactive effect.

7. Divorce 🔑253

In wife's action for divorce on the ground of cruelty, evidence did not establish that the wife received less than 50 per cent of the community property especially where the evidence of cruelty by husband was slight. Civ.Code, § 146.

8. Divorce 🔑252

The amount of an award in excess of 50 per cent of the community property where divorce is granted on the ground of cruelty rests largely in the discretion of the trial court. Civ.Code, § 146.

9. Motions 🔑10

The code section providing that a motion is deemed to have been made and pending before the court upon due service and filing of the notice of the motion cannot be given a retroactive effect so as to make a motion timely that was made too late under the law as it existed at the time it was made. Code Civ.Proc. § 1005.5.

Allan Sapiro, San Francisco, Warren Sapiro, South San Francisco, for appellant.

Delany, Fishgold & Minudri and Molly H. Minudri, San Francisco, for respondent.

KAUFMAN, Justice.

Plaintiff, Lois Elizabeth Barry, appeals from an order denying her motion to vacate an interlocutory judgment and decree of divorce. The motion was made pursuant to Sec. 473, Code of Civ.Proc.

Lois Elizabeth Barry and William J. Barry were married in 1934. Both became insurance brokers and developed a business, which according to Mrs. Barry, amounted to approximately $8500 a year from renewal premiums alone. Marital difficulties arose in 1951 and the husband suggested that the wife contact his lawyer. The husband's attorney prepared a complaint on behalf of the wife and a property settlement agreement which the wife signed in the attorney's office. The complaint which was filed on August 10, 1951, listed the items of community property, and alleged the extreme cruelty of the husband as the grounds of divorce.

Immediately thereafter the wife called the husband's attorney and directed him to do nothing about the divorce. Acting through new counsel, she filed an amended complaint for divorce on August 21, 1951, and repudiated the property settlement agreement having been advised that it was improper since she did not have independent legal advice. The amended complaint also listed the items of community property and asked a decree of divorce on the ground of the husband's extreme cruelty, asked that the wife be awarded temporary and permanent alimony and the community property. The property consisted of a house in San Francisco, household furniture, an automobile, bank deposit, life insurance policies on the life of defendant with face value of over $18,500—the cash value is not stated—against one of which was a loan of $1,537, one policy on the life of plaintiff in the face value of $1,000 with a loan of $250.

On August 30, 1951, an order for alimony pendente lite, costs and counsel fees was made in a hearing before the court at which parties were present. Alimony of $135 per month was granted, $35 of which was to take care of payments on the home, and appellant was given the right to reside in the home.

On September 28, 1951, the husband filed an answer denying the allegations of the amended complaint and a cross-complaint seeking a divorce from plaintiff on the ground of her extreme cruelty. The cross-complaint listed the same community property, but in the case of four of the insurance policies alleged that they had no cash value, and in addition listed jewelry of a value of $1,000. The home was subject to a mortgage of $4,000, and the automobile to a $1,200 mortgage, the furniture, to a loan of $300.

On February 1, 1952, the action was tried both parties being present. The wife testified that her husband left her alone on Saturdays and Sundays when he went golfing, that she had to cook dinner for his mother every Saturday night, that they went to night school together and both obtained insurance broker's licenses, that now that the business had developed to the point where it paid a good income he moved the business away so that she was receiving no benefits. Consequently, she stated that she had become nervous and upset.

The attorney for the wife then stated that it had been stipulated between the attorneys for the parties that the home was to go to the defendant, that the household furniture was to go to plaintiff, but not the office furniture. The automobile was to be awarded to defendant and Mrs. Barry was to receive the sum of $9,000 cash in 90 days, plus $100 a month for a period of 10 months, the $100 a month to continue as it had been from the order to show cause.

The interlocutory decree which was entered on February 26, 1952, divided the community property as follows: To the husband, the home at 1483–31st Ave., San Francisco, the insurance business and office furniture, the 1950 Plymouth sedan, all insurance policies on the life of the husband; to the wife, the sum of $9000, an additional sum of $1,000 payable in installments of $100.00 per month for a period of 10 months, the household furniture, an insurance policy on the life of the plaintiff, all jewelry in plaintiff's possession. Defendant was also ordered to pay attorney fees to plaintiff's attorney.

On August 26, 1952 the plaintiff filed notice of motion to vacate the judgment on the grounds of mistake and inadvertence in that she believed she had not waived her right to future alimony, support and maintenance and excusable neglect, because she was ill at the time of the hearing and unable to understand the full meaning of the proceedings. This motion was heard by the court on September 19, 1952 and order denying the motion was entered on October 10, 1952.

At the hearing on the motion to vacate, Mrs. Barry testified that just prior to the hearing her counsel informed her of the proposed payment of $9,000 plus the monthly payments. She stated that she had understood she would continue to live in the house, and that she did not understand that she had waived alimony but thought she retained her right to the same. She did not realize until July, 1952, that the interlocutory decree did not provide for alimony.

Appellant contends that the interlocutory decree in effect contained a provision for alimony in that it provided for a $9,000 lump sum payment and an additional sum of $100 per month for 10 months. She had asked for alimony in her complaint and had been awarded temporary alimony of $100 per month. She notes that her attorney at the trial stated that "The $100 a month to continue as it has been from the order to show cause." But in the sentence just preceding this he had twice referred to the $100 a month for a period of 10 months. It is contended that the fact that the provision for $100 a month is set forth in a paragraph separate from the $9,000 provision supports the theory that it is alimony. That paragraph provides for "an additional sum of $1,000.00, said sum to be paid in installments of $100 per month for a period of 10 months." Appellant argues that this provision should be construed as alimony in that it is separate and severable from the portion of the decree awarding the community property payment to the wife—that the $9,000 is the community property settlement. However, the $9,000 sum is item 2, the $1,000 sum, item 3, and following that are six other items of community property awarded to one party or the other.

Appellant cites Brown v. Superior Court, 110 Cal.App. 464, 294 P. 428, but in that case the interlocutory decree provided for a continuance of the provisions of the order for maintenance pendente lite. And in Bechtel v. Bechtel, 124 Cal.App. 617, 12 P.2d 970, the court had decreed permanent alimony of $150 per month for a period of 5 years beginning September 1, 1930 and plaintiff appealed from this portion of the decree, claiming an abuse of discretion. The decree was affirmed, and the court stated that where the court orders payments of alimony at stated periods it may modify its order. In both of these cases there was no question but that the interlocutory decree had definitely awarded alimony.

[1] It has been held in this state that when the question of alimony is an issue in a divorce, and the decree of divorce expressly provides that there shall be no alimony or where it neither awards alimony to the wife nor reserves the right thereafter to make an allowance for her support, the husband is permanently relieved from the obligation. O'Brien v. O'Brien, 124 Cal. 422, 57 P. 225; O'Brien v. O'Brien, 130 Cal. 409, 62 P. 927; Harlan v. Harlan, 154 Cal. 341, 98 P. 32; McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257.

Appellant maintains that the wife was given permission to live in the home, and such permission was an award of additional support and maintenance. Fairchild v. Fairchild, 87 Cal.App.2d 172, 196 P.2d 60. The interlocutory decree, however, awarded the home to defendant and there is nothing in said decree giving the wife permission to occupy it. She may have been given permission to occupy it at the time of the hearing on the order to show cause when alimony pendente lite was granted, as stated in appellant's brief, but no such provision is contained in the interlocutory decree.

[2] Respondent contends that appellant's motion to set aside and vacate the interlocutory decree was not made within the six months as provided in sec. 473, Code of

Civ.Proc. In no case, under this section, may the application be made at a time later than six months from the date of the decree. The interlocutory decree was entered on February 26, 1952. Later, on August 26, 1952 appellant filed a notice of motion under sec. 473 to vacate said judgment, stating that "on the 4th day of September, 1952 * * * or as soon thereafter as counsel can be heard * * * plaintiff * * * will move the Court to set aside and vacate that interlocutory decree of divorce." On September 19, 1952 the motion was actually made before the Court. This was more than six months after the entry of the interlocutory decree of divorce.

It appears that respondent's contention must be upheld for it was settled at the time this motion was made that it was not sufficient that notice of motion should be given within the six months period that a motion would be made after the six months. The motion itself must be made and the action of the court requested on it within the six months. In re Morehouse, 176 Cal. 634, 169 P. 365; Estate of Hunter, 99 Cal.App. 191, 196, 278 P. 485; Brownell v. Superior Court, 157 Cal. 703, 109 P. 91; Estate of Corcofingas, 24 Cal.2d 517, 521, 150 P.2d 194. This rule demands an affirmance of the order of the trial court denying the motion to vacate the interlocutory decree.

[3] Appellant's contention that the 1953 amendment to sec. 1005.5, Code of Civ. Proc. made his motion timely because that amendment provides that "A motion * * * is deemed to have been made and to be pending before the court for all purposes, upon the due service and filing of the notice of motion". However, sec. 3, Code of Civ.Proc. provides: "No part of it is retroactive, unless expressly so declared." See Security First National Bank v. Sapkin, 19 Cal.App.2d 224, 64 P.2d 1097, 66 P.2d 656.

[4] Our Supreme Court in Schmitt v. White, 172 Cal. 554, 559, 158 P. 216, 217 held, "It is uniformly held that a change in the law extending the time in which a proceeding may be commenced will not be considered as operating to create a new right as to one where the time under the old law had already expired; that is, at least, unless the intent to accomplish this is very clearly manifested."

[5, 6] It is a general rule that it is the province of an appellate court to review the judgment of an inferior court as of the time when it was rendered, and to decide whether the judgment or order made by the court below was correct or erroneous at the time it was made or rendered. This is in accord with the rule that the courts do not usually give statutes a retroactive effect. (See 2 Cal.Jur. § 572, p. 972, and cases there cited.)

Appellant's final argument is that the decree made an inequitable division of the community property, for under sec. 146 of the Civil Code in the cases of extreme cruelty the disposition of the community property is left to the discretion of the trial court, but as a general rule more than half is awarded to the innocent spouse. Knapp v. Knapp, 23 Cal.App. 10, 136 P. 719; Hill v. Hill, 82 Cal.App.2d 682, 187 P.2d 28. In Gaeta v. Gaeta, 102 Cal.App.2d 87, 226 P.2d 619, it was held that the failure to award more than half to the innocent spouse was an abuse of discretion.

[7, 8] Appellant has not clearly shown that she received less than half of the community property. She received $10,000 cash, the household furniture subject to a loan of $300 and insurance policies in her name. Respondent received the home subject to a $4000 mortgage, the automobile subject to a $1200 mortgage, insurance policies only one of which, he asserts, had a cash surrender value and against which the maximum had been loaned. The value of the insurance business depended upon his individual earning power. It is impossible from an examination of the record for this court to say that appellant received less than 50% of the community property. Furthermore, the evidence of cruelty in this case was slight. See Nieri v. Nieri, 103 Cal.App.2d 208, 229 P.2d 126. The amount of the award in excess of 50% of the community property rests largely in the discretion of the trial court. LeFiell v. Le-

Fiell, 108 Cal.App.2d 321, 322, 324, 239 P.2d 61; Cash v. Cash, 110 Cal.App.2d 534, 243 P.2d 115.

[9] In our opinion the 1953 amendment to sec. 1005.5, Code of Civ.Proc. can not be given a retroactive effect so as to make a motion timely that was made too late under the law as it existed at the time the motion was made.

While the court below correctly denied the motion because it was made too late its denial must also be upheld because the record does not disclose any abuse of discretion.

Order affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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123 Cal.App.2d 819

KAHN v. KAHN et ux.

Civ. 20053.

District Court of Appeal, Second District, Division 2, California.

March 15, 1954.

Divorced wife brought action against divorced husband on divorce judgment obtained by her in another state and requiring husband to pay her $300 a month as alimony and for support of three minor children. The Superior Court of Los Angeles County, Joseph W. Vicker, J., entered judgment adversed to wife, and she appealed. The District Court, of Appeal, Moore, P. J., held that wife could recover nothing on account of children because more than five years had elapsed from time when children attained majority and action was filed, and because divorce judgment was uncertain as to amount of award for child's support, and that she could recover no alimony because it could not be gathered from divorce judgment the amount the court intended for alimony.

Judgment affirmed.

1. Limitation of Actions ⇨72(1)

Where wife obtained divorce judgment in Ohio in 1925 requiring husband to pay her $300 a month as alimony and for support of three minor children, and in 1953 she brought action in California against husband on 1925 judgment, and all children had reached their majorities more than five years before action was brought in 1953, California five year limitations statute precluded any recovery on behalf of children. Code Civ.Proc. § 336; R.C. Ohio, §§ 3103.03, 3105.14, 3109.01.

2. Appeal and Error ⇨882(3)

Plaintiff, who supported position of trial court at trial that five year limitations statute was applicable, was estopped to assert the contrary on appeal. Code Civ. Proc. § 336.

3. Judgment ⇨928

Constitutional provision requiring full faith and credit to be given in each state to public acts, records, and judicial proceedings of every other state, did not prevent application of California five-year limitation statute to Ohio judgment in action in California on the judgment. Code Civ.Proc. § 336; U.S.C.A.Const. art. 4, § 1.

4. Divorce ⇨310

Under Ohio law, orders and decrees of divorce courts in Ohio for child support are by implication, operation of law, and express statutory provision, limited to child's minority and automatically expire when child attains majority. R.C.Ohio, §§ 3103.03, 3105.14, 3109.01.

5. Divorce ⇨392

Limitation of Actions ⇨166

Where Ohio divorce judgment requiring husband to pay wife $300 a month as alimony and for support of three minor children did not indicate amount that was intended by Ohio court as alimony, and wife could not recover for support of children in California, in view of California five year limitation statute, because children had reached their majority more than five years before action was brought in California, judgment was too uncertain to be enforced in California by wife with respect to portion thereof intended for alimony. Code Civ.Proc. § 336.

6. Divorce ⚷392

If wife seeks to recover unpaid installments on divorce decree from another court, and amount of award is combined sum of alimony and child support, and children have obtained their majority, and court is unable to determine portion intended for alimony as distinguished from part allowed for child support, then entire award of such decree is illegal and unenforceable.

7. Divorce ⚷392

Where wife obtained divorce judgment in Ohio in 1925 requiring husband to pay her $300 a month as alimony and for support of three minor children, and children had reached their majority, wife, before she could make any headway in California toward realizing on judgment, was required to request Ohio court to modify decree by entering judgment for accrued sums. R.C. Ohio, §§ 3103.03, 3105.14, 3109.01.

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Stanton, Stanton, Welbourn & Moore, Sidney S. Kohn and Louis B. Stanton, Los Angeles, for appellant.

Bernard B. Cohen, Los Angeles, for respondent.

MOORE, Presiding Justice.

On February 27, 1953, Mrs. Kahn sued her former husband for $93,000 and interest on a judgment obtained by her on October 31, 1925, in Cuyahoga County, Ohio.[1] From her pleading as finally settled, it appears that prior to the judgment both parties resided in Ohio; that they were husband and wife and had three children, Rita, Helen and Joyce; Mrs. Kahn instituted an action, caused personal service to be made on defendant, their marriage to be dissolved and custody of the three children to be awarded to her. The decree provided for alimony and support as follows: "It is ordered that the plaintiff is hereby allowed as reasonable alimony for herself and the support of her three minor children, and the defendant is ordered to pay to the plaintiff the sum of Three Hundred ($300.00) per month, each and every month, until the further order of the court."

When the instant action was called for trial, the court sustained respondent's objection to the introduction of any evidence on the ground that the third amended complaint does not state a cause of action. Judgments of dismissal were thereupon entered. From the arguments made, it is assumed that the appeal applies only to the judgment in favor of Leo J. Kahn.

Two questions are posed for solution, namely, (1) Is the action barred by the statutes of limitation? (2) Is the Ohio decree sufficiently certain to be enforceable?

Action is Barred.

[1, 2] That the Court of Common Pleas of Cuyahoga County, Ohio, had jurisdiction of causes relating to divorce and child support is beyond dispute. It could provide alimony to a wife and support money to her children. In the exercise of such powers, the Ohio court awarded $300 as "alimony for herself and the support for her three minor children." But, since all three children had attained their majorities more than ten years prior to the commencement of this action, how may any one of them prevail in an action on such judgment? Section 336 of the Code of Civil Procedure bars an action upon a decree of the court of any state if brought more than five years after its date. The language of the section, on the face of it, bars an action on a judgment commenced more than five years after its entry in the original court. But inasmuch as a child under age might enforce a judgment for the last five years preceding the filing of a complaint on the foreign judgment or for any portion of such five years, a question is raised as to the applicability of section 336. Because no installment payable under the Ohio judgment

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[1] Respondent's present wife was joined as a defendant, but inasmuch as her presence as a party is immaterial to the issues on this appeal, no further mention will be made of her.

became payable within such last preceding five years, and because all had matured more than five years before the instant suit was filed, not one of the three children can successfully assert a right under the Ohio decree, even if the entire judgment had run in their favor only. Section 336, supra; Biewend v. Biewend, 17 Cal.2d 108, 115, 109 P.2d 701, 132 A.L.R. 1264; Castle v. Castle, 71 Cal.App.2d 323, 324, 162 P.2d 656. At the trial, appellant conceded that she was not entitled to recover any installment that had matured more than five years prior to the filing of her action. Having thus supported the position of the trial court at the trial, she is now estopped to assert the contrary. Cross v. Bouck, 175 Cal. 253, 257, 165 P. 702; Kalmus v. Kalmus, 103 Cal.App.2d 405, 426, 230 P.2d 57; 4 Cal.Jur.2d, sec. 558, p. 424.

[3] Appellant blandly waves aside the question of the California statute of limitation and asserts her right under section 1 of Article IV of the federal constitution which requires full faith and credit to be given in each state to the Public Acts, Records, and judicial proceedings of every other state, as that section is implemented by 28 U.S.C., § 1738. She cites in support of her thesis Sistare v. Sistare, 218 U.S. 1, 16, 30 S.Ct. 682, 54 L.Ed. 905; Barber v. Barber, 323 U.S. 77, 65 S.Ct. 137, 89 L. Ed. 82; Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701, 132 A.L.R. 1264; Barns v. Barns, 9 Cal.App.2d 427, 50 P.2d 463. Full faith and credit is not the precise issue. The judgment had served its purpose everywhere and could have commanded full faith and credit until it encountered the statutes of limitation. It is of no value now to the children because it has fully served its express purposes. It was never intended to provide support for the children after they reached majority, even had they continued to reside in Ohio. Ohio Revised Code, §§ 3103.03, 3105.14, 3109.01.[2]

In Sistare v. Sistare, supra, the New York decree directed the payment of weekly installments as alimony and child support. When plaintiff sued in Connecticut to recover the accrued installments, she lost in the Supreme Court of that state on the theory that because the New York court had power retrospectively to modify accrued installments, the New York judgment was not entitled to full faith and credit. But the Supreme Court of the United States held that the New York Court had no power to modify accrued installments and that the New York decree as to accrued installments was entitled to full faith and credit. However, the decision is not pertinent here because the Sistare children were still minors when their mother sued in Connecticut.

The Barber case, supra, is not pertinent because it involved alimony only. In Biewend v. Biewend, supra, it was held that as to accrued installments, not subject to modification by the Missouri Court, the judgment was held to be entitled to full faith and credit; but as to future installments, subject to modification, they were not entitled to full faith and credit but are enforceable under the doctrine of comity. The other cited cases, Barns v. Barns, 9 Cal.App.2d 427, 50 P.2d 463; Handschy v. Handschy, 32 Cal.App.2d 504, 505, 90 P.2d 123; Gough v. Gough, 101 Cal.App.2d 262, 225 P.2d 668; McDonald v. Butler, 68 Cal. App.2d 120, 156 P.2d 273; Armstrong v. Armstrong, 117 Ohio St. 558, 160 N.E. 34, 57 A.L.R. 1108, are likewise distinguishable on their facts.

Not only is the judgment for support of the children barred by the provisions of section 336 of the Code of Civil Procedure, but it is barred also by the laws of Ohio. After declaring the legal obligation of a parent to support his child, Ohio General Code, § 7997, only to, but not beyond the child's majority, the Supreme Court of Ohio proceeded to declare: "'A proceeding for alimony does not invoke the equity powers of the court but is controlled by statute. The court is only authorized to exercise such power as the statute expressly gives * * *.' The Legislature having imposed no obligation upon the parent beyond the majority of the children, the court was without power to create such obligation, was without power to do other than provide for the maintenance, care, education, and custody of the children during minority, and was without power to make any order with reference to the children which was not for the purpose of maintenance, care, custody, and control during minority." Thiessen v. Moore, 105 Ohio St. 401, 137 N.E. 906, 911. In that case the defendant had been ordered by the divorce decree to convey land to his spouse for life, the remainder to their four children. Instead, the husband bequeathed the land to one of his sons. In reversing the judgment which held the title to have been vested in the four children, the Ohio Supreme Court declared the law in the language above quoted and held that "The effect, and undoubted purpose of the order, was to direct the course of the succession to the title to the real estate after the death of the parents, and not to provide maintenance for the children during minority; it was beyond the jurisdiction of the court in that respect, was absolutely void". In Miller v. Miller, 154 Ohio St. 530, 97 N.E.2d 213, and in Beilstein v. Beilstein, Ohio App., 61 N.E.2d 620, and In re Beilstein, 145 Ohio St. 397, 62 N.E.2d 205, 160 A.L.R. 1430, the Supreme Court of Ohio with emphatic language determines that a parent, in a divorce action, cannot be required to support a child after it has attained its majority; "there is no jurisdiction to make such an order. Section 7997, G.C. * * * limits the responsibility on the part of the father to support only of minor children." Beilstein v. Beilstein, supra, 61 N.E.2d at pages 622, 623. There "is no legal liability on the part of a father to support and maintain an adult child." In re Beilstein, supra, 62 N.E.2d at page 207.

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[2] The Ohio Code sections require (1) the husband to support his wife and minor children; (2) the courts to grant alimony for the wife and support for the minors; and declares all persons over 21 years, under no legal disability, are of full age for all purposes.

[4] From the foregoing it cannot be successfully disputed that orders and decrees of divorce courts in Ohio for child support are by implication, by operation of law and express statutory provision, limited to the child's minority and automatically expire with its attaining majority. See decisions of courts in other states: Rife v. Rife, 272 Ill.App. 404; Van Tinker v. Van Tinker, 38 Wash.2d 390, 229 P.2d 333, 334; Boehler v. Boehler, 125 Wis. 627, 104 N.W. 840, 841; Hansen v. Hansen, 93 Cal.App.2d 568, 570, 209 P.2d 626.

The Judgment as to Alimony.

[5, 6] Even though the judgment with respect to child support had expired more than ten years prior to the commencement of this action, appellant evidently conceives that it should operate in her favor for the alimony included. How can that be done? The courts of California are not expected to rewrite the judgments of the courts of Ohio. If the proposal is that we can reasonably interpret a definite share of the $300 monthly installments was intended for appellant in her own right, the answer is that nothing is found in the Ohio judgment to indicate the amount that was intended by the court as alimony. The judgment is, therefore, too uncertain to be enforceable and the amended pleading, consequently, does not state a cause of action. If appellant is to realize upon the judgment, she must resubmit the matter to the Ohio court for a clarification. From a review of the pertinent decisions it is clearly the established law that if a wife seeks to recover the unpaid installments on her decree from another court and the amount of her award is the combined sum of alimony and child support and her children have attained their majorities and the court is unable to determine the portion intended for alimony as distinguished from the part allowed for child support, then the entire award of such decree is illegal and nonenforceable. Hale v. Hale, 6 Cal.App.2d 661, 45 P.2d 246.[3] The judgment in suit can serve no purpose unless it be first resubmitted to the court of its origin for modification.

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[3] Accord: Danz v. Danz, 96 Cal.App.2d 709, 713, 216 P.2d 162; Harris v. Harris, 10 Cal.App.2d 734, 736, 52 P.2d 985, 54 P. 459; McVey v. McVey, 60 Ariz. 380, 137 P.2d 971, 972; Levy v. Dockendorff, 177 App.Div. 249, 163 N.Y.S. 435,

The law is well exemplified by the case of Levy v. Dockendorff, 177 App.Div. 249, 163 N.Y.S. 435, 439. Having had judgment in North Dakota for the sum of $85 monthly as alimony and child support the wife sued in New York to recover the arrearages. It was there held that even though the plaintiff's right to alimony was barred by a specified contract, no recovery could be allowed for her son because the decree made no apportionment. "It is not shown", said the court, "how or why that amount was fixed * * *. The record fails to disclose either the operation of his [the North Dakota judge's] mind or the facts upon which his decision was reached. There exists, therefore, no basis upon which an apportionment may be made by this court. That issue must be relegated to the foreign tribunal in which the matter was originally presented and determined."

In Hale v. Hale, supra, in 1918 the wife was awarded $45 per month for alimony and support of three children. After the youngest child had attained her majority in 1932, the mother obtained an ex parte order for execution as to installments which had accrued between 1921 and 1932. In remanding the cause, the court directed issuance of execution only as to installments which had accrued to the date of the wife's remarriage in 1926. The court said, 6 Cal.App.2d at page 663, 45 P.2d at page 247, "In August, 1932, the youngest child became of age, and thereupon the entire duty of defendant based on the decree ceased. In the year 1926 plaintiff remarried and within two years thereafter the two elder children had become of age. * * * To determine what portions of the entire amount during the later years after the remarriage of plaintiff would be allowed for the support of Earl who attained his majority in August, 1932, would be to indulge in speculation and guess, and such determination is clearly not the province either of this court or of the trial court."

The authorities cited in the marginal note hold that a court cannot allocate a portion of a combined award of another court for alimony and a part for child support. See also Evans v. Evans, 116 Wash. 460, 199 P. 764.

Appellant can recover nothing on account of her children because (1) more than five years had elapsed between the date her youngest child attained majority and the date she filed her complaint herein and (2) because the Ohio decree is uncertain as to the amount of the award for child support. She can recover no alimony because it cannot be gathered from the decree the amount the court intended for the wife. Therefore, the exclusion of all evidence was the correct ruling on the grounds cited.

Barred in Ohio.

[7] There is still another reason why the complaint does not state a cause of action, namely, the law of Ohio. Were appellant to return now to the state of her origin, she could not recover arrearages for child support because the children have attained their majorities and she is guilty of laches. Also, since the Ohio court reserved continuing jurisdiction over the subject of alimony and child support, appellant does not possess the absolute right to recover in a collateral proceeding in another court. Before she can make any headway toward realizing on her judgment, she must request the court that dissolved her marriage to modify the decree by entering a judgment for the accrued sums. In re Shipley, 11 Ohio Supp. 20; Meister v. Day, 20 Ohio App. 224, 151 N.E. 786, 787; Collins v. Collins, 79 Ohio App. 329, 73 N.E.2d 814, 816. In each of the cited cases the order to pay was limited, as in the instant judgment, by the phrase "until the further order of this court." Each action failed either because of laches on the part of the plaintiff or because she had neither moved the court that had en-

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439; Parker v. Parker, 203 Cal. 787, 795, 266 P. 283; Schluter v. Schluter, 130 Cal.App. 780, 785, 20 P.2d 723; McKannay v. McKannay, 68 Cal.App. 701, 706, 230 P.2d 214; Herman v. Brennan, 236 Mich. 604, 211 N.W. 52, 53; Boehler v. Boehler, 125 Wis. 627, 104 N.W. 840, 841; Rife v. Rife, 272 Ill.App. 404, 411.

tered the decree to reduce the installment order to a lump sum nor petitioned the same court in a separate action for a lump sum judgment. By reason of the fact that in the judgment here involved, the Ohio court expressly reserved a continuing jurisdiction over the subject matter, appellant can state no cause of action until she has requested the Ohio court to modify its decree by adjudging a definite lump sum to be due. Having failed to do so, her complaint states no valid cause of action.

State ex rel. Cook v. Cook, 66 Ohio St. 566, 64 N.E. 567, 58 L.R.A. 625, and Armstrong v. Armstrong, 117 Ohio St. 558, 160 N.E. 34, 57 A.L.R. 1108, cited by appellant are factually distinguishable.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

124 Cal.App.2d 32

PEOPLE v. WILLIAMS.

Cr. 955.

District Court of Appeal, Fourth District, California.

March 19, 1954.

Burglary prosecution. The Superior Court, Inyo County, John P. McMurray, J., entered an order setting aside the information on the ground that defendant was not legally committed, and the People appealed. The District Court of Appeal, Griffin, J., held that accused's statement at preliminary examination that he had no money with which to hire an attorney indicated a desire to have an attorney appointed to represent him and failure of magistrate to appoint counsel at preliminary examination made commitment illegal.

Affirmed.

1. Criminal Law 🔑232

Where provision of Penal Code was amended to require appointment of counsel at preliminary examination upon request of defendant, and the same provision was, at the same session, subsequently further amended in a minor particular without including the requirement as to appointment of counsel, the omission of such requirement in the latter amendment was inadvertent and did not result in repeal by implication of the earlier amendment. Pen. Code, §§ 859, 866.5, 987.

2. Criminal Law 🔑232, 641(1)

The accused has the right, in any criminal prosecution in any court, to appear and defend, in person and with counsel, and at preliminary examination, magistrate must inform accused of his right to counsel, must ask him if he desires counsel, and must allow him reasonable time to send for counsel. Const. art. 1, § 13.

3. Criminal Law 🔑232

Accused's statement at preliminary examination that he had no money with which to hire an attorney indicated a desire to have an attorney appointed to represent him and failure of magistrate to appoint counsel at preliminary examination made commitment illegal. Pen.Code, § 859.

4. Criminal Law 🔑232

Where defendant was examined at preliminary hearing, was not represented by counsel, and did not waive such right, examination of him as to voluntariness of statements made to police officers, which statements indicated defendant's presence at scene of alleged offense, was improper. Pen.Code, § 866.5.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Robert Loundagin, Dist. Atty., Independence, George Bobolia, Deputy Dist. Atty., Los Angeles, for appellant.

Kenneth W. Kearney, Independence, for respondent.

GRIFFIN, Justice.

The people appeal from an order setting aside an information charging the defendant with the crime of burglary alleged to have been committed on September 23, 1953, on the ground that he was not legally committed by the magistrate in that counsel was not appointed to represent him at the preliminary examination.

The appeal is based on an agreed statement of facts. Defendant was duly arraigned in the Justice Court and was informed of his constitutional rights under section 858 of the Penal Code, which included his right to the aid of counsel in every stage of the proceedings. He did not then express a desire for the services of an attorney. The preliminary examination was set for the following day. The defendant was brought into court without an attorney and he was informed that that was the time and place set for the preliminary examination upon the charge read to him, and he was interrogated by the magistrate in respect to his desire to have an attorney represent him as follows:

> "You didn't want to hire an attorney to represent you, is that right?
>
> "Defendant: I have no money to hire one or anything to hire one.
>
> "The Court: Well, you are able-bodied, aren't you? A. Yes.
>
> "The Court: You can work, can't you? A. Yes.
>
> "The Court: I see no reason why an attorney should be appointed to represent you at the taxpayer's expense at this preliminary hearing anyhow. So that you are ready to proceed now. You have already been informed and you know that you do not have to testify yourself unless you want to."

Thereafter, witnesses were sworn on behalf of the people, and testified pertaining to the breaking and entry into a store, and of the missing money and merchandise. The undersheriff questioned the defendant after his arrest. While the undersheriff was on the witness stand, after stating that defendant's statements were made freely and voluntarily, and before he related them, the magistrate interrupted and remarked:

> "Just a minute if we are approaching a confession here I want to make sure since Mr. Williams isn't represented by an attorney. I would like to ask him a question or two. Is this going to bring about the introduction of a confession?
>
> "(By the prosecutor): A statement. It might amount to a confession.
>
> "The Court (directing questions to Mr. Williams): Q. You have heard, Mr. Williams, Undersheriff Stanton's statements here. At any time were you threatened at all in any way?
>
> "(By the prosecutor): Your Honor, may I ask that on voir dire you put the witness under oath?
>
> "The Court: Yes, I think that is proper."

Thereafter, Williams was sworn as a witness and the magistrate inquired whether or not the undersheriff had threatened him in any way to say anything about "this burglary". It appears from the record that the defendant signed a written statement in reference to his presence at the scene of the burglary on that evening. In reply to the question propounded by the magistrate: "You made some statements to them (the officers) I take it?" the defendant answered "Yes". "Q. And they were all made voluntarily on your part? A. Yes. * * * Q. You weren't promised any benefits from making such statements? A. None at all." Defendant was then asked if he cared to testify or produce any witnesses in his own behalf. After a negative answer he was held to answer the charge in the Superior Court.

In that court an attorney was appointed to represent the defendant and before plea, a motion was made to set aside the information on the ground that defendant was denied his statutory right to have counsel appointed to represent him at the preliminary examination. The motion was granted and the court stated that it was his opinion, from the record presented, that the defendant did desire to have an attorney appointed to represent him at the preliminary examination and that the magistrate refused. It is apparent that such refusal was based on the fact that since the defendant had no money to hire an attorney the magistrate was not going to appoint one at the taxpayer's expense merely because it appeared that defendant was ablebodied and able to work.

The sole question presented on this appeal is whether, under the facts related, the failure of the magistrate to appoint counsel to represent defendant at the preliminary examination is such a violation of the defendant's right as to make the resulting commitment illegal.

It is conceded that prior to the amendment of section 859 of the Penal Code in 1951, the statutes did not require the magistrate to appoint counsel at the request of a defendant at the preliminary examination. People v. Crowley, 13 Cal.App. 322, 324, 109 P. 493; People v. Campos, 10 Cal. App.2d 310, 320, 52 P.2d 251; People v. Brooks, 72 Cal.App.2d 657, 660, 165 P.2d 51.

In 1951, the legislature amended section 859, Stats.1951, chapter 1160, by adding a paragraph: "If he desires and is unable to employ counsel, the court must assign counsel to defend him." This sentence is likewise contained in section 987 of the Penal Code pertaining to the arraignment of a defendant in the Superior Court.

At the same session, by a later enactment, Stats.1951, chapter 1608, section 859 was amended in a minor particular in which the words "judicial district" were substituted for the words "city or township", without including the sentence heretofore quoted.

[1] It is the people's contention, citing the general rule, that where two legislative enactments conflict, in that one changes or omits some provision contained in the other, the latter approved act ordinarily repeals by implication the inconsistent terms of the earlier enactment, citing 23 Cal.Jur. secs. 73 and 83, pages 683 and 693; In re McManus, 123 Cal.App.2d 395, 266 P. 2d 929, and cases therein cited. Accordingly, it is contended that construing section 866.5 of the Penal Code, enacted in 1953, chapter 1482, Stats.1953, providing that the defendant may not be examined at the examination, unless he is represented by counsel, or unless he waives his right to counsel after being advised at such examination of his right to aid of counsel, it is the more logical conclusion that the legislature intended a repeal of the first enactment of section 859 in 1951, pertaining to the duty to appoint counsel at the preliminary hearing, since there was no attempt to reinsert the omitted sentence in the later enactment.

In re McManus, supra, discusses the several authorities upon which the court relied in holding that when two laws upon the same subject, passed at different times at the same session of the legislature, are inconsistent with each other, the one last passed must prevail. There it was clear that the two enactments under consideration were in apparent conflict and inconsistent with each other, and it was held, in considering the intention of the legislature, that the one latest in point of time of enactment, i. e., approved by the Governor and filed with the Secretary of State, prevailed, citing Davis v. Whidden, 117 Cal. 618, 49 P. 766.

At the request of the district attorneys and judges of several municipal courts in the state the attorney general's office, on February 21, 1952 (19 Ops.Cal.Atty.Gen. p. 104) after exhaustive research, rendered an opinion on this same question and held that the failure to carry the amendment contained in chapter 1160 into chapter 1608 did not show legislative intent to repeal the earlier enactment, but presented a case of inadvertent inconsistency. In that opinion the legislative history pertaining to the two enactments is set forth in detail, and recites:

> "Chapter 1160 originated as Assembly Bill 1164. As originally introduced, its only effect was to amend Penal Code section 987a, relating to the compensation of counsel appointed to defend accused persons. At the second reading on April 12, 1951, another section was added to the bill, for the purpose of including in Penal Code section 859 the requirement now in question. With certain other amendments not relevant here, Assembly Bill 1164 was passed and approved and became chapter 1160 of the 1951 statutes.
>
> "It had come to the notice of the Judicial Council that numerous sections

of the Penal Code used the terms 'justice of the peace', 'justice's court', and 'township', and that under the plan adopted in 1949 for the reorganization of the inferior courts, these terms had become obsolete (1949 Cal.Stats. Chap. 1510). The research staff of the Judicial Council, therefore, drafted a bill, which, on January 18, 1951, was introduced in each house (S.B. 573, A.B. 1771) for the purpose of striking out the obsolete terminology and substituting where necessary the terms 'judge of the justice court', 'justice court', and 'judicial district'. These bills were passed and became Chapter 1608 of the 1951 statutes. That the only purpose of Chapter 1608 was to clarify the law by making the changes mentioned above is demonstrated by the facts that no substantive changes were included, and that the corrections were ordered to take effect on January 1, 1952, *only* in the courts reorganized on that date (Id. sec. 31).

"Penal Code section 859 was one of the thirty sections found to contain obsolete terminology; it provided for the delivery of a message 'to any counsel whom the defendant may name, in the *city or township in* which the court is situated.' (Italics added.) The draftsman of chapter 1608, therefore, restated Penal Code section 859 as it appears in the 1949 edition of the code, substituting the correct term 'judicial district' for the obsolete term 'city or township'."

The author then plausibly explains the omission to include, in the restatement of section 859, the final paragraph added by chapter 1160, as follows, which we also adopt as our conclusion:

"The bills which became Chapter 1608 were introduced on January 18, before the bill which became Chapter 1160 had been amended on April 12, to provide for appointment of counsel. By chance, Chapter 1168, as amended to provide for the appointment of counsel, was passed and approved before Chapter 1608. Apparently, equally by chance, no one concerned with the progress of Chapter 1608 through the Legislature noticed that Penal Code section 859 was affected by other pending legislation. The discrepancy between the two chapters was thus obviously inadvertent, and was not the result of an intention to nullify the provisions of Chapter 1160 regarding the appointment of counsel."

The general rule relied upon by appellant is discussed in that opinion. We conclude that the following authorities, and those cited in the opinion of the Attorney General, supra, support the conclusion here adopted: People v. King, 28 Cal. 265, 266; State v. Zorn, 99 Mont. 63, 41 P.2d 513; Pond v. Maddox, 38 Cal. 572, 573; Fletcher v. Prather, 102 Cal. 413, 36 P. 658; City of Los Angeles v. Lelande, 11 Cal. App. 302, 104 P. 717; People ex rel. Board of State Harbor Com'rs v. Pacific Improvement Co., 130 Cal. 442, 62 P. 739; Ex parte Ruffin, 119 Cal. 487, 51 P. 862; Hellman v. Shoulters, 114 Cal. 136, 44 P. 915, 45 P. 1057; Childs v. Cross, 41 Cal.App.2d 680, 107 P.2d 424; Sutherland, Statutory Construction, sec. 1932; 4 Ops.Cal.Atty.Gen. 52; People v. Mora, 120 Cal.App.2d 896, 262 P.2d 594; and In re Jingles, 27 Cal.2d 496, 498, 165 P.2d 12.

The next question presented is whether the Superior Court was, under the evidence produced, justified in concluding that defendant Williams "desired" counsel to defend him and whether he was unable to employ counsel. If so it was, under the section, the duty of the magistrate to assign counsel to defend him.

An examination of the testimony shows that the time between arraignment in the magistrate's court and the time for hearing the preliminary examination was only a matter of overnight, when defendant's ability to secure his own counsel, if he so desired, was, to say the least, somewhat limited. When he appeared for the hearing the magistrate propounded the question: "You didn't want to *hire* an attorney to represent you, is that right?" (Italics ours.) (The question was not whether he wanted the court to appoint or assign an attorney to represent him.) The defendant answered that he had "no money to hire one". The fact that he was able-bodied and could work did not preclude him from being classified as one unable to employ counsel when he was then confined in jail and accordingly unable to work. The statement of the magistrate indicates that he would not have appointed an attorney to represent the defendant at the preliminary hearing even though he had requested such assistance, due to the fact that the expense of such representation might fall upon the taxpayers.

[2] The right to counsel is a fundamental constitutional right which has been carefully guarded by the courts of this state. The accused has the right, in any criminal prosecution in any court whatever, to appear and defend, in person and with counsel. California Constitution, Art. I, § 13. At the preliminary examination the magistrate must inform the accused of his right to counsel, ask him if he desires counsel, and allow him a reasonable time to send for counsel. In re James, 38 Cal.2d 302, 310, 240 P.2d 596. See, also, In re Masching, 41 Cal.2d 530, 261 P.2d 251.

[3] The testimony produced supports the trial court's conclusion that from defendant's demeanor he did desire to have an attorney appointed to represent him, and had sufficiently complied with section 859 of the Penal Code entitling him to have counsel assigned to defend him at the preliminary examination.

[4] In further support of the order, it may be said that by the showing made, the magistrate, for his own satisfaction, called the defendant to the witness stand and examined him in reference to the purported statement he made and signed, for the purpose of determining whether or not that statement was made under promises of immunity. These statements indicated defendant's presence at the scene of the alleged burglary that evening.

Section 866.5 of the Penal Code, adopted in 1953, Stats.1953, chapter 1482 (effective at the time of the preliminary hearing here involved), provides that the defendant may not be examined at the examination, unless he is represented by counsel, or unless he waives his right to counsel after being advised at such examination of his right to aid of counsel. Since defendant was examined at the preliminary hearing, was not represented by counsel, and apparently did not waive such right, under the provisions of this section, the order of the trial court was authorized.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

123 Cal.App.2d 865

RIOS et al.

v.

LACEY TRUCKING CO., Inc., et al.

LOPEZ et al.

v.

LACEY TRUCKING CO., Inc., et al.

GRAJEDA et al.

v.

LACEY TRUCKING CO., Inc., et al.

Civ. 19859–19861.

District Court of Appeal, Second District,
Division 2, California.

March 16, 1954.

Action for personal injuries and wrongful death arising out of automobile collision. The Superior Court, Los Angeles County, John J. Ford, J., entered order denying defendants' motions for change of venue for convenience of witnesses and promotion of ends of justice, and defendants appealed. The District Court of Appeal, Fox, J., held that court did not abuse its discretion in denying the motions.

Orders affirmed.

1. Venue 🔑21

Actions against owner of truck and trailer, and driver thereof, for injuries and death arising out of a collision, were properly filed in county wherein owner resided and had his principal place of business. Code Civ.Proc. § 395.

2. Venue ⚷68

Under statute authorizing trial court, on motion, to change place of trial when convenience of witnesses and ends of justice will be promoted, it is equally essential that ends of justice will be promoted by change of venue, and burden of proving both of such conditions is necessarily on the moving party. Code Civ.Proc. § 397, subd. 3.

3. Appeal and Error ⚷965
Venue ⚷51, 52(1)

Motion for change of venue on ground that convenience of witnesses and ends of justice would be promoted by change is committed to sound discretion of trial court, and its determination will not be disturbed on appeal unless it clearly appears as matter of law that there has been an abuse of such discretion. Code Civ.Proc. § 397, subd. 3.

4. Venue ⚷72

Convenience of a party in attending trial cannot be considered on motion for change of venue for convenience of witnesses. Code Civ.Proc. § 397, subd. 3.

5. Venue ⚷66

Affidavits filed in opposition to defendants' motions for change of venue for convenience of witnesses and promotion of ends of justice were sufficient to raise question as to whether or not plaintiffs could likely obtain an unbiased jury and a fair trial in county to which defendants sought to remove venue. Code Civ.Proc. § 397, subds. 2, 3.

6. Venue ⚷70

Weight to be given affidavits filed in opposition to motions for change of venue was for determination of trial court.

7. Venue ⚷70

Where defendants filed motions for change of venue on ground that convenience of witnesses and ends of justice would be promoted by change, plaintiffs, in affidavits filed in opposition to such motions, were entitled to raise, and court was entitled to consider, the question whether plaintiffs could obtain a fair trial in county to which defendants sought to change venue. Code Civ.Proc. § 397, subds. 2, 3.

8. Venue ⚷70

In automobile collision case, court did not abuse its discretion in denying motions for change of venue for convenience of witnesses and promotion of ends of justice, where affidavits in support of motions showed inconvenience to two witnesses if venue were not changed, and affidavits in opposition to motions raised question of uncertainty of fair trial if litigation were transferred. Code Civ.Proc. § 397, subds. 2, 3.

◆

Hansen & Barstow, Fresno, and Robert W. Stevenson, Los Angeles, for appellants.

Hildebrand, Bills & McLeod, D. W. Brobst, Oakland, for respondents.

FOX, Justice.

These actions for personal injuries and wrongful death arose out of a collision in Madera County, California, between a 1936 Ford sedan in which the plaintiffs were riding, and a truck and trailer owned by John A. Lacey, doing business as Lacey Trucking Company. Defendant Fordice was operating the truck at the time of the accident. Mr. Lacey is a resident of and has his principal place of business in Los Angeles County.

Upon issue being joined, defendants filed identical motions in each case for a change of venue to Madera County upon the ground that "the convenience of witnesses and the ends of justice will be promoted by changing the place of trial from said Los Angeles County to said Madera County." The motions were based on Code of Civil Procedure section 397, subdivision 3.[1]

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[1] Section 397, subd. 3 reads in part as follows: "The court may, on motion, change the place of trial in the following cases: * * * 3. When the convenience of witnesses and the ends of justice would be promoted by the change; * * *."

Defendants appeal from the orders denying their motions.

[1] Preliminarily, it should be noted that these actions were properly filed in Los Angeles County since this county is the residence of defendant Lacey and his principal place of business is located here. Code Civ.Proc. sec. 395.

In an affidavit in support of the motions by Robert M. Stevenson, one of counsel for defendants, it appears that defendant Fordice is a resident of Bakersfield, Kern County, and is employed "as a line haul driver" by defendant Lacey between Bakersfield and various points north of the city of Madera, in the state of California; "that leaving said city for any length of time will prevent him from making his normal trips in the course of his employment * * *." This affidavit then states that one Himes was "present at the scene of the accident" and gives a résumé of his anticipated testimony. Mr. Himes is a resident of the city of Kerman, Fresno County, and "is self-employed in and around the said city" which is approximately 15 miles south of Madera and 230 miles north of Los Angeles. Leaving Kerman for any length of time, says the affidavit, "will seriously interfere with his occupation causing him great loss" and, continues the affidavit of counsel, "it will be more convenient for him to appear in Madera than in Los Angeles." The other two witnesses are members of the California Highway Patrol stationed in Madera who investigated the accident.

Two affidavits were filed in opposition to the motions. One was by Manuel Hermosa, an investigator for counsel for plaintiffs, who stated that pursuant to such employment, "he contacted witnesses in Madera and canvassed the neighborhood adjacent to the scene of the accident; that during the course of his investigation he interviewed approximately fifteen (15) or twenty (20) people; that in the course of these interviews, the majority of the people interviewed told him that they were not interested, that it was just a bunch of Mexicans that had been hurt, reflecting a general prejudice against Mexican workers in this area; that thereafter, because of this expressed prejudice against the Mexican workers in this area, he inquired generally as to whether or not a fair trial could be had in Madera; that due to the general prejudice he experienced in interviewing witnesses, it is his opinion that a fair trial could not be had by Mexican workers in the courts of Madera." The other affidavit was by D. W. Brobst, one of counsel for plaintiffs. He states that these cases will be tried before a jury; that he has talked to investigator Hermosa and as a result of the information received from him "that there is a general prejudice in and around Madera against Mexican workers" it is his opinion that "it would be extremely difficult to obtain an unbiased jury" due to this general feeling.

[2] Subdivision 3 of section 397, Code of Civil Procedure, contains conjunctive conditions, both of which must be established before the moving party is entitled to change the place of trial; "it is not only necessary that the convenience of witnesses be promoted but equally essential that the 'ends of justice' be promoted before the court is justified in granting the motion." Churchill v. White, 119 Cal.App.2d 503. 507, 259 P.2d 974, 976; Willingham v. Pecora, 44 Cal.App.2d 289, 295, 112 P.2d 328; Figley v. California Arrow Airlines, 111 Cal.App.2d 285, 286, 244 P.2d 472. "The burden of proving both of these conditions is necessarily on the moving party." Willingham v. Pecora, supra [44 Cal.App.2d 289, 112 P.2d 332].

[3] A motion for a change of the place of trial on the ground that the convenience of witnesses and the ends of justice would be promoted by the change is committed to the sound discretion of the trial court and its determination will not be disturbed on appeal unless it clearly appears, as a matter of law, that there has been an abuse of such discretion. Sowers v. Sowers, 127 Cal.App. 579, 582, 16 P.2d 176; Rice v. Schubert, 101 Cal.App.2d 638, 642, 226 P.2d 50.

[4] Upon examination of the affidavit in support of the motion re convenience of witnesses it is immediately apparent that the convenience of Mr. Fordice cannot be considered in the absence of unusual cir-

cumstances since he is a party. Wrin v. Ohlandt, 213 Cal. 158, 160, 1 P.2d 991; Carnation Co. v. El Rey Cheese Co., 92 Cal. App.2d 726, 728, 208 P.2d 63. As to the two highway patrolmen, both would testify to the same facts, so one officer's testimony would only be cumulative of the other and therefore unnecessary. It does not appear that one of these officers could not attend the trial in Los Angeles, or that such attendance would unduly interfere with the work of the office in Madera. Nor are any facts stated to support the conclusion of the affiant that the absence of a state highway patrolman for a brief period for the purpose of testifying to facts ascertained in the course of his official duties could cause him "great loss." As to witness Himes, the nature of his business is not disclosed. It is simply stated that "he is self-employed in and around the city of Kerman" in Fresno County. Whether his work is regular, intermittent or part time does not appear. No facts are stated in support of affiant's conclusion that his absence from Kerman "for any length of time will seriously interfere with his occupation causing him great loss." It does not appear that Himes was either unable or unwilling to come to Los Angeles to testify.

On the question of the convenience of witnesses it thus appears that the court was required to consider the convenience of only two, and that there is a conspicuous absence of factual support for counsel's conclusion that it would cause these two men "great loss" to come to Los Angeles for this trial. The trial court no doubt took this into consideration in determining the weight to be given the affidavit in support of the motions.

[5, 6] We come now to a consideration of the affidavits in opposition to the motions. While these affidavits are not in commendatory detail they are sufficient to raise the question as to whether or not these plaintiffs could likely obtain an unbiased jury and a fair trial in Madera County. The weight to be given to these affidavits was of course for the trial court to determine.

Defendants assert that the record fails to show that plaintiffs are Mexican workers and therefore fails to show they fall within the class of persons against whom it is claimed prejudice exists in Madera County. It is true that plaintiffs are not specifically referred to as Mexican workers but the trial court could reasonably have drawn such an inference from the Hermosa affidavit.

[7] Defendants further contend that plaintiffs have prematurely raised the question of the difficulty of their getting a fair trial in Madera County. They point out that subdivision 2 of section 397, Code of Civil Procedure, authorizes the court to change the place of trial "When there is reason to believe that an impartial trial cannot be had therein", i. e., in the county where the action is then pending. Hence, they argue, a motion for a change of venue on this latter ground would have to be made in Madera County after the action had been transferred there. The answer to this argument is that plaintiffs are not moving for a change of venue on the ground that an impartial trial cannot be had in Madera County, or upon any other ground. They are not making *any* motion. Defendants are making the motion for change of place of trial. One of the elements they must establish is that "the ends of justice would be promoted by the change". Code Civ.Proc. sec. 397, subd. 3. Plaintiffs' affidavits are addressed to that question, and properly so, for the ends of justice would not be promoted if, by the change, a fair trial was unlikely, for such a trial is the very essence of justice. To hold that matters relating to a fair trial could not be considered in this proceeding but only by the Madera Superior Court upon motion of the plaintiffs after the case had been transferred there, would not promote "the ends of justice", for it would mean both delay and extra expense.

[8] In passing on these motions it was the trial judge's responsibility, in the exercise of a sound discretion, to weigh and evaluate (1) the inconvenience to Mr. Himes and to one of the highway patrolmen from Madera if the trial is held in Los Angeles, and (2) the uncertainty of the plaintiffs getting a fair trial if the litigation is transferred to Madera County. As was said in Figley v. California Arrow

Airlines, 111 Cal.App.2d 285, at page 288, 244 P.2d 472, at page 474, "considering the showing on both sides, the trial court was confronted with a situation where it could have decided the motion either way and its action in deciding as it did cannot be here disturbed."

The orders are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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124 Cal.App.2d 190

DICKISON et al. v. LA THORPE.

Civ. 4677.

District Court of Appeal, Fourth District, California.

March 26, 1954.

Action by automobile driver for personal injuries sustained in collision with motorist traveling on through highway. Motorist filed cross-complaint for damages to automobile. The Superior Court, Fresno County, Strother P. Walton, J., granted driver's motion for new trial after verdict against driver on complaint, and against motorist on cross-complaint. Motorist appealed. The District Court of Appeal, Mussell, J., held that where motorist was concededly negligent, and driver had stopped before entering highway from private road and then proceeded with caution, trial court did not abuse discretion in granting motion for new trial on ground that evidence was insufficient to justify verdict.

Order affirmed.

1. Automobiles 🔑208

It is the duty of a driver of an automobile entering highway from private driveway to look for approaching automobiles and not to proceed if one is coming, unless, as a reasonably prudent and cautious person he believes, and has the right to believe, that he can pass in front of approaching automobile in safety. Vehicle Code, § 553.

2. Automobiles 🔑245(67)

In action for personal injuries by driver who stopped before entering highway from private road and then proceeded to cross with caution when fog prevented her seeing approaching automobile and collision resulted, question of contributory negligence was for the jury. Vehicle Code, § 553.

3. New Trial 🔑70

In action for personal injuries sustained in automobile collision by driver who had stopped at entrance to highway and then proceeded to cross with caution and was struck by motorist who was traveling on highway at high rate of speed despite poor visibility, trial court did not abuse its discretion in granting motion for new trial on ground that evidence was insufficient to justify verdict against driver. Vehicle Code, § 553.

Hansen & Barstow, J. C. Hammel, and Harold V. Thompson, Fresno, for appellant.

H. A. Savage, Stutsman, Hackett & Nagel, Fresno, for respondents.

MUSSELL, Justice.

This is an action for damages for personal injuries sustained in an automobile collision. Defendant answered and filed a cross-complaint for damages to his automobile. A jury trial resulted in a verdict against the plaintiffs on their complaint and against the defendant on his cross-complaint. Judgment was entered in accordance with the verdict of the jury and plaintiffs thereafter moved for a new trial for the following causes:

(1) Irregularity in the proceedings of the court and jury and abuse of discretion by the court by which these plaintiffs and cross-defendants were prevented from having a fair trial.

(2) Misconduct of the jury.

(3) Accident and surprise which ordinary prudence could not have guarded against.

(4) Newly discovered evidence material to these plaintiffs and cross-defendants which they could not, with reasonable diligence, have discovered and produced at the trial.

(5) Insufficiency of the evidence to justify the verdict.

(6) Errors in law occurring at the trial and excepted to by these plaintiffs and cross-defendants.

The trial court granted the motion on the grounds set forth therein and including the insufficiency of the evidence to justify the verdict. Defendant appeals from the order granting the new trial asserting that the evidence demonstrates that plaintiff Sybil Dickison was guilty of negligence as a matter of law and that since there was no substantial evidence to support a verdict for plaintiffs, the order granting a new trial must be reversed.

The accident occurred at approximately 7:45 a. m., November 28, 1949, on highway 99 near Kingsburg in Fresno county. Heavy fog limited visibility to a distance of from 50 to 75 feet. Plaintiff Sybil Dickison drove a Chevrolet automobile, with lights on and windshield wiper working, in an easterly direction along an east-west private roadway to its intersection with highway 99, which, at that point, runs north and south. She stopped at the entrance to the highway, then having ascertained that it was safe to cross the southbound lanes, proceeded easterly to the traffic island which separated the north and south traffic lanes. The distance between the north and south traffic lanes on the highway at this point was approximately thirty-seven and one-half feet. Plaintiff again stopped before proceeding across the northbound traffic lanes, rolled down the right window of her car, and while looking to the right for northbound traffic, proceeded across the highway at a speed of approximately five to ten miles per hour. When the front bumper of her car was near the center white line dividing the northbound traffic lanes, she turned to look straight ahead and was struck by defendant's northbound automobile. Plaintiff did not see defendant's car at any time before the impact.

Defendant was traveling north in the right lane of highway 99 at a speed which he stated could have been 45, 55, or more miles per hour and which was stated by one of the witnesses to have been "60 or better". Defendant estimated the visibility as about 30 to 40 feet in the fog. He stated that when he first saw plaintiff's car, it was approximately 30 feet away; that he put on his brakes but was unable to stop and that the point of impact was in the east lane of the highway. The evidence shows that the defendant's car left 45 feet of skid marks leading up to the point of impact.

Defendant first asserts that the evidence shows that plaintiff Sybil Dickison was guilty of negligence as a matter of law. This contention lacks merit. As was said in McDougall v. Morrison, 55 Cal.App.2d 92, 96, 130 P.2d 149, 151:

> "Contributory negligence as a matter of law, can only be found where reasonable minds cannot but conclude that a reasonably careful and prudent person situated as was plaintiff would not have acted as he did. The situations where a court will so declare are rare. Casselman v. Hartford Acc. & I. Co., 36 Cal.App.2d 700, 98 P.2d 539; Enz v. Johns, 112 Cal.App. 1, 296 P. 115. If the circumstances are such that reasonable minds can differ, or, if the evidence is in conflict, the finding of the trier of the facts is conclusive."

In Page v. Cudahy Packing Co., 31 Cal. App.2d 282, 288, 87 P.2d 913, 916, it is said:

> "Contributory negligence is ordinarily a question of fact for the determination of the jury. It becomes a question of law only when the undisputed facts, viewed in the light of common knowledge and experience, clearly indicate that the plaintiff failed to use that degree of care which an ordinarily prudent person would be bound to exercise under similar circumstances. Gleason v. Fire Protec-

tion Engineering Co., 127 Cal.App. 754, 756, 16 P.2d 750. In Haight v. White, 16 Cal.App.2d 426, 60 P.2d 548, 549, it is said in that regard: '"Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference pointing unerringly to the negligence of the plaintiff contributing to the injury. * * * In all other cases the question of contributory negligence is a question of fact for the jury."'"

As was said in Dennis v. Gonzales, 91 Cal.App.2d 203, 207, 205 P.2d 55, 57:

> "Whether the established facts constitute contributory negligence as a matter of law may not be easily determined. Their solution depends upon 'the existing circumstances in each particular case.'"

[1] Under section 553 of the Vehicle Code it is the duty of a driver of an automobile entering the highway from a private driveway to look for approaching cars and not to proceed if one is coming, unless, as a reasonably prudent and cautious person he believes, and has the right to believe that he can pass in front of the other in safety. McDougall v. Morrison, supra, 55 Cal.App.2d 96, 130 P.2d 151.

In the instant case, plaintiff Sybil Dickison stopped before entering the highway. When she reached the center island, she again stopped, lowered her right window and looked to the right before starting across the northbound traffic lanes. She saw no car approaching and proceeded across, looking to her right until approximately half way across the northbound traffic lane. Defendant was driving at a high rate of speed, with visibility of 50 to 75 feet. Admittedly, he was negligent and no claim is made by appellant that the evidence did not support the finding of negligence on his part.

[2] The evidence shows that plaintiff Sybil Dickison was mistaken as to her ability to safely cross the highway. However, it was said in Malinson v. Black, 83 Cal. App.2d 375, 378, 188 P.2d 788, that *every mistake of judgment is not negligence,* for mistakes are made even in the exercise of ordinary care, and whether such mistakes of judgment constitute negligence, is a question of fact. Under the circumstances shown, we cannot hold that plaintiff Sybil Dickison was guilty of negligence as a matter of law or that the evidence would not support a judgment in her favor.

[3] A new trial was granted on the grounds, among others, that the evidence was insufficient to justify the verdict. As was said in Re Estate of Elliot, 114 Cal. App.2d 747, 748–749, 250 P.2d 684, 685:

"The following rules are pertinent:

> "(1) In passing on a motion for a new trial made on the ground of the insufficiency of the evidence to sustain the verdict, it is the duty of the trial judge to review all the evidence, weigh its sufficiency and judge the credibility of the witnesses. He is at liberty to disregard the findings of the jury which are implied from the verdict. He functions as a thirteenth juror. (Fisher v. Zimmerman, 23 Cal.App.2d 696, 700(2), 73 P.2d 1243; In re Estate of Phillipi, 76 Cal.App.2d 100, 103(3), 172 P.2d 377; Broderick v. Sutherland, 94 Cal.App.2d 694, 696(3), 211 P. 2d 364. Cf. 4 Cal.Jur.2d (1952) Appeal and Error, sec. 598, p. 476.)
>
> "(2) In passing upon the propriety of an order granting a new trial on the ground of the insufficiency of the evidence, the test is whether or not there is any evidence that would legally substantiate and uphold the verdict for the moving party had the jury decided for him. Measured by this test the only question for an appellate court to decide is whether the trial court abused its discretionary powers. (Van Antwerp v. Smith, 39 Cal.App. 2d 458, 459(1) et seq., 103 P.2d 446)."

We conclude that the trial court did not abuse its discretion in granting the motion for a new trial on this ground alone and since we have reached this conclusion, it is unnecessary to determine whether the motion should have been granted on the other grounds urged.

The order granting a new trial is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

124 Cal.App.2d 195

STRAIN
v.
SECURITY TITLE INS. CO. et al.

Civ. 4688.

District Court of Appeal, Fourth District, California.

March 26, 1954.

Hearing Denied May 19, 1954.

Action was brought to quiet title, cancel notes, and restrain defendants from selling realty under trust deed given to secure notes. The Superior Court of Fresno County, Edward L. Kellas, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that where notes, which plaintiff had executed, represented sums contributed by defendants to partnership and had been given to defendants as security for return to defendants of capital invested in partnership business, and, on incorporation of partnership business, stock in corporation was issued to defendants, but not in payment of notes as contended by plaintiff, Superior Court properly made judgment for defendants conditioned on surrender of stock.

Judgment affirmed.

1. Payment 🔑8(1)

"Payment," is that which parties to contract agree shall be accepted as such.

See publication Words and Phrases, for other judicial constructions and definitions of "Payment".

2. Judgment 🔑229

Court of Equity, in imposing a condition, is not bound down to strict legal rights of parties, but will consider all circumstances in order to arrive at justice.

3. Judgment 🔑229

Court granting equitable relief has power to make its decrees contingent on compliance by plaintiff with certain conditions.

4. Equity 🔑39(1)

Suit to quiet title, cancel notes, and restrain defendants from selling realty under terms of trust deed given to secure notes, was an equitable action, and court had jurisdiction to hear and determine all issues necessary to do complete justice.

5. Judgment 🔑229

Where notes, which plaintiff had executed, represented sums contributed by defendants to partnership and had been given to defendants as security for return to defendants of capital invested in partnership, and, on incorporation of partnership business, stock in corporation was issued to defendants, but not in payment of notes as contended by plaintiff, court properly made judgment for defendants conditioned on surrender of stock.

6. Bills and Notes 🔑493(1)

A note or bill of exchange is presumed to have been given or endorsed for a sufficient consideration. Code Civ.Proc. § 1963, subd. 21.

7. Mortgages 🔑25(6)

In action to quiet title, cancel notes, and restrain defendants from selling realty under terms of trust deed given to secure notes, evidence sustained implied finding that there was consideration for the notes.

◆

Lawrence W. Young, Fresno, for appellant.

Meux & Gallagher, Fresno, for respondents.

MUSSELL, Justice.

This is an action to quiet title, cancel certain promissory notes and to restrain defendants from selling the real property described in the complaint under the terms of a deed of trust given to secure said notes.

It is alleged in the complaint that on February 6, 1948, plaintiff and her husband, L. R. Strain, executed two promissory notes, payable to defendants Glenn and Phyllis Magee, one for $5,000, with interest at six per cent and the other for $15,000, with interest at five per cent; that both notes were payable on or before January 24, 1951; that on February 6, 1948, plaintiff and her husband also executed a deed of trust on the real property described in the complaint to secure the payment of said notes; that said real property was held in joint tenancy by Mr. and Mrs. Strain; that said L. R. Strain died and plaintiff, as the surviving joint tenant, became the sole owner of the property; that the two promissory notes secured by the trust deed were fully paid prior to August 15, 1952; that a notice of default and election to sell under said trust deed was filed on August 15, 1952, by the defendant title company as trustee; that unless said title company is restrained by the court it will sell the property under the terms of the trust deed to satisfy the sum of $18,240, plus interest, alleged by defendants to be due under said notes. Defendants, in their answer, denied that the said notes had been fully paid prior to August 15, 1952, or at any other time, and alleged that they had an interest in the property involved.

The trial court found that the notes had not been paid in full as alleged by plaintiff and she appeals from the judgment denying her the relief sought in the complaint.

Facts

On January 24, 1946, a limited partnership agreement was executed by and between Henry C. Berg and L. R. Strain, general partners, and Glenn E. Magee and Phyllis Magee as limited partners. This partnership was formed for the purpose of carrying on a general plumbing and heating business in Fresno and was for a term of five years from and after January 24, 1946. The stated capital of the partnership was $45,000, contributed as follows: Berg and Strain, who had theretofore been conducting a partnership business, were to transfer the assets from the general partnership to the limited partnership and these assets were valued at the sum of $30,000. The Magees, as limited partners, were to contribute $7,500 each, payable $10,000 upon the execution of the agreement and an additional $5,000 on February 15, 1946. The agreement further provided that upon the termination of the partnership (on January 24, 1951) the limited partners should receive their contribution to the partnership in the sum of $15,000, plus all moneys owing to them from the partnership by reason of the terms of said agreement. On January 24, 1946, when the Magees contributed the sum of $10,000 to the partnership, they received a promissory note payable to them in the sum of $5,000, signed by Berg and his wife and the Strains. This note was secured by a trust deed and was payable on or before January 24, 1951.

On June 1, 1947, an amended agreement of limited partnership was executed by and between L. R. Strain, Henry C. Berg and Glenn E. Magee. The purpose of this agreement was, among other things, to accomplish the gradual retirement of Berg from the partnership. It was agreed therein that Strain would be the general partner and Magee and Berg limited partners. Provision was made for the transfer of Berg's interest to Strain and the return to Berg of his contribution to the partnership within two years. The capital contribution of Berg was set forth therein as the sum of $30,000 and that of Magee as $22,491.01. It was further provided that the amended agreement of the copartners should continue in full force and effect until January 24, 1951, unless sooner terminated.

On February 6, 1948, the Strains executed the two promissory notes here involved, one for $5,000 and the other for $15,000, and on the same date executed a trust deed on their real property to secure the payment of these notes. The $20,000 represented by these two notes was the $20,000 originally contributed to the partnership by the Magees.

On November 17, 1947, Berg executed a receipt and release by which he transferred all of his interest in the partnership to L. R. Strain and waived all claims against the partnership. On February 11, 1948, the trust deed securing the $5,000 note which he and his wife had signed on June 24, 1946, was reconveyed and Berg thereafter had no interest in the partnership.

On March 12, 1948, articles of incorporation of the L. R. Strain Plumbing and Heating Company were filed in the office of the secretary of state and on April 8, 1948, the corporation filed an application for a permit to issue stock. It was stated in the application that the purpose of forming the corporation was to acquire the assets of L. R. Strain Plumbing and Heating Company, a partnership limited in nature and consisting of L. R. Strain as a general partner and G. E. Magee as a limited partner. The corporation proposed to issue to L. R. Strain 620 shares of common stock in exchange for his interest in the copartnership, valued at $62,000 as of March 15, 1948. It was also proposed to issue to Magee 200 shares of preferred stock in said corporation for his interest, valued at $20,000. The permit was issued in accordance with the application and thereafter the corporation issued 200 shares of its preferred stock to Magee pursuant thereto. This stock was delivered to Magee and was in his possession at the time of trial.

Plaintiff contends that there was no consideration for the notes involved and that Magee accepted 200 shares of preferred stock in said corporation in full payment of said notes. The trial court found that the notes had not been paid in full; "that at the time said notes and deed of trust were executed, the defendant Glenn E. Magee was a limited partner in the limited partnership known as L. R. Strain Plumbing and Heating Co., and that Lee R. Strain was the general partner; that the value of Glenn E. Magee's interest in said limited partnership was $20,000; that said Lee R. Strain wished to incorporate said business, and in consideration of Glenn E. Magee consenting to said incorporation and the transfer of all partnership assets to said corporation, L. R. Strain and Virginia M. Strain executed said notes and deed of trust as security for the repurchase of the shares of preferred stock issued to said Glenn E. Magee in exchange for his interest as a limited partner. We conclude that these findings are supported by sufficient substantial evidence and that the contentions of plaintiff are without merit.

The evidence shows that the two notes involved (totaling $20,000) represented the sums originally contributed to the partnership by the Magees. The partnership, by agreement of the parties, was to end January 24, 1951, and the notes were made payable on that date. On the said last mentioned date the $20,000 contributed to the partnership by the Magees was to be returned to them. It may be reasonably inferred from the evidence that the notes were given as security for the return to the Magees of the capital invested by them in the partnership and that this money was to be paid to them on January 24, 1951. There is no testimony in the record that the Magees agreed to release the Strains from the obligations on the notes upon acceptance by them of the 200 shares of preferred stock or that Magee agreed to accept the stock as payment of the indebtedness and the evidence shows that the stock involved was not delivered to Magee upon condition that the notes be surrendered by him to the corporation.

[1] Payment is that which the parties to the contract agree shall be accepted as such. Hamilton v. Hollman, 102 Cal.App. 166, 168, 282 P. 977. In Borland v. Nevada Bank, 99 Cal. 89, 94, 33 P. 737, 738, it is said:

> "Payment, like sale, can result only from the mutual agreement of the parties that the transaction shall have that effect, and without such consent the transaction cannot be treated by the court as a payment. Technically, payment can be made only in money. It is defined in the Civil Code to be 'performance of an obligation for the delivery of money only.' Section 1478. Payment may, however, be made in merchandise, or any commodity other than money which the parties to the transaction agree shall be accepted as payment, but the consent of the creditor to accept as payment the thing received is as essential as the purpose of the debtor that it shall have that effect.

> 'The acceptance of any valuable thing in discharge of the debt amounts to payment, but it is the distinct agreement of the creditor to accept the thing in discharge of the debt that gives it the character of payment. Without this, the transaction is regarded either as furnishing matter of set-off, or as security collateral to the original debt, according as the subject received is in possession or in action.' Covely v. Fox, 11 Pa. [171] 174."

The articles of incorporation of the L. R. Strain Plumbing and Heating Company, Inc. provide "that the preferred stock may be redeemed in whole or in part at the option of the corporation on the 24th day of January, 1951, or at any time thereafter at a redemption price equal to the par value of the preferred stock plus accrued and unpaid dividends." If the stock issued to Magee had been thus redeemed on January 24, 1951, and the redemption price paid to him, the notes involved would have been paid. However, this was not done and Magee desiring to obtain his capital contribution as provided in the partnership agreement instituted proceedings for the collection of the notes.

The trial court found that the defendant should be required to surrender to the plaintiff the 200 shares of preferred stock involved and concluded that upon such surrender, plaintiff is not entitled to an injunction as prayed for in her complaint. The judgment recites that the defendants have filed in said court a consent to the surrender to plaintiff of said stock and that plaintiff is not entitled to the injunction sought.

[2-5] It is argued that the court erred in entering judgment conditioned upon the surrender of the said stock. However, in imposing a condition, a court of equity is not bound down to the strict legal rights of the parties, but will take into consideration all the circumstances in order to arrive at the justice of the case. Weyant v. Murphy, 78 Cal. 278, 283, 20 P. 568. And as was held in Seeger v. Odell, 18 Cal.2d 409, 418, 115 P.2d 977, 982, 136 A.L.R. 1291: "A court granting equitable relief has the power to make its decrees contingent upon compliance by the plaintiff with certain conditions." This is an equitable action and the court had jurisdiction to hear and determine all issues necessary to do complete justice. Bacon v. Wahrhaftig, 97 Cal.App. 2d 599, 604, 218 P.2d 144.

[6] Plaintiff argues that there was no consideration for the notes involved. This argument is without merit. It is presumed that a promissory note or bill of exchange was given or endorsed for a sufficient consideration, Code Civ.Proc. sec. 1963, subd. 21, and as was said in DeTray v. Higgins, 31 Cal.App.2d 482, 494, 88 P.2d 241, 246:

> "A promissory note is presumed to have been given for a sufficient consideration under section 1614 of the Civil Code, and in an action thereon, the introduction of the note in evidence establishes a *prima facie* right to recover according to its terms. The burden of showing a want of consideration, under section 1615 of that code, is cast upon the party seeking to avoid it, and if he fails to make this showing, the presumption prevails and furnishes sufficient evidence to support a finding that the note was given for a good and valuable consideration."

[7] The implied finding that there was consideration for the notes involved is supported by the record.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

124 Cal.App.2d 100

PEOPLE v. LOPEZ.

Cr. 2960.

District Court of Appeal, First District,
Division 1, California.
March 24, 1954.

Defendant was convicted in the Superior Court in and for the City and County of San Francisco, Twain Michelsen, J., of robbery while armed with a deadly weapon, and he appealed. The District Court of Appeal, Fred B. Wood, J., inter alia, that evidence on issue of identification of defendant was sufficient to sustain conviction.

Judgment and order affirmed.

1. Robbery 🔑24(3)

Evidence, attacked on basis of insufficiency as to identification of defendant, was sufficient to sustain conviction of robbery while armed with a deadly weapon.

2. Criminal Law 🔑741(2)

In robbery prosecution, wherein defendant attacked the sufficiency of the evidence relative to identification of him as the robber, any inaccuracy of the victim as an observer or defects in his memory, allegedly disclosed by failure to identify any amount of silver money or currency which was in safe at time of robbery, and similar defects concerning testimony of an officer, were matters for consideration of triers of facts in weighing the evidence and evaluating the testimony.

3. Witnesses 🔑246(2), 266

It is duty of trial judge in a criminal case to interrogate a witness when the occasion warrants it, but he may not take a witness out of the hands of his counsel and proceed along an independent and extensive line of examination and cross-examination.

4. Criminal Law 🔑656(2)

In prosecution for robbery while armed with a deadly weapon, record did not warrant conclusion that judge had been guilty of improper comments or interrogation of witnesses.

5. Criminal Law 🔑1035(3), 1044, 1053

In order for a defendant to be entitled to claim on appeal that he was prejudiced by interrogation of witnesses by trial judge, timely objection during the trial must be made, and correct course is to except to the ruling or to the language to which he objected and to move to strike from the record any prejudicial remarks of the court and to request that jury be instructed to disregard them.

6. Criminal Law 🔑1166½(12), 1171(1)

In prosecution for robbery while armed with a deadly weapon, record was insufficient to warrant finding of prejudicial misconduct upon part of district attorney and court concerning in part, an objection of district attorney to cross-examination of one of the arresting officers concerning conversation had with defendant's parents as to whereabouts of defendant the night the offense was committed, and rulings of court, including ruling that defendant's counsel should make more specific certain questions on cross-examination.

◆

Lois B. Preston, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of robbery while armed with a deadly weapon, defendant has appealed from the judgment and from the order denying his motion for new trial.

He claims insufficiency of the evidence, errors of law in the admission and exclusion of evidence, misdirection of the jury in matters of law, prejudicial interrogation of defendant by the trial judge, and prejudicial misconduct on the part of the district attorney and the court.

(1) *The asserted insufficiency of the evidence relates to the identification of defendant as the robber.*[1]

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[1] Defendant does question the adequacy of proof that the robber was in possession of a deadly weapon (a pistol), upon the ground that the pistol was not produced. It was not necessary to produce the pistol. The testimony of the person robbed was sufficient.

The offense occurred at a gasoline service station attended by one Lewis Boyce. Boyce testified he was working at the station when a car occupied by two people drove in about 2:00 a. m.; defendant, the passenger in the car, got out and asked Boyce to fill the tank with Ethyl; the gas cap was locked and neither the driver nor the defendant could locate the key, so they drove off; about 15 minutes later defendant returned on foot; there was no car present this time; Boyce was transferring money from the cash box to a floor safe; defendant had a gun in his hand which appeared to be a .32 caliber and demanded the money, amounting to about $105, which Boyce turned over to him; defendant told Boyce to go into a back room and stay there until defendant got away and not to notify the police, took Boyce's keys from him, and then left; the lighting at the station was very good.

[1, 2] This evidence is sufficient. Defendant challenges it on the basis, it would appear, that Boyce was an inaccurate observer or had a poor memory because, defendant asserts, Boyce could "not identify any amount of silver money, could not identify the amount of currency that was in the safe * * *, does not recall whether the sales that evening were mostly cash or charge accounts, did not know the amount of currency in the safe * * *, as to how many twenty dollar bills there were, tens, fives or ones." That is the type of challenge which defendant makes concerning the testimony of Boyce and that of officer Girard, which we need not detail further. These were matters for the consideration of the triers of the facts in weighing the evidence and evaluating the testimony, not for appraisal by the reviewing court in the absence of anything which even tends to show that the testimony was inherently unbelievable. See People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814; People v. Harsch, 44 Cal.App.2d 572, 575, 112 P.2d 654; People v. Castro, 68 Cal.App.2d 491, 494–495, 157 P.2d 25.

(2) *As to asserted errors committed during the course of the trial,* defendant quotes a number of excerpts from the reporter's transcript, without specifying as to any of them wherein the asserted error lies, and then says that "during the entire trial, the trial judge did not permit full objections to evidence, but ruled before an objection was made, and made expressions which are reflected in foregoing testimony, which prejudiced the defendant" in the minds of of the jury; and "that the court erred in its ruling upon the evidence, in that it permitted cross-examination of defendant as to facts not brought out on direct examination * * *".

[3] The portions of the transcript thus commented upon by defendant are summarized below. We do not find in them any cause for reversal. It is the duty of the trial judge to interrogate a witness when the occasion warrants it but he may not take a witness out of the hands of his counsel and proceed along an independent and extensive line of examination and cross-examination. People v. Boggess, 194 Cal. 212, 241, 228 P. 448. We are convinced that that principle was not here violated. The passages quoted do not represent a continuous line of examination or series of comments by the court. They are isolated instances occurring in various portions of 227 pages of testimony. In each instance there appears to have been a proper occasion for comment or interrogation by the court.

Concerning the circumstances under which Boyce identified the defendant at police headquarters, Boyce was asked whether the inspector said anything to him regarding the defendant. An objection was made on the ground that no foundation had been laid to show that defendant was present. The court overruled the objection, saying that a "yes" or "no" answer was proper. The next question asked was whether defendant was in the robbery detail at the time. The court then restated the question asking Boyce to tell what happened within the presence and hearing of the defendant. Boyce answered, saying that the man was brought in and the inspector asked if that was the man, to which he answered "Yes, that is the man." The fact that defendant was then present, heard Boyce's identifying statement and said nothing, neither denying Boyce's statement nor telling Boyce that he was wrong, appears from defendant's own testimony upon cross-examination. We fail to see any possible prejudice to the defendant.

Boyce, on cross-examination, testified that he did not know how much money was in the cash box when he came on duty. Defendant's counsel asked him again if he knew how much was in the cash box. The court interposed, saying "He says he doesn't know. I am wondering how much farther you can go when he says he doesn't know. Wouldn't it be speculative, any additional answer that he might give to you?" Defendant's counsel responded, "All right." We perceive no error here.

Asked by defendant's counsel if he did not remove any funds from the cash box to the safe before 2:00 o'clock, Boyce responded, "No, ma'am." The court interposed, "do you mean that you did not?" and the witness replied "I did not before 2:00 o'clock, yes." That merely served to clarify the answer.

When Boyce was asked how many cars came into the station that night, the court said "Over what period of time?" Defendant's counsel responded, "From 11:00 o'clock until 2:00 o'clock," and proceeded with the interrogation of the witness. Again we find no error.

Defendant's counsel asked Boyce whether defendant wore a dark or light suit when he came to the station and the court said "He has already testified to that, that it was dark blue. Isn't that right?" and the witness said, "Yes, sir." It is not desirable for the court to interfere with the examination of a witness but on this occasion we do not see that it was prejudicial to the defendant.

Defendant testified he arrived at his home at 1:30 that evening. His counsel then asked, "Q. You did not go out again —A. No. "Q. Is that correct? * * *—" Whereupon the court commented, "I don't think you expected that answer. 'You did not leave after that?' And then you said 'Is that correct?' And he says, 'No' which gives it an affirmative answer." Counsel then reframed the question and got an unmistakably clear answer. Why defendant thinks he should complain of that, is inexplicable.

Defendant had testified upon cross-examination that he had talked about this case with his mother but not with his father except after he was out of jail. Then when asked if shortly after the day of the offense he had a conversation with his father in which the latter told him that the inspectors were asking whether defendant was home that night, his counsel objected on the ground of not proper cross-examination. Upon the overruling of the objection he said he had no such conversation with his father. This apparently was oustide the scope of the direct examination. We do not see that his negative answer was prejudicial to him.

A question whether defendant owned a pistol was allowed over the objection that it was not proper cross-examination. It was allowed as a preliminary question (subject to motion to strike if not connected up) in view of the fact that upon direct, defendant had answered "No" to this question: "* * * did you at 2:00 o'clock in the morning on October 23rd, 1952, go to a Standard Oil station at Fell and Van Ness and hold up Mr. Boyce?" and the information charged robbery while armed with a pistol. The district attorney then restated the question, asking defendant if he owned a pistol on October 23, 1952. Defendant answered "No" and was next asked if he owned a pistol during the few weeks prior to that time, which was objected to as highly prejudicial. The objection was overruled and he answered "No." The district attorney then asked defendant if he had ever told anyone that he could pawn pistols, during the period just preceding October 23rd. An objection to this question was sustained by the court as to its form. The defendant was then asked if he had told anyone that he had pistols which he could pawn. He answered, "No." To the objection, the court stated that the answer was in and that the question was accepted as preliminary, subject to a motion to strike.

Defendant said he was at the Orpheum Bar, Eighth and Market, prior to 1:30 upon the evening in question. To the question, "That is how far from Van Ness and Market?" his counsel objected that it called for the conclusion of the witness. The objection was properly overruled. He answered, "Around seven or eight blocks." After a few more questions, cross-examination ended and defendant's counsel had no further questions. The court then interrogated the witness further as to the distance and defendant revised his estimate to "about three blocks."

The court then asked several questions concerning defendant's knowledge as to what he was being held for at the time Boyce identified him when he was brought into the room at police headquarters. The district attorney then took over the questioning and asked defendant whether he knew that an attempt was to be made to identify him as the person who committed robbery. Defendant answered "no," but that he knew that an attempt was to be made to identify him. He claimed that he was not told that he was being identified as a robber. In answer to the district attorney's question he said he told the inspector, "It didn't make any difference. I didn't do it." "Q. Didn't do what?" A. "Didn't rob anybody or do anything." "Q. Then you knew you were being charged with a robbery?" A. "No, sir." This questioning was objected to on the ground that it called for a conclusion and was an attempt to put words in the defendant's mouth. The objection was overruled. The court then asked the defendant what he meant when he said he didn't do it. The answer was "Didn't do anything. Period."

[4, 5] We conclude that in none of these instances did the trial judge abuse his power to interrogate witnesses. He did not indulge in such questioning as could have interfered with defendant's presentation of his case. He did not indicate bias either by question or by comment. Nor did he prejudice the defendant by permitting cross-examination beyond the scope of the direct examination. Moreover, now to claim prejudice, defendant should have made appropriate and timely objection during the trial, which he did not. "Counsel's correct course was to except to the ruling or to the language to which he objected and to move to strike from the record any prejudicial remarks of the court and to request that the jury be instructed to disregard them. People v. Galuppo, 81 Cal. App.2d 843, 849, 185 P.2d 335; People v. Mendez, supra, 193 Cal. [39] 48, 223 P. 65. Failing thus to establish his record, in vain will he assail the conduct of the trial judge." People v. Harris, 87 Cal.App.2d 818, 827, 198 P.2d 60, 65.

[6] (3) *Defendant claims prejudicial misconduct upon the part of the district attorney and the court* but the record shows that such a claim is without foundation.

The principal incident to which defendant directs attention in this regard is a discussion between court and counsel concerning a question defendant's counsel wished to ask upon cross-examination of one of the arresting officers concerning a conversation he had with the defendant's parents as to the whereabouts of defendant the night the offense was committed.

The district attorney objected that it was not proper cross-examination. After some discussion, the district attorney suggested, defendant's counsel agreed, and the court concurred, that it would be desirable to complete the discussion in the absence of the jury. The jury was excused and the court entertained an offer of proof. There ensued considerable discussion, as the result of which the court ruled that the question was proper. The jury was recalled, the question was asked, the witness answered, and then defendant's counsel announced she had no further questions of that witness.

The other acts of asserted misconduct were rulings upon questions which had been asked and answered, and a few instances in which the court suggested that defendant's counsel make certain of her questions, upon cross-examination of Boyce, more specific; all, it would appear, quite proper and appropriate.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

124 Cal.App.2d 58

OLCESE v. DAVIS et al.

Civ. 15724.

District Court of Appeal, First District,
Division 2, California.
March 23, 1954.

Buyer's action for damages for alleged breach by sellers of oral agreement to sell total crop of onions being harvested on certain ranch for stipulated price. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgment on verdict for plaintiffs, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that the evidence presented question for trier of fact as to whether delivery of part of crop related to the alleged agreement so as to take the agreement outside the statute of frauds under doctrine of partial performance, but that the use of lost anticipated profits as measure of damages was error.

Reversed and remanded for new trial on issue of damages only.

1. Appeal and Error 🔑994(3), 1012(1)

The credibility of witnesses and the weight of evidence are matters for trier of facts and cannot be reviewed by District Court of Appeal.

2. Sales 🔑52(5)

Evidence established oral agreement to sell total crop of onions being harvested on certain ranch for stipulated price.

3. Frauds, Statute of 🔑158(1)

Where delivery of commodities to which oral sales agreement related is relied upon as part performance to take agreement outside statute of frauds, and delivery may refer to either one of two different alleged agreements, buyer must prove that seller made delivery in recognition of, and pursuant to, the agreement sued upon.

4. Frauds, Statute of 🔑159

In action for seller's breach of alleged oral agreement to sell total crop of onions being harvested on certain ranch for stipulated price, evidence presented question for trier of fact as to whether delivery of part of the crop related to the alleged agreement so as to take agreement outside statute of frauds under doctrine of partial performance or whether such delivery was a full performance of oral agreement for the quantity delivered only.

5. Sales 🔑418(12)

Damages for seller's breach of contract to sell onions was difference between contract price and market price of onions at time and place of agreed delivery, where onions were available on open market, not loss of profits which buyers would have made by resale of onions elsewhere. Civ. Code, §§ 1787(3), 3354.

6. Sales 🔑418(15)

Where buyer is entitled to recover loss of profits as damages for seller's breach of sales contract, the profits recoverable are net profits, not gross profits.

◆

Connolly & Cerini and Arthur H. Connolly, Jr., San Francisco, for appellant.

Langer & Simpson, J. C. Simpson, San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an action for damages for the alleged breach by sellers of an oral agreement to buy and sell the total crop of onions being harvested on a certain ranch for $1.10 per bag, of which crop 6,000 bags were delivered and paid, but delivery of the larger balance was refused notwithstanding several demands. Damages are based on the loss of profits which plaintiffs would have made by sale of the balance of the onions in Havana, Cuba.

The main defense was that the oral agreement was not as alleged and that the delivery of 6,000 bags was not a part performance of such agreement but was a full performance of an oral agreement for that quantity only.

[1,2] The court sitting without a jury found for plaintiffs and defendant Hansen appeals, the action having been dismissed as to defendant Davis. Appellant primarily urges a reversal on the ground that neither the contract as alleged nor circumstances taking it out of the statute of frauds for the purpose of this action were

proved. It was agreed at the trial that oral evidence as to the alleged agreement would be admitted subject to motion to strike if part delivery and acceptance taking it out of the statute were not proved. The contention that the oral evidence did not support the finding of an agreement of sale of the whole crop is based on minor discrepancies in the testimony of the witnesses for plaintiffs who testified to that effect and on arguments as to their credibility and the weight of the evidence. That these are matters for the trier of facts, which cannot be reviewed by us, is too well known to require citation of authority.

[3, 4] With respect to the insufficiency of the evidence to take the agreement out of the statute, appellant advocates the theory that plaintiffs in this action by buyers must prove that defendant seller delivered the ten cars (6,000 bags) to plaintiffs in recognition of, and pursuant to, the larger oral contract which plaintiffs seek to enforce. Appellant relies mainly on Howland v. Iron Fireman Mfg. Co., 188 Or. 230, 213 P.2d 177, 215 P.2d 380, which case, well reasoned and extensively supported by authority, is good authority for the rule stated. The rule itself is correct and sensible law in cases where, as here, the performance may refer to either one of two different alleged agreements. However, appellant's further contention that the seller's intention that his delivery be in reference to the contract alleged by the buyer must appear directly from the seller's actions and not only from his words, and that it can not be proved by oral evidence of plaintiff's witnesses, is not supported by the Howland case or any other authority cited by appellant and must be rejected. The Howland case holds that the question to which of two alleged agreements the part performance is referable is for the jury, and states, 215 P.2d at page 384, that "the finding of the jury on disputed issues as to the nature of the contract may have a material bearing upon the further question as to whether acceptance and receipt [here delivery] were referable to the contract as found." The rule quoted by appellant from 12 Cal.Jur. 879 "Mere words, unaccompanied by any act, are not enough" does not relate to the reference of the part performance to a certain contract, but to the acceptance and receipt (or delivery) itself. Even in that respect the statement is incomplete as the acceptance by words alone is sufficient to satisfy the statute when the buyer is already in possession of the goods, e. g., by bailment or pledge. Wilson v. Hotchkiss, 171 Cal. 617, 154 P. 1, L.R.A.1916F, 389; 1 Williston on Sales, 222. In other cases cited by the appellant in which the result was adverse to a plaintiff buyer, the facts showed that plaintiff knew that the delivery of seller was not intended to be in part performance of the alleged agreement. Our statute of frauds as to sales of goods does not contain any special requirement as to the kind of evidence admissible to show acceptance and receipt or part payment or their reference to the contract alleged by the plaintiff. In this case the testimony of plaintiffs' witnesses that an agreement of sale was entered into for Guidice's total crop of medium onions, and that the defendant Davis, the manager of defendant Hansen, when the ten car loads were delivered said that it was a partial shipment of the Guidice crop, that he was going to use eight cars of the Guidice crop to deliver to another client but that he would replace them by others if satisfactory to plaintiffs, if believed by the trial court, notwithstanding the strong denial by Davis as a witness, was sufficient to support the inference that the delivery of the ten cars was intended by seller as pursuant to the alleged sale of the total crop. Even if the rule applicable to part performance of oral contracts involving real property that the proof relating to part performance and its reference to the alleged agreement must be "unequivocal" or "clear and convincing" applies also to acceptance and receipt taking oral contracts of sale of goods out of the statute of frauds, 37 C.J.S., Frauds, Statute of, § 287, page 826 et seq., such rule is for the guidance of the trial court alone and does not influence the review on appeal. Helbing v. Helbing, 89 Cal.App.2d 224, 229, 200 P.2d 560; Viner v. Untrecht, 26 Cal.

2d 261, 267, 158 P.2d 3. The decision of the trial court as to the conclusion, enforceability and breach of the alleged agreement must be upheld.

[5] However, the judgment must be reversed because the wrong measure of damages was applied. With respect to the damages it is argued that there was no evidence showing that the normal measure of damages, § 1787(3), Civil Code, to wit, difference between contract price and market price at time and place of agreed delivery, could not be applied. There was no evidence that no onions were available for plaintiffs to buy in the open market here, and even plaintiffs' witnesses testified that such onions were so available. It is further urged that even if loss of profits could have been used as basis for damages this should have referred to *net* profits (after deduction of all expenses, overhead, etc.) whereas here no expenses or overhead were deducted. Appellant also points out that there was no finding and no evidence as to the date of default so that there was no date as to which the price in Havana or elsewhere could be decisive, and the prices differed strongly at different dates.

The applicable rule of damages in cases of this kind is fixed in section 3354 of the Civil Code which reads: "In estimating damages, except as provided by sections three thousand three hundred and fifty five and three thousand three hundred and fifty six, the value of property, to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase."

Here the undisputed proof was that there were onions available in the open market at the time in question, that plaintiffs bought "quantities" of onions in the open market. But no evidence was offered as to the price they were required to pay for such onions—hence no proof of their loss, if any.

The plaintiffs did not plead that similar goods were unobtainable in the open market and the trial court made no express finding to that effect. In view of plaintiffs' evidence such a finding could not have been made.

But for another and related reason the judgment cannot be sustained. It was based on this computation—cost price per bag $1.10; freight charges $1.18, total $2.28; selling price $3; "profit per bag $.72." The number of bags undelivered being 16,800 the court multiplied this by "profit per bag $.72" and gave judgment for $12,096. This computation does not allow anything for plaintiffs' expenses for overhead or other costs for doing business. Furthermore the plaintiffs' own witness testified that at the time they were selling onions in Cuba at $2.40 per bag—not for the $3 allowed in the court's computation.

[6] But the rule is settled in this state that in cases of this kind a plaintiff cannot recover his gross anticipated profits. In West Coast Winery, Inc., v. Golden West Wineries, Inc., 69 Cal.App.2d 166, 169, 158 P.2d 623, 625, it was said:

"However, when loss of profits is a factor in fixing damage the defendant is required to pay the plaintiff only the net profits, not gross profits, or gross selling price. The rule applicable in such a situation is stated in Coates v. Lake View Oil & Refining Co., 1937, 20 Cal.App.2d 113, 66 P.2d 463. It is there said (20 Cal.App. 2d at page 119, 66 P.2d at page 466): 'Gross profits are really not profits at all, for they generally refer to the excess in the selling price over the cost price without deducting the expenses of resale and other costs of doing business. See Buie v. Kennedy, 164 N.C. 290, 80 S.E. 445.

"'To allow plaintiff to recover a judgment based in part on his gross profits would result in his unjust enrichment. If he is entitled to recover at all, because of his loss of profits, such recovery must be confined to his net profits. Net profits are the gains made from sales "after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed." Black's Law Dictionary, p. 1439.' See, also, Carrier v. Piggly Wiggly of San Francisco, 1936, 11 Cal.App.2d 180, 53 P.2d 400. Here, to allow plaintiff to recover the retail sale price of the wine would be to put it in a better position than it would have been in if defendant had returned the wine according to the exchange agreement."

Judgment reversed and remanded for a new trial on the issue of damages only.

DOOLING and KAUFMAN, JJ., concur.

124 Cal.App.2d 95

NORMAN et al. v. MURPHY et al.

Civ. 8303.

District Court of Appeal, Third District, California.

March 23, 1954.

Action by husband and wife for personal injuries received by them in automobile accident, and for death of an unborn child resulting from same accident. The Superior Court, Del Norte County, Finley, J., sustained demurrer to cause of action for death of child, and from judgment of dismissal of such cause of action plaintiffs appealed. The District Court of Appeal, Paulsen, J. pro tem., held that an unborn child is not a "minor person" within statute authorizing heirs and personal representatives of a minor person to maintain an action for wrongful death of such person.

Judgment affirmed.

1. Death 🔑11

An action for wrongful death was unknown at common law, and, being wholly statutory in origin, must stand or fall by terms of statute under which recovery is sought.

2. Death 🔑13

In statute authorizing heirs or personal representatives of "a person not being a minor" to maintain action for wrongful death of such person, quoted words were intended to designate an adult, and not an unborn child. Code Civ.Proc. § 377.

See publication Words and Phrases, for other judicial constructions and definitions of "A Person Not Being a Minor".

3. Infants 🔑72(1)

Statute providing that a child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in event of its subsequent birth, was adopted to create a cause of action for benefit of the child, and to protect its interests in event of its subsequent birth. Civ.Code, § 29.

4. Death 🔑13

Infants 🔑72(2)

Under common law, child had no right to recover damages for prenatal injuries and its parents had no right to recover damages for its death either before or after birth.

5. Death 🔑11

Statutory wrongful death action is a new action, in the sense that it did not previously obtain under common law, and not a continuation or revival of an old action or one that subsisted prior to death, and it is founded upon the injury causing death as it affects the heirs and personal representatives and not as it affects the decedent individually. Code Civ.Proc. § 377.

6. Death 🔑11

Right of action for wrongful death is unqualifiedly a matter of statutory provision and is completely within jurisdiction of legislature to grant, to withhold, or to restrict as it sees fit. Code Civ.Proc. § 377.

7. Damages 🔑42

In action by husband and wife for personal injuries received by them in automobile accident, burial expenses for unborn child whose death resulted from such accident could be recovered by the parents as incidents of their own damages.

8. Death 🔑13

An unborn child is not a "minor person" within statute authorizing heirs or personal representatives of a minor person to maintain action for wrongful death of such person, and hence natural parents and heirs of unborn child could maintain no action for wrongful death of such child in automobile accident. Code Civ.Proc. § 377; Civ.Code §§ 25, 26.

See publication Words and Phrases, for other judicial constructions and definitions of "Minor Person".

◆

Robert F. Appel, Crescent City, for appellants.

William W. Speer & Lloyd M. Creasey, Crescent City, for respondents.

PAULSEN, Justice pro tem.

Appellants, husband and wife, brought this action to recover damages for personal injuries received by them in an automobile accident and also, by their fourth cause of action, to recover damages for the death of an unborn child, resulting from the same accident. In said cause of action it was alleged that plaintiffs "were husband and wife, the natural parents and heirs of unnamed Baby Norman, deceased"; that at the time of the accident he was a "healthy, unborn baby, having been carried within its mother for a period of more than four and one-half (4½) months"; that in the accident the mother was so injured "as to cause her to have a miscarriage and" to cause "the death of said unborn, unnamed Baby Norman." Damages were claimed for burial expenses for the child and for deprivation of its anticipated services, assistance, companionship, love, affection and support.

The court sustained a demurrer to said fourth cause of action without leave to amend and this appeal is from the judgment of dismissal that followed.

The questions presented here have never been directly decided by the courts of this state and appellants admit that the weight of authority supports the ruling of the trial court. They argue, however, that logic and the trend of modern decisions elsewhere demand an interpretation of California law that would permit such an action.

The pertinent parts of section 377 of the Code of Civil Procedure upon which the action is based read as follows:

> "When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, * * *."

[1] An action for damages for wrongful death was unknown at common law, and being wholly statutory in origin the action must stand or fall by the terms of the statute under which recovery is sought. Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752; Davis v. Southern Arizona Freight Lines, Ltd., 30 Cal.App.2d 48, 85 P.2d 897; Evans v. Shanklin, 16 Cal.App.2d 358, 60 P.2d 554; 25 C.J.S., Death, §§ 13, 14.

[2] It is at once apparent from an examination of section 377 that no cause of action for the death of an unborn child was thereby created unless such child is deemed to be a "minor person," and there is nothing in our statutes that indicates an intention to make it such. Considered in its context, it is clear that the phrase "a person not being a minor" was intended to designate an adult.

[3, 4] Except for certain purposes with which we are not presently concerned, minors are persons under 21 years of age. Civ. Code, § 25. "The periods specified in the preceding section must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority." Civ.Code, § 26. While this definition of minority does not preclude the idea that an unborn child may, for certain purposes, be considered "a person," it points most persuasively to the conclusion that it can not be considered "a minor person." This conclusion is further fortified by the provision of section 29 of the Civil Code that "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for *its* interests *in the*

*event of its subsequent birth * * *.*" (Italics supplied.) As pointed out by this court in Scott v. McPheeters, 33 Cal.App.2d 629, 92 P.2d 678, 93 P.2d 562, section 29 was adopted *to create* a cause of action for the benefit *of the child*, and to protect its interests in the event of its subsequent birth. Under the common law the child had no right to recover damages for prenatal injuries and its parents had no right to recover damages for its death either before or after birth.

[5] While section 29 of the Civil Code created a new cause of action for the benefit of a child, section 377 of the Code of Civil Procedure created a new cause of action for the benefit of the heirs of "a person not being a minor," or of a "minor person." Speaking of section 377, it is said in Secrest v. Pacific Electric Ry. Co., 60 Cal.App.2d 746, 141 P.2d 747, 748: "It is a new action—that is, one that had not previously obtained under the common law—and not a continuation or revival of an old action or one that subsisted prior to the death. It is founded upon the injury causing death as it affects the heirs and personal representatives and not as it affects the decedent individually."

The legislature again recognized the rules of the common law and made provision for the protection of the rights of unborn children by an amendment to section 270 of the Penal Code.

Considering the status of an unborn child in the field of criminal law, we find that prior to 1925 section 270 read in part as follows:

> "A father of either a legitimate or illegitimate minor child who wilfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance for his child is guilty of a misdemeanor. * * *"

In 1925 there was added to the section this sentence: "A child conceived but not yet born is to be deemed an existing person *in so far as this section is concerned.*" (Italics supplied.) The reasons for such amendment are obvious, but the declaration that the unborn child was to be deemed to be an existing person was limited to that section only.

If, notwithstanding the provision of section 26 of the Civil Code that the period of minority is to be calculated from the first minute of the day on which persons are born, an unborn child is to be deemed a "minor person," it is difficult to understand why it was necessary to enact section 270 of the Penal Code or section 29 of the Civil Code for the protection of unborn children.

Prior to the adoption of the Practice Act and later of section 377 of the Code of Civil Procedure, a husband, father, or other support of a family might die in California as the result of the deliberate or negligent action of another who was permitted to escape the responsibility for his wrongful acts because of the defects of the common law. These statutes brought needed relief to dependent heirs by providing for damages for the loss of such things as financial support and the pecuniary value of loss of society, comfort and protection. The new right was extended also to the loss occasioned by the death of a child and included such items as loss of services to parents, but in such cases these were offset by the costs to the parents of education, support, etc. As the age of the decedent descended from majority to infancy the fixing of the pecuniary value of losses with any degree of accuracy became increasingly difficult.

[6–8] The right of action for wrongful death is unqualifiedly a matter of statutory provision and is completely within the jurisdiction of the legislature to grant, to withhold, or to restrict as it sees fit. 25 C.J.S., Death, § 18; Treat v. Los Angeles Gas, etc., Corp., 82 Cal.App. 610, 256 P. 447. And it is evident from a consideration of the statutory provisions cited that the common-law rule has been well understood and the modifications thereof well considered in view of the changes deemed necessary and desirable. The need for a right of action for the death of an unborn child is more apparent than real. The burial expenses asked for in the present action may be recovered by the parents as incidents of their own damages. Considering the highly speculative nature of the pecuniary value of an unborn child, even if viable, it is apparent that practically everything that could be recovered in an action for the death of an unborn child can now be recovered by the mother in connection with her own claim for general damages. The legislature could easily have conferred such a right of action but, in our opinion, it has not done so.

We are not unmindful of the fact that contrary to the great weight of authority some states have held that an unborn, viable, child is a person in being for the purpose of an action of this nature. See annotation in 10 A.L.R.2d 634. Without pausing to analyze the decisions to this effect from other states, we may observe that in almost every case the legislature of the state where the question arose had made no exceptions to the common-law rule and had granted no additional rights as has been done in this state, and the court was motivated by a desire to accomplish the same results as have been accomplished here by statutory changes. But even if the courts of this state should now hold that an unborn, viable child is "a person" within the meaning of our law, it could not be held to be "a minor person" in view of the provisions of sections 25 and 26 of the Civil Code.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

124 Cal.App.2d 42

EISTRAT
v.
BRUSH INDUSTRIAL LUMBER CO. et al.

Civ. 19841.

District Court of Appeal, Second District, Division 2, California.
March 22, 1954.

Rehearing Denied April 9, 1954.
Hearing Denied May 19, 1954.

Action for damages for conversion by seller against subsequent purchasers from original purchaser who had breached his contract with seller. The Superior Court, Los Angeles County, Clarke E. Stephens, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, McComb, J., held that seller, who had informed subsequent purchasers that they would not be held liable for alleged breach and instituted action against purchaser aided by writ of attachment upon subsequent purchasers for sums which they owed purchaser, waived his rights against subsequent purchasers.

Judgment affirmed.

1. Trover and Conversion 🔑11

Seller, who had entered into a contract whereby purchaser was given right to cut and remove lumber from seller's property, and who, after lumber had been cut by purchaser in violation of terms of contract and sold to subsequent purchasers, had informed subsequent purchasers that they would not be held liable for alleged breach and instituted action against purchaser aided by writ of attachment upon subsequent purchases for sums which they owed purchaser, could not recover from subsequent purchasers for conversion.

2. Election of Remedies 🔑7(1)

One who obtains an attachment in pursuance of a contractual remedy is estopped from later pursuing another remedy predicated upon an alleged tort arising from same set of facts.

3. Appeal and Error 🔑1071(5)
Trial 🔑397(2)

If judgment is sustained by findings in one count of complaint and findings are supported by evidence, the fact that other findings are not supported by evidence will not be considered on appeal.

4. Judgment 🔑829(3)

Federal court's finding, in bankruptcy proceedings against purchaser of timber, that purchaser's rights under contract had terminated because of purchaser's failure to comply with contract was not binding on purchaser's vendee, who had not been a party to bankruptcy proceedings, in vendor's subsequent action against purchaser's vendee for conversion.

5. Judgment 🔑634

A party to subsequent action is not bound by judgment in a prior action, and doctrine of res judicata does not operate as an estoppel, unless he was a party or privy to prior action and the identical issue raised in the subsequent proceeding was determined in the prior proceeding.

Jerrell Babb, Los Angeles, for appellant.

Wallace F. Mills, Kenneth M. Liskum, Wendell W. Schooling, Huntington Park, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover damages for conversion and injury to property, plaintiff appeals.

The evidence being viewed in the light most favorable to defendants (respondents) discloses that on or about August 2, 1948, plaintiff entered into an agreement with Jones Lumber and Mill Company (hereinafter referred to as the vendee) by the terms of which plaintiff gave vendee the right to cut timber on certain property owned by plaintiff. This contract contained among others the following provisions:

"Purchaser is to comply with all California State laws and California State and United States Forestry Rules and Regulations pertaining to logging. All necessary clean-up and fire protection shall be at the Purchaser's expense.

"Purchaser agrees that no title or ownership of any timber shall pass from Seller until after the timber is cut."

Thereafter, the vendee without complying with the provisions of the contract relative to complying with State and United States forestry rules cut timber on plaintiff's land, removed it and sold it to defendants; that plaintiff upon discovering the fact that vendee was removing the timber from his land without complying with the forestry rules went to defendants and told them that vendee had not complied with the forestry rules and had therefore violated the contract of August 2, 1948.

After discussing the matter with defendants plaintiff stated he did not want to terminate his contract with vendee and he would not hold defendants liable "in any way" in connection with his dispute with the vendee.* Subsequently vendee was adjudicated bankrupt and in the proceedings, to which defendants were not parties, the Federal court found that all rights of vendee in and to the contract of August 2, 1948, had been terminated not later than October 10, 1948, due to vendee's failure to comply with the terms of the contract relative to observing the forestry rules.

December 9, 1948, plaintiff filed an action in Tulare County, California, against vendee for the purpose of obtaining a judgment that the agreement between plaintiff and vendee had been terminated and asking that title be quieted to the real property from which the timber had been removed, and to recover certain monies due for timber removed from the property. In such action plaintiff levied a writ of attachment upon defendants herein for an amount which it owed vendee for lumber purchased from him. Thereafter the present action was instituted and the trial court found in favor of defendants.

These are the sole questions necessary for us to determine:

First: *Does the evidence sustain the finding of the trial court "that plaintiff had no right, title or interest in or to said lumber; that said defendant was the owner of said lumber, and refused and had the right to refuse to deliver said lumber, or any part thereof, to plaintiff"?*

[1, 2] *Yes.* The evidence discloses that plaintiff entered into a contract giving vendee the right to remove certain lumber from property which he owned, that thereafter

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* Mr. Reginald P. Kratz, vice president of defendant corporation who conducted the public relation affairs of the company testified as to his conversation with plaintiff as follows:

"Well," he said, "that seems like a good plan and thanks very much, and I realize that you were buying this in good faith and have no intention of entering into any argument with us, and we won't hold you responsible in any way, and I will proceed with Jones along the lines that you suggested and work out a new agreement with him." (Clerk's Transcript, page 173.)

vendee did remove the lumber but did so in violation of certain provisions of the contract (this lumber was sold to defendants); that plaintiff knowing of the violation of the provisions of the contract waived any rights against defendants by (1) expressly telling them he would not hold them liable in any way for the alleged breach of contract by vendee; (see evidence set forth in the footnote, supra) and (2) by instituting the action in Tulare county against vendee and obtaining the levy of a writ of attachment upon defendants for sums which it owed vendee. The rule is established in California that one who obtains an attachment in pursuance of a contractual remedy is estopped to later pursue another remedy predicated upon an alleged tort arising from the same set of facts. (Estrada v. Alvarez, 38 Cal.2d 386, 391[6], 240 P.2d 278; Steiner v. Rowley, 35 Cal.2d 713, 720, 221 P.2d 9.)

[3] This rule is here applicable and since defendants purchased the timber from vendee under a valid contract, the above finding of the trial court was sustained by the evidence. The rule is settled that if a judgment is sustained by findings in one count of a complaint, which findings, as in the instant case, support the judgment, the fact that other findings are not supported by evidence will not be considered on appeal for the reason that irrespective of the determination of such question the judgment would be affirmed. (Hooker v. Thomas, 86 Cal. 176, 178, 24 P. 941; see cases cited, 43 West's Cal.Dig. (1951), Trial, 🔑397(2), p. 129.)

We therefore refrain from discussing other findings which are attacked by plaintiff.

Second: *Was the trial court bound by the findings of the Federal court in the bankrupt proceedings involving the vendee?*

[4, 5] *No.* The rule is established in California that a party to an action in a subsequent proceeding is not bound by the judgment in a prior proceeding, and the doctrine of res judicata does not operate as an estoppel, unless he was a party or privy to such action and the identical issue raised in the subsequent proceeding was determined therein. (Whitney v. City and County of San Francisco, 52 Cal.App.2d 363, 365, 126 P.2d 367; Bernhard v. Bank of America, 19 Cal.2d 807, 813[5], 122 P.2d 892.)

Third: *Did the trial court err in excluding evidence of other transactions between defendants and the vendee?*

No. The record discloses that such evidence was in fact received. Therefore there is no merit in plaintiff's contention that the court erred in not receiving such evidence.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

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124 Cal.App.2d 225

CITY OF LOS ANGELES
v.
COHEN.

Civ. 19707.

District Court of Appeal, Second District,
Division 3, California.

March 29, 1954.

Rehearing Denied April 27, 1954.
Hearing Denied May 27, 1954.

The City of Los Angeles, a municipal corporation, brought action against accountant for unpaid license taxes. The Superior Court of Los Angeles County, Irvin Taplin, J., entered judgment adverse to city and city appealed. The District Court of Appeal, Shinn, P. J., held that accountant, who contracted to purchase all acceptable accounts of corporation, and who purchased 4602 invoices under the agreement, and who realized yearly profits of about $2,000 for purchasing and collecting accounts, was engaging in business of purchasing or discounting obligations within meaning of city licenses ordinance, though he performed such services only for corporation, though he entered into agreement in order to accommodate a friend and not for profit, and though he was not dependent on such business and spent only three or four hours a week at it.

Judgment affirmed.

Licenses ⚷11(11)

Accountant, who contracted to purchase all acceptable accounts of corporation, and who purchased 4602 invoices under the agreement, and who realized yearly profits of about $2,000 from purchasing and collecting accounts, was "engaging in business" of purchasing or discounting obligations within meaning of city licenses ordinance, though he performed such services only for corporation, though he entered into agreement in order to accommodate a friend and not for profit, and though he was not dependent on such business and spent only three or four hours a week at it.

See publication Words and Phrases, for other judicial constructions and definitions of "Engaging in Business".

Samuel Cohen, in pro. per.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., James A. Doherty, Deputy City Atty., Los Angeles, for respondent.

SHINN, Presiding Justice.

Defendant appeals from a judgment in favor of the City of Los Angeles for unpaid license taxes imposed under section 21.108 of the City License Ordinance.[1] The ordinance excepts the business of engaging in transactions for the purchase or sale of real property and of making loans secured by liens upon real property.

The facts for the most part were stipulated and the remaining facts are not in dispute. The question is whether defendant was engaged in the business of purchasing or discounting or arranging for the purchase or discounting of any obligation of money due or to become due, or any evidence of any obligation of money due or to become due or the loaning of money or advancing credit, within the meaning of the ordinance.

The material facts are the following: By agreement with Modern of October 31, 1947, defendant obligated himself for one year to purchase from Modern Picture Frame Co. such accounts receivable as were acceptable to him; he had the exclusive right to purchase them; he agreed to pay the full face value of the accounts so purchased less a trade discount of 2½ per cent, without recourse to Modern for credit losses; defendant was to pay on the date of purchase 72½ per cent of the face amount of the invoices less trade discounts; he was to retain 25 per cent as security for faithful performance of the agreement by Modern, but was to pay the 25 per cent retained as a reserve on the 10th day of the month following payment of the account by the customer to Modern. The terms of payment were modified by agreement of February, 1948; defendant was to retain at all times $500 as security for faithful performance of the agreement and upon the date of purchase was to pay Modern 95 per cent of the face amount of the accounts less trade discounts. In March, 1949, the agreement was again modified, particularly with reference to the accounts of approved chain stores and department stores. During the year 1948 defendant issued approximately 75 checks totalling $120,990.66 in exchange for assignment of approximately 75 schedules of accounts receivable embracing 2033 invoices. During 1949 he issued 75 checks totalling $96,718.58 in exchange for assignment of approximately 75 schedules of accounts embracing 1612 invoices. During 1950 he issued approximately 40 checks totalling $57,466.67 in exchange for assignment of approximately 40 schedules of accounts embracing 957 invoices. The total number of checks was approximately 190, for $275,175.91, and the invoices numbered 4602. In addition defendant guaranteed the account of Modern with Hammond Lumber Company to the extent of $5,000 for which no additional charge was made. He sustained certain losses but he also profited in a substantial amount. The parties agree that defendant devoted but three or four hours a week to his business with Modern and that he realized profits of about $2,000 a year.

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[1] "Sec. 21.108. Subject to the proviso contained in the second paragraph of this section, for every person engaged in the business of loaning money, advancing credit, or loaning credit or arranging for the loan of money or advancing of credit or loaning of credit for and on his own behalf or on behalf of any other person as principal, agent or broker, whether security of any kind is taken for such loan or advance or not, or purchasing or discounting or arranging for the purchase or discounting of any obligation of money due or to become due, or any evidence of any obligation of money due or to become due, whether such obligation or evidence is secured, guaranteed or not, and whether the person so purchasing or arranging for the purchase of the items aforesaid acts as principal, agent or broker, the sum of $300.00 per year for each such person; * * *."

Plaintiff has prepared his own briefs. His argument runs somewhat as follows: He is by profession an accountant, accustomed to making $40,000 or $50,000 a year, although he was not actively engaged in his profession during the years in question; Modern was owned by a family named Marion; the company was in financial difficulties and without sufficient credit to enable it to sell its accounts at a bank; Mr. Marion was a personal friend; defendant undertook to help out in the situation by purchasing Modern's accounts; he did not purchase accounts from anyone else; he engaged only in a series of casual and occasional transactions; the attorney who drew the contract advised him that he would not need a license if he dealt with only one client and did not hold himself out to the public as engaged in the finance business; a deputy city clerk told him the same thing; he did not hold himself out as being engaged in the finance business and he devoted but a small part of his time to his transactions with Modern; his charges were less than would have been made by those regularly engaged in similar activities. His sole motive was to help out a friend during a critical period and not to earn a livelihood. These arguments do not go to the heart of the question whether defendant was engaged in the business of "* * * purchasing or discounting or arranging for the purchase or discounting of any obligation of money due or to become due, or any evidence of any obligation of money due or to become due * * *" within the purview of section 21.108 of the ordinance.

In the Matter of Application of Smith, 33 Cal.App. 161, 163, 164 P. 618, 619, the court said: "Business is defined as that which occupies the time, attention, or labor of men for the purpose of profit or improvement." In 5 Words and Phrases, Business, page 998 et seq., will be found a collection of cases from many jurisdictions which hold that " 'Business,' in a legislative sense, is that which occupies the time, attention, and labor of men for purposes of livelihood or for profit; a calling for the purpose of a livelihood." It is used in the latter meaning in the statutes relating to license taxes. See, also, 12 C.J.S., Business, page 765 et seq. The words "engage", "engaged", and "engaging" relate to and connote frequency and continuity of action. Cases so holding are collected in 14A Words and Phrases, page 188 et seq. It is, of course, well established that a single or occasional disconnected act does not constitute "engaging in business".

Over a three year period plaintiff issued 190 checks in 190 transactions and purchased altogether 4602 invoices under an agreement by which he bound himself for a period of one year to purchase Modern's accounts which were acceptable to him. There was both frequency and continuity in these transactions. Defendant derived substantial profits. The fact that he was at the same time accommodating a friend has no bearing upon the nature of the business, and since he derived profits from the business it is of no consequence whatever that he was led into the business by motives of friendship rather than the expectation of profit. He is deserving of credit, of course, but not on his tax liability. Neither is it of any consequence that he may not have been dependent upon the business for his livelihood, and devoted but little time to it. The fact that he had but a single client and did not solicit business from others has no bearing upon the nature of the business. In short, the question is not even a close one. Defendant had no tenable grounds nor reasonable excuse for refusing to pay the tax imposed by the ordinance.

The record does not support defendant's contention that he was not afforded a full opportunity to present his defense. He was permitted to argue, and to file points and authorities.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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124 Cal.App.2d 141

ZIMMERMAN et al. v. STRAUS et al.

Civ. 15574.

District Court of Appeal, First District,
Division 1, California.
March 25, 1954.

Hearing Denied May 19, 1954.

Action for damages on account of alleged fraud on part of defendants in connection with dissolution of a partnership. The Superior Court in and for the County of Alameda, James R. Agee, J., overruled defendants' demurrer to third amended complaint and rendered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Finley, J. pro tem., held that evidence was sufficient to support finding that defendants had fraudulently induced plaintiffs to sign agreement providing for division of the partnership assets in a manner out of all proportion to the capital accounts of the partners.

Judgment affirmed.

1. Fraud 🔑45

Money Received 🔑17(1)

Complaint, for damages for fraud and for money had and received, arising out of defendants' alleged fraud in inducing plaintiffs to sign agreement which allegedly provided for division of partnership assets in a manner out of all proportion to the capital accounts of the partners, sufficiently alleged that defendants had made false representations of fact rather than of opinion.

2. Fraud 🔑58(2)

Money Received 🔑18(3)

In action for damages for fraud, wherein there was a claim for money had and received, evidence was sufficient to support finding that defendants had fraudulently induced plaintiffs to sign agreement providing for division of partnership assets in a manner out of all proportion to the capital accounts of the partners.

3. Appeal and Error 🔑989

The function of reviewing court begins and ends with a determination as to whether there is any substantial evidence in a record to support the verdict.

◆

Arthur Harris, Berkeley, for appellants.

Leon Schiller and George I. Hoffman, San Francisco, for respondents.

FINLEY, Justice pro tem.

This appeal is taken by defendants from the judgment entered upon a verdict in favor of plaintiffs.

Appellants, husband and wife, and respondents, also husband and wife, were partners in the operation of two lunchroom establishments, one in Berkeley and the other in San Francisco. In this action respondents seek damages from appellants on account of alleged fraud on the part of appellants in connection with dissolution of the partnership. Demurrers were sustained to several complaints first filed by respondents, but a demurrer to the third amended complaint was overruled. Two points are raised on appeal which are stated by appellants as follows:

(a) The lower court erred in overruling appellants' demurrer to respondents' third amended complaint;

(b) Evidence is insufficient as a matter of law to support the verdict.

The third amended complaint is in two causes of action. Appellants' demurrer was both general and special. It is argued by appellants that it should have been sustained because the complaint states that the parties agreed to dissolve the partnership effective as of March 31, 1948, on the basis of the capital accounts as of that date; that they executed a dissolution agreement on February 11, 1948, and appellants argue that the capital account of a partner is not a fixed sum but fluctuates depending upon the results of the partnership enterprise, and that it would have been impossible for either appellants or respondents more than a month previous when they signed a dissolution agreement to know what the state of their respective capital accounts would be on March 31, 1948, and that any expression on the subject made by appellants was an expression of opinion and not a misstatement of fact.

Actually the complaint sets forth that in the latter part of January, 1948 the parties agreed to dissolve the partnership effective as of March 31, 1948, in accordance with the capital accounts of the parties as of the date of dissolution; that on February 7, 1948 appellant William E. Straus falsely, fraudulently and with intent to deceive and defraud respondents made certain specific false representations to respondent Arthur B. Zimmerman as to how the assets of the partnership should be divided in accordance with the capital accounts of the parties at the date of dissolution; that these representations were false and known to appellants to be false; that respondents, trusting their copartner William E. Straus and relying upon his fairness, good faith and superior knowledge, relied upon said representations and were induced thereby on February 11, 1948 to enter into a written agreement to settle the affairs of the partnership in line with these misrepresentations.

The second cause of action is in the form of a common count for money had and received by appellants for the use and benefit of respondents.

[1] The gravamen of the action is that by means of fraudulent misrepresentations respondents were induced to sign the agreement of February 11, 1948, which provided for division of the partnership assets in a manner out of all proportion to the capital accounts of the partners either at that time or on March 31, 1948. Although the complaint is not as concise as it might have been, we are satisfied that it sufficiently states a cause of action based upon fraud, and appellants' demurrer was properly overrule as to both causes of action.

[2, 3] Appellants' second point is that the evidence is insufficient, as a matter of law, to support the verdict. We have reviewed the record and find this point also to be without merit. The record is replete with testimony to support respondents' allegation that they were fraudulently induced to sign the dissolution agreement of February 11, 1948. Further we need not go, for on this issue the function of an appellate court begins and ends with a determination as to whether there is any substantial evidence in the record to support the verdict. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Estate of Meister, 77 Cal.App.2d 487, 175 P.2d 574; Estate of Teel, 25 Cal.2d 520, 154 P.2d 384; Dandini v. Dandini, 82 Cal.App.2d 263, 186 P.2d 41.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

FRANCIS
v.
CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. No. 15695.

District Court of Appeal, First District, Division 2, California.

March 26, 1954.

Hearing Granted May 19, 1954.

Action by pedestrian for injuries sustained when struck by bus while in crosswalk. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment on verdict for defendants, and plaintiff appealed. The District Court of Appeal, Dooling, J., held, inter alia, that instruction that pedestrian had continuing duty to look in direction in which danger was to be anticipated and that such duty was not met by looking once and then looking away was prejudicially erroneous.

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* Opinion vacated 282 P.2d 496.

Reversed.

Nourse, P. J., dissented.

1. Automobiles ⚷246(31)
Trial ⚷295(7)

In action by pedestrian for injuries sustained by coming into contact with bus in cross-walk, portion of instruction that it was pedestrian's continuing duty to look in direction in which danger was to be anticipated and that such duty was not met by looking once and then looking away was prejudicially erroneous and was not cured by other portion to effect that pedestrian could not look only one way and continue so to look but had to look in directions of anticipated danger and to continue to be alert to safeguard against injury, or by other instructions.

2. Automobiles ⚷245(72)

In action by pedestrian for injuries sustained when struck by bus while in cross-walk, wherein issue was raised as to whether pedestrian had been crossing intersection against traffic, evidence presented question for jury.

3. Evidence ⚷584(3)

The testimony of a single credible witness is sufficient to support a finding. Code Civ.Proc. § 1844.

4. Appeal and Error ⚷1170(9)

The test of whether erroneous instruction was prejudicial is whether a different verdict would have been improbable had the erroneous instruction not been given. Const. art. 6, § 4½.

Jack H. Werchick, San Francisco, for appellant.

Dion R. Holm, City Atty. City & County of San Francisco, Joseph F. Murphy, Richard Saveri, Dep. City Attys., San Francisco, for respondents.

DOOLING, Justice.

Plaintiff appeals from a judgment for defendants entered pursuant to a jury verdict. Plaintiff was a pedestrian crossing Sutter Street at the intersection of Sutter and Powell Streets in San Francisco when he came in contact with a municipal bus and suffered personal injuries. The incident occurred at about 5 p. m. Appellant was in the easterly marked crosswalk and had taken three or four steps southerly from the curb at the northeast corner. The bus was proceeding westerly on Sutter Street. A traffic officer was directing traffic at the time. The crucial question was whether the traffic officer had signaled to stop the east-west flow of traffic before plaintiff left the curb.

Plaintiff testified that he was standing on the curb waiting for the east-west traffic flow to be stopped by the traffic officer; that the officer blew his whistle and extended his arms with palms outward toward the east-west traffic on Sutter Street and motioned one car already in the intersection to clear it. Plaintiff then looked easterly along Sutter Street, saw the municipal bus approaching 50 or 75 feet away and without looking in that direction again took three or four steps when he was struck by the right front corner of the bus.

[1] The court gave the jury at the request of the defendants the following instruction:

"It is the duty devolved upon Mr. Francis, as the act of an ordinarily prudent person, that immediately before placing himself in a position of danger, to look in the direction in which danger is to be anticipated. *This is a continuing duty and it is not met by looking once and then looking away.* It is not a duty to look only one way and continue so to look, but rather to look in the direction or directions of anticipated danger and to continue to be alert to safeguard against injury." (Emphasis ours.)

The exact language which we have emphasized in this instruction has been held to be prejudicial error. Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631; Goodwin v. Foley, 75 Cal.App.2d 195, 170 P.2d 503. In the Salomon case the Supreme Court said: "The vice of the instruction * * * lies in the unqualified statement that 'this is a continuing duty, and is not met by looking once and then looking away.' Whenever there is room for an honest difference of opinion between men of average intelligence, the question of whether the plaintiff was negligent in failing to look again in the direction from which the defendant's car was approaching is a question of fact for the jury and the finding of the triers of fact is conclusive." 1 Cal. 2d at page 15, 32 P.2d at page 633.

Even if the jury believed plaintiff's testimony implicitly this instruction would compel a verdict against him, since he testified that he looked at the bus only once when he saw it 50 or 75 feet from the intersection and did not look that way again until the bus was too close for him to escape it.

Respondents argue that the last sentence of the instruction cures the error in the offending sentence. The only direction from which danger could reasonably be expected while plaintiff was in the northerly half of Sutter Street was from the direction in which the bus was approaching, so that the last sentence which informed the jury that the duty was "to look in the direction or directions of anticipated danger" only emphasized the error, rather than curing it. A similar sentence is found in the offending instruction in the Salomon case, "it is the duty of the pedestrian to look to the right and to the left whenever he or she has voluntarily put himself or herself into a position which may be one of peril coming from either direction." Salomon v. Meyer, supra, 1 Cal.2d at pages 13–14, 32 P.2d at page 632.

Respondents' further argument that the error in this instruction is cured by other instructions is not borne out by an examination of the instructions given. The offending instruction singled out the plaintiff by name and clearly implied by its language, "immediately before placing himself in a position of danger", that in entering the intersection plaintiff did in fact place himself in such a position of danger as to place upon him the continuing duty to look to the east, because as we have pointed out that was the only direction from which danger could be reasonably anticipated before he reached the center line of Sutter Street. No amount of general instructions could cure the error in this specific instruction which put the continuing duty on the plaintiff to look in the direction of anticipated danger (i. e., in this case to the east) and expressly told the jury that this duty "is not met by looking once and then looking away."

[2, 3] Respondents finally argue that the error was not prejudicial under Art. VI, § 4½ Const. They point out that plaintiff was the only witness who testified that the traffic officer had signaled the east-west traffic to stop before plaintiff left the curb. Neither the bus driver nor the traffic officer saw the impact between plaintiff and the bus, but both testified that the officer at the time was directing the flow of traffic east and west across Powell Street. Two pedestrians who saw the impact gave similar testimony. However respondents' witnesses contradicted one another in certain particulars of which we mention two. Three of the witnesses testified that the flow of traffic east and west had continued for some time before the impact. The fourth testified that the bus came to a stop before crossing Powell Street because the flow of traffic was north and south on Powell Street as it neared the intersection and that only when the officer stopped the north-south flow of traffic and gave the signal for east-west traffic to proceed did the bus start up and cross over Powell. The driver testified that he learned of the impact while the bus was still in motion by some passenger saying: "A man got hit." One of the other witnesses testified that he boarded the bus after it stopped on the northwest corner and asked the driver: "Did you know that you hit a man?", to which the driver answered: "No." The plaintiff was not impeached or shaken in his testimony in any way and a plaintiff's verdict would find ample support in the evidence, since the testimony of a single credible witness is always sufficient to support a finding. Section 1844 Code Civ.Proc.

[4] Under these circumstances we cannot say that a different verdict would have been improbable had the erroneous instruction not been given. This is the test of prejudicial error most recently laid down

by the Supreme Court in both civil and criminal cases. People v. Carnine, 41 Cal.2d 384, 260 P.2d 16; Daniels v. City & County of San Francisco, 40 Cal.2d 614, 624, 255 P.2d 785; People v. Newson, 37 Cal.2d 34, 45, 230 P.2d 618; Delzell v. Day, 36 Cal.2d 349, 351, 223 P.2d 625.

Judgment reversed.

KAUFMAN, J., concurs.

NOURSE, Presiding Justice (dissenting).

I dissent. The majority opinion rests wholly on Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631 and Goodwin v. Foley, 75 Cal.App.2d 195, 170 P.2d 503. They both concern a similar instruction that it is the duty of a pedestrian to look before placing himself in a position of danger and that "This is a continuing duty and it is not met by looking once and then looking away." Both cases are contrary to the great weight of authority. For citations see Gibb v. Cleave, 12 Cal.App.2d 468 at page 471, 55 P.2d 938. No qualifying language was used in either of those cases. Here the condemned instruction further read: "It is *not a duty* to look only one way and continue so to look, but rather to look in the direction or directions of anticipated danger and to continue to be alert to safeguard against injury." (Emphasis added.)

In final analysis the instruction means nothing more than that the pedestrian's duty is not fulfilled by taking one look and then closing his eyes and walking blindly into the "direction of anticipated danger."

This distinction in the two cited cases is clearly expressed in Taha v. Finegold, 81 Cal.App.2d 536, 541, 184 P.2d 533, where the portion of the instruction resting on the question of contributory negligence and the "one look" was followed by the injunction that the issue of contributory negligence was to be determined on what was the usual conduct of an ordinarily prudent person. If the jury should determine that an ordinarily prudent person would keep his eyes open when crossing a busy intersection then it could properly conclude that the pedestrian's duty was not ended with a single look.

It is elementary that all instructions must be read together. It is not sufficient to take one sentence and rely wholly upon that. Here the qualifying language that it is the duty of a pedestrian to continue to be alert to safeguard against injury renders the instruction free from error, as was held in Taha v. Finegold, supra. The reason for the instruction is obvious. In a busy intersection, such as we have here, vehicles frequently make both right and left turns. Such movements may not be observed through one look while standing on the curb. The instruction means no more than that a pedestrian must always be on the alert to avoid such injury. For that reason I do not believe that the instruction was prejudicial.

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124 Cal.App.2d 269

E. K. WOOD LUMBER CO. et al.

v.

ROBERTS et al.

Civ. 15766.

District Court of Appeal, First District, Division 2, California.

March 30, 1954.

Cross-action by maker of note to enjoin sale of mortgaged property for default on note and to have note reformed on ground that by mutual mistake of maker and payee, or by mistake of maker and fraud of payee the note did not embody alleged agreement that it should be repaid out of revenue from mortgaged property. From adverse judgment of Superior Court, Alameda County, Thomas J. Ledwich, J., maker appealed. The District Court of Appeal, Gibson, Justice pro tem., held that evidence supported finding that alleged agreement for repayment never existed and the payee was not a party to any fraud or mistake in the execution of the note.

Judgment affirmed.

Mortgages ⚷338

Reformation of Instruments ⚷45(8)

In cross-action by maker to enjoin sale of mortgaged property for default on note and to have note reformed on ground that by mutual mistake of maker and payee, or by mistake of maker and fraud of payee the note did not embody alleged agreement that note should be repaid out of revenue from the mortgaged property, evidence supported finding that there was no such agreement and that no fraud or mistake was involved in the execution of the note.

◆

Frederick L. Hilger, Eureka, for appellant.

Samuel B. Stewart, Jr. and Christopher M. Jenks, San Francisco, H. H. Bechtel, Oakland, for respondents.

GIBSON, Justice pro tem.

On January 6, 1949, cross-complainant Roberts was the owner of real property in Oakland upon which he was erecting a building. To assist him in financing construction thereof, he had theretofore borrowed in excess of $30,000 from cross-defendant Bank of America National Trust & Savings Association, and evidenced the same by a promissory note and secured it by a deed of trust on the property. He found he needed more money to complete the building and applied to the bank therefor. After negotiating with the officials of the latter for awhile, the bank agreed to lend him the additional sum of $42,500, and pursuant thereto, on the date aforesaid, he made and executed a promissory note in words and figures as follows, to-wit:

"42,500.00—Oakland, Calif., January 7, 1949.

Six months after date hereof, for value received, I promise to pay in lawful money of the United States of America, to the order of the Bank of America National Trust & Savings Association at its Piedmont Avenue Branch in this city Forty-Two Thousand Five Hundred and no/100ths Dollars with interest in lawful money from date hereof, at the rate of 5% per annum until paid, payable six months from date, and if said interest is not paid as it becomes due, it is to be added to the principal and becomes a part thereof, and thereafter bear interest at the same rate, and in case said interest, or any part thereof, be not paid within 10 days after the same becomes due and payable, the whole of said principal sum shall forthwith become due and payable at the option of the holder of this note.

"Deed of trust dated February 20, 1947, executed by John Stewart Roberts and recorded February 27, 1947, in Book 5061 of Official Records, Page 389, Alameda County Records secures the indebtedness evidenced by the note. John Stewart Roberts."

About three weeks after the maturity of the note, nothing having been paid thereon, the trustee under said deed of trust, after notice of default, noticed said property for sale. Whereupon in this action, originally begun by other parties, appellant by cross-complaint against the respondents Bank and Corporation of America, trustee in said deed of trust, sought to enjoin said sale and to have said note reformed so as to have it read and mean other than it did by its express terms. Its position is succinctly set forth in paragraphs 5, 6, and 7 of the first count of the amended cross-complaint and in Count 3 thereof. Said paragraphs referred to are as follows:

"V. That prior to the presentation of said promissory note, said cross-defendant and defendant had agreed that repayment of said Forty Two Thousand Five Hundred ($42,500.00) Dollars, and all other sums owing to said Bank of America National Trust & Savings Association, would be made from the specific revenue received from the property described in the deed of trust hereinabove mentioned in paragraph 2.

"VI. That by the mutual mistake of defendant and said cross-defendant, or by the mistake of the defendant and the fraud of the cross-defendant, in concealing its knowledge thereof, said promissory note did not embody the actual agreement theretofore made as aforesaid, but said provision for such repayment was omitted.

"VII. That defendant executed said written agreement in the belief that the same embodied the actual agreement theretofore made as hereinabove alleged."

The third count of the amended cross-complaint refers to the first six paragraphs of the first count thereof and adds the allegations that on or about December 3, 1948, during discussion of the execution of said note, defendant informed Mr. Edwards, vice-president of the Bank of America National Trust & Savings Association, that defendant could only pay the indebtedness incurred in the past and to be incurred in the future, out of the specific revenue from the real property which was the security for the repayment of said indebtedness; that said Edwards allowed appellant to believe that this source of revenue would be that from which the Bank would look to for the payment of said indebtedness; that appellant had no knowledge that the Bank would demand payment of the note from any source other than that of the specific revenue to be received from the realty concerned. Appellant prayed that said note be reformed, the sale under the deed of trust be enjoined, and for a general relief.

The foregoing allegations were appropriately denied in the answer to the amended cross-complaint and thus the issues are clear cut. It should here be said that other points were originally raised by appellant, but we find there is no merit therein; and that they have been either expressly or impliedly abandoned by him.

In its findings the lower court found against appellant's contentions and adjudged the cross-complainant take nothing against the cross-defendants. The cross-complainant has appealed and has brought the matter before this court on a settled statement.

The sole issue for us to decide is whether or not the findings are supported by the evidence. We have examined the record in detail and have come to the conclusion the findings are amply supported. This being the case, we have no alternative other than to affirm the judgment.

Referring back now to the allegations contained in Paragraph 5 of the amended cross-complaint, which the Court found not to be true, we can find no evidence in the record which sustains them. We are referred to pages 22, 23, and 24 of the settled statement as containing such evidence. All we find there, in this connection is, appellant stated to the Bank representatives at a discussion between them relative to lending this money that the only way he could ever hope to have an equity in the building was to "stay in the act and pay out of income", but no comment was made by the representatives of the Bank in regard thereto. On the other hand, B. F. Edwards, one of said Bank representatives, testified he told appellant at that time it would be "out of the question" to pay off the loan, if made, out of the income. This witness also testified no one at that meeting, in his presence, told appellant the loan could be repaid out of the revenue from the property. In short, we find in the statement, no evidence of any such agreement, but we do find evidence from which it may well be concluded there was none.

Considering Paragraph 6 of the amended cross-complaint, we are pointed to no evidence and can find none, that the note was executed through mutual mistake or fraud. When appellant went to the escrow holder title company, he read the note, understood it, and noted its maturity date was six months thereafter, questioned it, whereupon the escrow agent told him to "do what he wanted to, it was his business". He then went to the telephone, talked to his attorney Mr. Wallace, told the latter it was a six months note, and should he sign it? And the latter advised him to do so, and he would explain it to him later. Appellant also says Wallace told him at that time the Bank would "remake the note every six months." He then went back to the counter and signed the note and left it with the escrow holder.

However, Mr. Wallace was a witness at the trial and he testified positively that at no time did he ever tell appellant the Bank would renew or "remake" the note or that the Bank had agreed to do so. Wallace also testified he never had any such agreement or understanding with the Bank at any time. Without detailing it here, it is sufficient to say other witnesses testified there was no such agreement and that appellant was never told that such a plan was acceptable. Indeed, the only one appellant claims told him that, was Wallace, and his own attorney, legal adviser and agent in this transaction. In addition to this, it is noted the appellant testified when his deposition was taken prior to the trial that he had never executed the note; at the trial he admitted he had.

Under all these circumstances, the Court could well conclude, as it did, there was no basis for a finding that the Bank misrepresented to, or concealed anything from, the appellant or that it was a party to any mistake, and consequently no fraud or mutual mistake had been proved.

The foregoing is likewise applicable to Paragraph 7 of the amended cross-complaint. The allegations appearing therein are, standing alone, insufficient to authorize the relief prayed for, and when taken with the other allegations appearing in the preceding paragraphs, the hereinabove observations are applicable thereto.

Also, the fact appellant took no action in regard to altering the note until two years later, and after he had been served with process herein, does not lend too much credence to the claim that he signed the note under any misapprehension as to the note's due date or when it would be payable.

Proceeding now to a consideration of the third count in the amended cross-complaint, we can find no evidence that the Bank was responsible for any belief appellant may have had that he would be permitted to pay off this note out of the specific revenue from the real property. Instances showing the Bank told appellant it could not and would not lend him this money on such a basis has been hereinabove referred to. Mr. Edwards also made this plain to Mr. Wallace, plaintiff's attorney. Both he and Wallace so testified. There is no question of the relationship between Wallace and appellant. The latter testified at one time, "I had no discussion with Mr. Wallace concerning the note, the terms of repayment, or anything. I left it entirely to him." He also testified that when he talked to Wallace on the telephone, he said to Wallace, "All right, if you are satisfied with it that is perfectly all right with me."

The findings on this count have full and adequate evidentiary support.

From the foregoing it must be concluded that the evidence forms no basis for reformation of the note. Moore v. Vandermast, 19 Cal.2d 94, 96–97, 119 P.2d 129; Bailard v. Marden, 36 Cal.2d 703, 708, 227 P.2d 10; Burt v. Los Angeles, etc., 175 Cal. 668, 166 P. 993. Nor for equitable estoppel. Young v. Bank of California, 88 Cal.App.2d 184, 186, 198 P.2d 543; McClain v. Bercut-Richards Packing Co., 64 Cal.App.2d 420, 425, 148 P.2d 907.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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124 Cal.App.2d 51

SHAND
v.
CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.
McIVER
v.
CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.

Civ. 15686, 15687.

District Court of Appeal, First District, Division 2, California.
March 23, 1954.

Proceedings for mandamus to compel Unemployment Insurance Appeals Board to pay unemployment benefits for certain periods to discharged employees. The Superior Court, City and County of San Francisco, William T. Sweigert, J., rendered judgments against employees as to period for which they received vacation pay, and they appealed and their appeals were consolidated. The District Court of Appeal, Nourse, P. J., held that where collective bargaining agreement entitled employee to paid vacation but not to extra pay in lieu of vacation, employee receiving, upon his discharge, lump sum as vacation pay could not recover unemployment benefits during period equivalent to that for which lump sum payment was made.

Judgment affirmed.

1. Social Security and Public Welfare ⚷387

Where collective bargaining agreement entitled employee to paid vacation but not to extra pay in lieu of vacation, employee receiving, upon his discharge, lump sum as vacation pay could not recover unemployment benefits during period equivalent to that for which lump-sum payment was made. Gen.Law, Act 8780d.

2. Constitutional Law ⚷146

Denial of unemployment benefits for period equivalent to that for which vacation pay was received by discharged employee did not constitute unconstitutional impairment of collective bargaining agreement entitling employee to paid vacation but not to extra pay in lieu of vacation. Gen.Law, Act 8780d.

3. Constitutional Law ⚷77

Determination that receipt of vacation pay, under contract entitling employee to paid vacation but not to extra pay in lieu of vacation, excluded unemployment constituted no more than construction of unemployment compensation statute, and application of same to factual situation, rather than legislation such as legislature cannot delegate to an administrative agency or court. Gen.Law, Act 8780d.

◆

Herbert Pothier and Marcel E. Cerf, Robinson & Leland, San Francisco, for appellants Shand & McIver.

McEnerny & Jacobs, Garrett McEnerny II, E. John Kleines and Elster S. Haile, San Francisco, for respondent Hearst Publishing Co.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw, Deputy Atty. Gen., Vincent P. Lafferty, Deputy Atty. Gen., for respondents California Employment Stabilization Commission.

NOURSE, Presiding Justice.

These are appeals from judgments ordering issuance of peremptory writs of mandate in proceedings to review final administrative decisions of the California Unemployment Insurance Appeals Board, herein further called the Board, denying the petitions of Robert Shand for payment of unemployment benefits and of Janice McIver for payment of disability benefits. Both petitioners, employees of the Oakland Post-Inquirer, a newspaper operated by Hearst Publishing Company, Inc., were discharged when that newspaper closed on September 1, 1950. Pursuant to a collective bargaining agreement each received a lump-sum payment comprising two weeks pay in lieu of notice, a number of weeks dismissal pay and a number of days vacation pay. The question presented in each case was in how far the payments received rendered the employees ineligible for the benefits they claimed. It was conceded that the two weeks in lieu of notice payment had that effect for the period from September 1 to September 15, 1950. The Board decided that also the payments for dismissal pay and vacation pay rendered the claimants not unemployed during a further period corresponding with the number of weeks and days for which they received such pay. In the mandamus proceedings the superior court held this to be correct as to the vacation pay, but incorrect as to the dismissal pay. Hearst Publishing Company and the administrative bodies and officials made respondents appealed from the judgments in so far as concerned with dismissal pay, the petitioners from the judgments in so far as concerned with vacation pay. The Shand and McIver cases were consolidated for purposes of appeal. The appeals as to the dismissal pay were dismissed at the request of all appellants concerned. The appeals now before the court relate to the vacation pay only.

The decision of the superior court in this respect is correct. At the time it was given the question was of first impression in California, but since then it has been decided in the same manner in Jones v. California Employment Stabilization Comm., 120 Cal. App.2d 770, 262 P.2d 91. Section 9.2 of the California Unemployment Insurance Act, Deering, Act 8780d, provides that "An individual shall be deemed 'unemployed' in any week during which he performed no services and *with respect to which* no wages are payable to him * * *." (Emphasis ours.) No services were to be performed by the claimants after their dismissal. The decisive question was whether the vacation pay was wages payable to them *with respect* to the time after the dismissal.

[1] We adopt as to this point the following part of the extensive opinion written by the trial judge:

"The employee is entitled under the agreement [sec. 18 of the collective bargaining agreement] to a 'vacation with pay.' If the employer has not given the vacation for the year in question, he cannot deprive the employee of the right thereto by discharging him. The employer has the option of continuing the employee on the payroll for the necessary vacation period before paying him off and discharging him or of doing what is in effect the same thing, i. e., discharging him and at the same time paying him then and there in cash for the vacation period.

"In the latter case, the employee remains, not actually but constructively, on the payroll for the vacation period following discharge. The vacation pay is clearly 'with respect to' that period and the employee remains ineligible for unemployment benefits. For an example of what is meant by an employee remaining constructively in the employer-employee relationship, see Social Security Board v. Nierotko, 327 U.S. 358, 66 S.Ct. 637 [90 L.Ed. 718].

"The vacation pay situation is similar to the in-lieu-of-notice pay situation, where the employer, instead of actually keeping the employee in his service pending the necessary notice period, exercises the option of discharging him and paying him off then and there in cash for the equivalent period.

"Petitioner concedes that the in-lieu-of-notice payment is 'with respect to' the equivalent notice period after discharge and that the employee remains ineligible for unemployment benefits during that period. There is, however, no difference in principle between the in-lieu-of-notice pay and the vacation pay.

"In both cases the purpose and the intent of the parties is clear and the courts of [read "have"], accordingly, held that vacation pay rendered the employee ineligible for unemployment benefits during the vacation period after discharge. (See Kelly v. Administrator, Unemployment Compensation Act, 1950, 136 Conn. 482, 72 A.2d 54; Mattey v. Unemployment Compensation Board of Review, 164 Pa.Super. 36, 63 A.2d 429; Moen v. Director of Division of Employment Security, 324 Mass. 246, 85 N.E.2d 779, 8 A.L.R.2d 429; Wellman v. Riley, 95 N.H. 507, 67 A.2d 428.)"

[2, 3] There is no merit in appellants' contention that the allocation of the vacation pay to a period following termination of employment is an unconstitutional impairment of the collective agreement because it takes from the employees the vacation pay to which the contract entitles them absolutely and substitutes it for unemployment compensation. There is no substitution. Appellants are not entitled to benefits during the period over which they receive vacation pay because in the sense of the statute they are then not unemployed but on vacation with pay. Although the right to vacation pay is earned by the employee's labor in a preceding period the vacation pay is not allocable to that period as the employee cannot at his choice take the pay during that period without taking vacation, Jones case, supra, 120 Cal.App.2d at page 773, 262 P.2d at pages 92, 93. The contract does not entitle the employees to a certain amount of extra pay independent of vacation, but only to "vacation with pay" and this right of theirs is in no way impaired. The "Benefit Decision" No. 6047 of the California Unemployment Insurance Appeals Board, In re Anderson and others, case No. 21593, dated July 10, 1953, on which appellants rely, is not in point. In that case the employees were according to their contract always entitled to a "bonus in lieu of vacation pay" without taking any vacation. It was therefore held that such payment was a bonus fully earned in and allocable to the period during which the employee worked for it.

There is no merit in appellants' contention that the decision that vacation pay excludes unemployment is legislation which the legislature cannot delegate to an administrative agency or court. It is no more than construction of the statute and its application to a factual situation, the normal function of such agency or court.

Judgments affirmed.

DOOLING and KAUFMAN, JJ., concur.

124 Cal.App.2d 213

PEOPLE v. TIPTON et al.

Cr. 2965.

District Court of Appeal, First District,
Division 1, California.
March 29, 1954.

Prosecution against both defendants for furnishing minor narcotics, and against one defendant for pimping. The Superior Court, San Francisco County, Milton D. Sapiro, J., entered judgments of conviction and defendants appealed. The District Court of Appeal, Peters, P. J., held that furnishing of narcotics to minor on four separate, consecutive days constituted four separate offenses and not one continuous offense.

Affirmed.

1. Poisons 🔑4

Under statute providing that any person who unlawfully furnishes any narcotic to a minor shall be guilty of a felony, acts of defendants, who furnished minor with narcotics on four consecutive days, constituted four separate violations. Health and Safety Code, § 11714.

2. Poisons 🔑9

The corpus delicti in any case, including a narcotic case, may be proved by circumstantial evidence.

3. Poisons 🔑9

In prosecution for furnishing narcotic to minor, testimony of minor that she had used heroin furnished her by defendants, in conjunction with doctor's testimony that in his opinion substance used by minor had been heroin, was sufficient to prove that substance furnished minor was a narcotic. Health and Safety Code, § 11714.

4. Criminal Law 🔑5

The Legislature has the power to determine penalties for criminal acts.

5. Criminal Law 🔑984

A trial court possesses discretion of determining whether criminal sentences shall be served consecutively or concurrently.

6. Criminal Law 🔑1213

Imposition of sentences, after conviction of furnishing minor with a narcotic on four separate counts, to four consecutive terms of imprisonment of five years each as to one defendant, and to two consecutive terms of imprisonment of five years with two concurrent terms of a like period as to another defendant, was within court's discretion and did not constitute cruel or inhuman punishment in constitutional sense. Health and Safety Code, § 11714.

7. Prostitution 🔑1

Under statute providing any male person who derives any support from earnings of prostitution of female person, knowing such female person to be a prostitute, shall be guilty of a felony, prosecution must prove that accused is a male, that female is a prostitute, that accused knew female was a prostitute, that prostitute made some earnings from her business, and that accused derived his support in some part from such earnings knowing that money given him was proceeds from such earnings. Pen. Code, § 266h; St.1921, p. 96.

8. Prostitution 🔑4

Evidence sustained conviction for pimping. Pen.Code, § 266h; St.1921, p. 96.

◆

Sol A. Abrams, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Clayton R. Janssen, Jr., Deputy Atty. Gen., San Francisco, for respondents.

PETERS, Presiding Justice.

John and Jeanette Tipton were charged and convicted of four separate violations of that portion of section 11714 of the Health and Safety Code which declares that any person "who unlawfully sells, furnishes, administers, gives, or offers * * * any narcotic to a minor, is guilty of a felony punishable by imprisonment in the state prison for not less than five years * *." In addition, John Tipton was convicted on a separate count of pimping, as that felony was defined in Statutes of 1921, Chap. 100, p. 96.[1] John was sentenced to four consecutive terms of imprisonment on the four narcotic counts, it being provided that the sentence for pimping should run concurrently with one of the sentences on the narcotic charges. As to Jeanette, her sentences on counts one and three were made to run concurrently as were those on counts two and four, it being provided that the terms on counts two and four should not commence until the expiration of the terms on counts one and three. Both defendants appeal from the judgment.

The principal witness for the prosecution was Clarice Strange, aged 17, the minor to whom appellants furnished the narcotics. She testified that she lived in a named San Francisco hotel in January of 1953. There is some conflict as to how long Clarice stayed at this hotel, and as to the precise dates of her occupancy, but the evidence is undisputed that she occupied the room continuously for at least one week. She testified that she had known the Tiptons, who lived across the street from the hotel in question, before she moved to that hotel; that during all the time she lived there she was practicing prostitution, from which activity she made from $30 to $60 per day; that no one solicited for her; that during all of this period she was using heroin daily which she secured from the Tiptons who were both addicts and sellers; that she had been a heroin user for two and a half years; that she took three to six hypodermic shots of heroin every day; that Jeanette Tipton was also a prostitute; that during all of the period in question she turned over her entire earnings from the prostitution to John Tipton who returned to her three or four dollars daily with which she purchased food; that in return the Tiptons furnished her daily with all of the heroin she needed; that she secured the heroin from both the Tiptons daily in the Tiptons' apartment over a period of several weeks under this arrangement, and took her shots in their presence, they frequently also taking shots with her. She estimated that she received heroin each day that would otherwise have cost her $50. The heroin was furnished to her on more than four separate days.

No heroin was produced at the trial. Clarice, however, testified that it was heroin she received from the Tiptons. She testified, in some detail, how she administered the drug to herself, how she felt if she did not have a shot when needed, and how she felt after administering the drug. A doctor, who qualified as an expert on drug addiction, testified as to the chemical nature of heroin, its effect on individuals, and the usual method employed by addicts in self-administering the drug. Then, in response to a hypothetical question, he stated that it was his opinion from Clarice's testimony that she had been using narcotics, was an addict, and that the drug could have been heroin.

[1] Neither appellant challenges the sufficiency of the evidence on the four narcotic charges, except in connection with the sufficiency of the evidence to prove the *corpus delicti*. Their basic contention is that their acts in furnishing narcotics to the minor on four consecutive days constituted but one continuing offense and not four separate offenses. Their argument is that the gist of the four narcotic charges was the contributing to the delinquency of a minor by furnishing her narcotics, and

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[1] Since 1953 the crime is now defined in section 266h of the Penal Code. The offense here involved occurred before the effective date of that statute. For that reason the definition in the 1921 statute is here applicable. The two definitions, so far as the problem here concerned is involved, are substantially identical.

that was but one offense, continuous in nature, which acts cannot be broken up into separate crimes with separate sentences.

There is no merit to these arguments. Section 11714 of the Health and Safety Code makes it a felony to furnish narcotics to a minor. The indictment charges that on four separate days appellants furnished narcotics to Clarice, a minor. The evidence supports the charges. Each time heroin was furnished, the act defined in the section was committed and completed. Each time heroin was furnished to her it was, therefore, a complete and separate offense. It is immaterial that the act was committed each time at the same place by the same people. While no case has been called to our attention dealing with this section of the code, there are several cases so holding in analogous situations. In People v. Phillips, 76 Cal.App.2d 515, 173 P.2d 392, defendant was charged in two counts with the crime of offering a bribe to a prize fighter. The evidence was that on two separate occasions he had offered a bribe to a fighter to induce him to throw a fight. Both times the offer was rejected. Both offers related to the same fight. Conviction of two separate offenses was upheld, it being held that two offenses had been charged and proved. In People v. Rhoades, 93 Cal.App.2d 448, 209 P.2d 33, and in People v. Von Mullendorf, 110 Cal.App.2d 286, 242 P.2d 403, it was held that a physician who twice attempted to produce a miscarriage on the same female during the same pregnancy for the same fee was properly convicted of two separate crimes. The reasoning of these cases demonstrates that the furnishing of narcotics on four separate occasions to a minor constituted four separate offenses and was not one continuous offense.

[2, 3] The next contention of appellants is that the *corpus delicti* was not proved in that no heroin was produced at the trial. It is pointed out that an essential element of the four narcotic charges was proof that the substance furnished the minor was a narcotic, and, it is contended, such proof can only be made by the introduction of the narcotic into evidence and its identification by an expert. The point is without merit. The *corpus delicti* in any case, including a narcotic case, may be proved by circumstantial evidence. People v. Corrales, 34 Cal.2d 426, 210 P.2d 843; People v. Ives, 17 Cal.2d 459, 110 P.2d 408; People v. Mehaffey, 32 Cal.2d 535, 197 P.2d 12. The prosecution need not physically produce the narcotic. It may prove that the substance was a narcotic by the testimony of the user and by the testimony of a doctor that, in his opinion, the substance used was a narcotic. This precise point was so decided in the recent case of People v. Candalaria, 121 Cal.App.2d 686, 264 P.2d 71. The evidence here meets all the tests laid down in that case.

[4–6] It is also urged that the sentences here imposed on the narcotic charges were unconstitutional in that they were cruel and inhuman, for the reason that several of them are made to run consecutively. Section 11714 of the Health and Safety Code fixes a minimum of a five-year sentence for the violation of its provisions. Appellants, as already pointed out, were convicted properly of four separate violations of that section. The sentences of five years for each violation were the sentences prescribed by the Legislature. The Legislature has the power to determine penalties for criminal acts. People v. Hess, 104 Cal.App.2d 642, 686, 234 P.2d 65. The trial court possesses the discretion to determine whether the sentences should be consecutive or concurrent. People v. Van Valkenburg, 111 Cal.App.2d 337, 244 P.2d 750. No abuse of discretion here appears. For these reasons the sentences here imposed were not cruel or inhuman in the constitutional sense.

Appellant John Tipton contends that the evidence is insufficient to support his conviction of pimping. He contends that the evidence simply shows that Clarice gave him and his wife her earnings from prostitution and that they, in return, furnished her with narcotics which were worth as much or more as her income from prostitution. Thus, so it is claimed, the evidence shows that Clarice was simply using her earnings to purchase narcotics. It is contended that this does not support a conviction of pimping against the narcotic seller.

[7,8] Statutes of 1921, Chapter 100, page 96, provides, in part: "Any male person who, knowing a female person to be a prostitute, shall live or derive support or maintenance in whole or in part, from the earnings or proceeds of the prostitution of such prostitute * * * shall be guilty of a felony, to wit: pimping * * *." Under this statute the prosecution must prove that the accused is a male; that the female is a prostitute; that the defendant knows that fact; that the prostitute has made some earnings from her business, and that the defendant has derived his support in whole or in part from such earnings knowing that the money given him was the proceeds from such earnings. See discussion and cases cited 20 Cal.Jur. p. 391, § 8. The prosecution proved all of these elements in the instant case. This appellant knew that Clarice was a prostitute. He arranged with her that if she would turn over her earnings to him from her prostitution that he would furnish her with narcotics. He knew that the money he received from Clarice had been earned by her as a prostitute. It is reasonable to assume that the furnishing of narcotics to Clarice was intended to induce her, and obviously would have the effect of inducing her, as an addict, to continue in prostitution in order to make the earnings with which to buy the heroin. We do not have to decide whether one who sells a prostitute food or clothing or other necessity knowing that she is paying him with the proceeds of prostitution is guilty of the offense defined by the section. That is not the instant case. Here, under the facts, the furnishing of the heroin had the purpose, intent and effect of inducing Clarice to engage in prostitution in order that appellant could make a profit therefrom. The statute clearly intended to make such inducement and participation a crime.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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124 Cal.App.2d 157

PROCTOR & GAMBLE MFG. CO. et al.
v.
SUPERIOR COURT OF STATE, IN AND FOR MARIN COUNTY.

Civ. 16149.

District Court of Appeal, First District, Division 2, California.
March 25, 1954.

Prohibition proceeding to restrain Superior Court from enforcing order compelling detergent manufacturer to furnish plaintiffs in personal injury action against manufacturer, with names and addresses of all persons claiming injury from contact with detergent. The District Court of Appeal, Kaufman, J., held that affidavits which were based on information and belief and hearsay, and which failed to show that requested information would be admissible in evidence were insufficient to support order, and that petition for "writ of prohibition or other appropriate writ" could be treated as petition for writ of mandate.

Peremptory writ of mandate directed to issue.

1. Witnesses ⚿16

In order that a subpoena duces tecum should issue, affidavits in support of motion therefor should sufficiently describe the documents or papers demanded. Code Civ. Proc. § 1985.

2. Discovery ⚿97(4)
Witnesses ⚿16

The basic principles applicable to affidavit in support of motion for subpoena duces tecum, and those applicable to affidavit in support of order for inspection, are the same. Code Civ.Proc. §§ 1000, 1985.

3. Prohibition ⚿5(3)

Writ of prohibition is not proper remedy to restrain court from enforcement of subpoena duces tecum or order for inspection. Code Civ.Proc. §§ 1000, 1985.

4. Mandamus ⚿53

The writ of mandate is appropriate remedy to command the Superior Court to vacate order for inspection. Code Civ. Proc. § 1000.

5. Mandamus ⚷1

Where petition is meritorious, even though prohibition is asked for, it can be treated as a petition for a writ of mandate.

6. Discovery ⚷97(4)

Where action for personal injuries was based upon theory of breach of express warranty that detergent was kind to hands, it was "material", within statutes providing for order for inspection and subpoena duces tecum, to show by affidavits, defendant's knowledge that others were harmed by the product. Code Civ.Proc. §§ 1000, 1985.

See publication Words and Phrases, for other judicial constructions and definitions of "Material".

7. Negligence ⚷27

A manufacturer must give appropriate warning of any known dangers in his product which user would not ordinarily discover.

8. Discovery ⚷97(4)

It is error to base an order of inspection on insufficient supporting affidavits. Code Civ.Proc. §§ 1000, 1985.

9. Discovery ⚷97(4)

Where, in action for personal injury against detergent manufacturer, affidavits, supporting plaintiffs' motion for order compelling manufacturer to furnish names and addresses of all persons claiming injury from contact with detergent, were based on information and belief and hearsay, and failed to show that desired information would be admissible in evidence, affidavits were insufficient to support order for inspection, though information sought was material to plaintiffs' action. Code Civ. Proc. §§ 1000, 1985.

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Boyd, Taylor & Reynolds, San Francisco, for petitioners.

Bagshaw, Schaal & Martinelli, San Rafael, for respondent.

KAUFMAN, Justice.

Petitioners, Proctor & Gamble Manufacturing Company seek an alternative writ of prohibition directed to the Superior Court of Marin County restraining respondent from enforcing an order compelling defendants to furnish certain information from their records, and commanding respondent court to vacate and set aside said order or show cause before this court as to why it has not done so. A peremptory writ following a return and hearing is also requested.

On February 3, 1953, plaintiffs Loretta T. and Robert L. Jones, husband and wife, filed a complaint in the Superior Court in and for Marin County against petitioners herein seeking $60,000 damages for injuries alleged to have been sustained by use of petitioner's product "Cheer", the cause of action being based upon breach of warranty. The answer of petitioners denied the material allegations of the complaint and alleged contributory negligence of Loretta Jones, and that such contributory negligence was imputed to her husband, and further alleged that the alleged injury, if any, was due solely "to plaintiff's physical and bodily condition and constitutional composition" on the date of alleged injury. The injury alleged from the use of "Cheer" was a severe dermatitis and dermatosis, causing nervousness and illness and inability to perform her household duties for a six month period, as well as permanent disfigurement of her hands which prior to that time were "beautiful and smooth."

On September 28, 1953, plaintiffs served and filed notice of motion to compel defendants to furnish all the following information within their knowledge: the names and addresses of all persons making complaint to defendants or either of them, whether at their main office or offices or any of their branch offices, claiming to have been injured or damaged by the use of the detergent known as "Tide" and/or the detergent known as "Cheer", products sold by defendants. The motion was based on the records in the case and on affidavit. The ground of the motion was the defendants had pleaded as a special defense the doctrine of "uniqueness", claiming plaintiffs' injuries were the proximate result of her own physical condition.

The affidavit of A. E. Bagshaw, an attorney for plaintiffs, avers *on information and belief* that the detergents "Tide" and "Cheer" are similar in chemical composition. He avers further *on information and belief* that defendants have in their custody and control numerous complaints of users of the products "Tide" and "Cheer", that said users were injured and suffered detergent burns from the use of said detergents, that it is material in the interests of justice that defendants furnish plaintiff with the names of all persons injured or damaged by "Tide" or "Cheer".

The Respondent Court on December 3, 1953, ordered petitioners to furnish plaintiffs with the names and addresses of all persons claiming or alleging to have been injured or damaged and/or to have suffered personal injuries, including "detergent burns" or "contact dermatitis" as a result of having come in contact with "Tide" or "Cheer". It ordered also a list of all cases for damages involving these products. The order covered a period from April 15, 1951 to November 30, 1953.

On December 31, 1953, petitioners filed notice of motion to vacate the order on the ground that the court was without jurisdiction to make it; that the affidavit in support of the motion was insufficient, and that the order was in violation of Section 19, Art. 1, California Constitution. At the time of the hearing a supplemental affidavit of A. E. Bagshaw was served and filed. This affidavit affirmed all the allegations of the prior affidavit, and alleged further *on information and belief* that both detergents "Cheer" and "Tide" have as their principal ingredients the chemical "Sodium Alkyl Aryl Sulfonate", and that the formula of each product differs only in minor details. It was further averred that in an action pending in the State of Washington, defendant corporation filed an affidavit pursuant to court order listing the names and addresses of approximately 117 persons who had submitted unfavorable comments regarding the alleged effect of "Tide" upon the skin. The affidavit then sets forth a partial list of these names and addresses. It is alleged that in pleading uniqueness of plaintiffs' injury defendants have inferentially alleged that plaintiff is the only person who was ever injured by said defendant's product "Cheer", and that it is evident that if defendants received 117 complaints regarding "Tide", it is self evident that they must have received numerous complaints concerning "Cheer", that such evidence is material to the issues of whether "Cheer" is (1) dangerous to the health of the general public; (2) dangerous to the health of plaintiff; (3) whether defendants knew prior to the sale of "Cheer" to plaintiff that others had received "detergent burns" or suffered dermatitis from use of the product.

The motion to vacate the order compelling petitioners to furnish the information requested was granted insofar as the product "Tide" was concerned, but denied insofar as the order pertained to "Cheer".

[1] In order that a subpoena duces tecum should issue, the documents or papers demanded should be sufficiently described. Section 1985, Code of Civ.Proc., requires that such an affidavit shall specify the exact matters or things desired. Union Trust Co. v. Superior Court, 11 Cal.2d 449, 458, 81 P.2d 150, 118 A.L.R. 259. In the present case there is no doubt as to that specific information defendants are asking for if such information exists. The affidavit must also set forth the materiality of the contents of the documents to the issues involved in the case. In McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 396, 159 P.2d 944, 950, it was declared that the affidavit "must clearly show that they [the desired documents, etc.] contain competent and admissible evidence which is material to the issues to be tried. The affiant cannot rely merely upon the legal conclusion, stated in general terms, that the desired documentary evidence is relevant and material." In the supplementary affidavit it is alleged that the desired evidence is material on the issue of whether "Cheer" is dangerous to the health of the general public, to the health of plaintiff, and on the issue of defendant's knowledge that personal injuries had been caused by the product prior to the sale to plaintiff.

There is no allegation that the desired information exists, it is simply alleged that if there were 117 unfavorable comments from all parts of the country on "Tide" there must have been complaints regarding "Cheer". The chemical structure of "Tide" is alleged on information and belief, as well as the similarity in composition between

"Tide" and "Cheer". Factual information on such matters is easily obtainable.

[2] It has been held that an affidavit wherein the material facts necessary for the issuance of a subpoena duces tecum are alleged only on information and belief without setting forth supporting facts is insufficient. Shell Oil Co. v. Superior Court, 109 Cal.App. 75, 80, 292 P. 531; Smith-Golden, Inc., v. Superior Court, 41 Cal.App.2d 512, 514, 107 P.2d 299; Lewis v. Superior Court, 118 Cal.App.2d 770, 773, 258 P.2d 1084; Los Angeles Transit Lines v. Superior Court, 119 Cal.App.2d 465, 259 P.2d 1004. The basic principles applicable to the affidavit required are the same whether the order is for a subpoena duces tecum under Section 1985, Code of Civ.Proc., or an order for inspection under Section 1000, Code of Civ.Proc. Los Angeles Transit Lines v. Superior Court, supra; McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944.

[3-5] Although respondent concedes that Prohibition would be a proper remedy it does not appear to be proper to use Prohibition to restrain the court from enforcement of a subpoena duces tecum or an order under Section 1000, Code of Civ.Proc. Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, 487, 171 P.2d 21, 166 A.L.R. 701; Los Angeles Transit Lines v. Superior Court, supra. The writ of mandate is the appropriate remedy to command the Superior Court to vacate the order. Smith-Golden, Inc., v. Superior Court, supra. Where the petition is meritorious, even though prohibition is asked for, it can be treated as a petition for a writ of mandate as was done in Los Angeles Transit Lines v. Superior Court, supra. Petitioner herein has asked for a "Writ of Prohibition or other appropriate Writ."

[6, 7] Respondent has filed an answer in which he points out that the materiality of the information sought does not have to be determined solely in reference to the affidavits, but the court may look to the pleadings as well. Since this is an action for breach of an express warranty that the product "Cheer" was kind to the hands, as well as an action for negligence, it is material to show defendant's knowledge that others were harmed by the product. Defendants have denied knowledge or means of knowledge that it was harmful. It is settled that if a manufacturer knows or should know that an article sold by him is dangerous he must give appropriate warning to the user of a danger which he ordinarily would not discover. Briggs v. National Industries Inc., 92 Cal.App.2d 542, 207 P.2d 110; Tingey v. E. F. Houghton & Co., 30 Cal.2d 97, 102, 179 P.2d 807. It has been held that if a seller knows or should know that an article sold by him is dangerous to *some* persons, even though few in number as compared with the number of users of the article, he is negligent if he fails to warn the ignorant of the hidden danger. 46 Am.Jur. 932, § 808; Annotation, Unusual Susceptibility to Injury, 121 A.L.R. 464; 26 A.L.R.2d 973.

[8, 9] We conclude that the respondent has failed to meet the requirements of Section 1985, Code Civ.Proc. or Section 1000, Code Civ.Proc. See Nelson v. Superior Court, 9 Cal.2d 729, 73 P.2d 232; Smith-Golden, Inc., v. Superior Court, supra; Los Angeles Transit Lines v. Superior Court, supra. It is error to base an order of inspection on insufficient supporting affidavits. Here the supporting affidavits being based on information and belief and hearsay are insufficient. Furthermore, they fail to show that the desired information would be admissible in evidence. Plaintiffs in order to obtain the information they desire need only to take the deposition of an officer of defendant corporation having knowledge of the facts.

In view of the foregoing a peremptory writ of mandate is hereby directed to issue out of this Court commanding the Superior Court to vacate its Order of Inspection.

NOURSE, P. J., and DOOLING, J., concur.

124 Cal.App.2d 113

CROOKS
v.
GLENS FALLS INDEMNITY CO.

No. 15739.

District Court of Appeal, First District,
Division 2, California.
March 24, 1954.

Action against insurer to recover on liability policy for death of decedent in collision between insured's cattle truck, in which decedent was riding, and train. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Kaufman, J., held, inter alia, that whether decedent was an employee of insured, engaged in course of employment at time of accident, so that plaintiffs were limited to their remedy under workmen's compensation laws, or was a joint venturer with insured, or an independent contractor, and thus within policy coverage, was question for jury.

Judgment affirmed.

1. Insurance 🔑668(10)

In action against insurer to recover on liability policy for death of decedent in collision between insured's cattle truck, in which decedent was riding, and train, whether decedent was an employee of insured, engaged in course of employment at time of accident, so that plaintiffs were limited to their remedy under workmen's compensation laws, or was joint venturer with insured, or an independent contractor, and thus within policy coverage, was question for jury.

2. Appeal and Error 🔑201(2), 719(1)

Where none of the incidents complained of on appeal as prejudicial acts and conduct of trial judge were objected to by appellant at trial, and no assignment of misconduct was made and there was no request that the jury be instructed to disregard them, appellant would be deemed to have waived objection to such acts and conduct.

3. Appeal and Error 🔑1046(5)

Cautionary instructions to jury not to infer that court has an opinion as to what the verdict should be do not cure the prejudicial effect of partisan comments or remarks by court.

4. Appeal and Error 🔑1064(2)

In action against insurer to recover on liability policy for death of decedent, involving issue as to whether decedent was an employee of insured, and hence without the coverage of the policy, or was a joint venturer or independent contractor, and thus within coverage, trial judge's repetition, in two instances, of testimony which dealt with lack of employment relationship and existence of joint venture did not have such prejudicial effect as to require reversal.

5. Declaratory Judgment 🔑389

Trial judge may refuse to declare the rights and liabilities of the parties if such declaration is not necessary or proper under the circumstances. Code Civ.Proc. § 1061.

6. Appeal and Error 🔑1071(6)

Where defendant's cross-complaint was a mere repetition of affirmative defenses in defendant's answer, failure of trial judge to make a declaration with respect to the relief sought by cross-complaint was not reversible error.

7. Appeal and Error 🔑197(2)

Where case was tried on a certain theory without objection, instructions thereon were proper, even though the issue had not been raised by the pleadings.

8. Appeal and Error 🔑1064(1)

In action against insurer to recover on liability policy, reference of trial judge, in an instruction, to defendant as the "so-called" insurance company did not constitute prejudicial error.

9. Master and Servant 🔑1

An "employee" is one who is subject to the absolute control and direction of his employer in regard to any act, labor or work to be done in course and scope of his employment.

See publication Words and Phrases, for other judicial constructions and definitions of "Employee".

10. Trial 🔑253(10), 296(7)

In action against insurer to recover on liability policy for death of decedent, involving issue as to whether decedent was an employee of insured and hence without the policy coverage, instruction that, if jury found decedent to have been employee of insured at time of accident, their verdict must be in favor of insurer, was incomplete in that it did not also state that if evidence were evenly balanced they must find for insurer, but, when read with other instructions on burden of proof, was not so misleading as to be prejudicial.

11. Trial ⚷252(14)

In action against insurer to recover on liability policy for death of decedent, involving issue as to whether decedent was an employee of insured and hence without the policy coverage, court did not err in refusing to give instruction in accordance with statute providing that workmen associating themselves under a partnership agreement, the principal purpose of which is performance of labor on a particular piece of work, are employees of person having such work executed, in absence of any evidence of such partnership. Labor Code, § 3360.

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Barfield & Barfield, San Francisco, for appellant.

Miller, Kroloff & Brown, Jack J. Miller, Stockton, Cyril Viadro, San Francisco, for respondents.

KAUFMAN, Justice.

This is an appeal by defendant Glens Falls Indemnity Company, from a judgment for $50,513.20 plus interest upon a jury verdict in favor of plaintiffs.

A judgment had been previously recovered in the Superior Court of Solano County by plaintiffs, Nettie Faye Crooks, the widow of Earl Crooks individually and as guardian ad litem of her two minor children, against the estate of Carol Wayne Crooks in an action for Earl's wrongful death.

Earl and Carol Crooks were brothers. On the night of November 15, 1949, they were both killed when the cattle truck and trailer which Carol was driving and in which Earl was riding collided with a railroad train. The truck was owned by Arthur J. Brown and Freda L. Brown and was covered by a comprehensive general automobile liability insurance policy issued by defendant, Glens Falls Indemnity Company. Appellant admits that the important issue at the trial was the status of Earl Crooks at the time of the accident, for if he was an employee of Brown and acting within the scope of his employment his heirs are limited to their remedy under the Workmen's Compensation laws. Plaintiffs contended that the Crooks brothers were engaged in a joint venture with Brown hence Carol Crooks was an "insured" within the meaning of the Insuring Agreements of the policy, and his liability to Earl was covered thereunder.

Arthur J. Brown, appellant's insured, was operating a business at Dixon, California, the Dixon Livestock Auction Company. In connection with the phase of his business concerned with livestock hauling, he operated as a highway carrier under a permit issued to him by the Public Utilities Commission. He owned several livestock trucks. When Brown's employees operated cattle trucks they were paid wages on an hourly basis. However, when Earl and Carol Crooks operated a cattle truck they split the profits derived from the operation of the truck on a two-thirds, one-third basis. No deduction was made from their share for unemployment insurance or social security. Brown testified that although the audit for Workmen's Compensation was not yet due at the time of the accident, he did not intend to report Earl and Carol as his employees under this hauling arrangement. Occasionally Earl and Carol worked in Brown's livestock yard, and on these occasions they were paid wages computed on a daily or hourly basis from which deductions were made for unemployment insurance and social security. These daily wages, Brown testified, he intended to report to the State Compensation Insurance Fund at the time of the audit.

Brown testified as to the arrangement between himself and the Crooks brothers as follows: "Well, we simply operated the trucks; I put up the trucks and the necessary money to run the trucks, and they furnished the necessary labor to keep the trucks in operation." The business could be procured by either Brown or the brothers. They received one-third and Brown two-thirds of the profit. They received their share every month. Brown stated that he considered his arrangement with the Crooks brothers to have been a joint venture. Brown notified Earl and Carol where to pick up loads and where to deliver them and warned them of any difficulties the job might involve, but gave them no further instructions, such as what route to travel as they were experienced cattle haulers. Their driving ability was one of the factors that induced Brown to enter into this arrangement with them.

[1] Appellant contends that the evidence as a matter of law establishes that at the time of the accident Earl Crooks was an employee of Brown engaged in the course of his employment, and that coverage under the policy is therefore excluded. Appellant cites several authorities to the effect that the question of whether a person is an employee or an independent contractor is one of law for the court if but one inference can be drawn from the evidence. Burlingham v. Gray, 22 Cal.2d 87, 100, 137 P.2d 9; Baugh v. Rogers, 24 Cal.2d 200, 206, 148 P.2d 633, 152 A.L.R. 1043; Perguica v. Ind. Acc. Comm., 29 Cal.2d 857, 859, 179 P.2d 812; Isenberg v. Cal. Emp. Stabl. Comm., 30 Cal.2d 34, 39, 180 P.2d 11; National Auto & Casualty Ins. Co. v. Ind. Acc. Comm., 80 Cal.App.2d 769, 772, 182 P.2d 634. Appellant says that it appears without dispute that Earl Crooks was performing work for Brown at the time. While it is true that Brown had notified the Crooks brothers where this load of cattle was to be picked up and where it was to be taken to, Brown testified that the choice of the route was theirs, that he didn't control the transportation, that they were experienced cattle haulers, that he believed their relationship was a joint venture. They were free to solicit business, use Brown's equipment for transporting, and presumably the profits would be divided on the same basis. Photostatic copies of the checks made out to the Crooks brothers for their share of the hauling transactions were in evidence, and showed no deductions for social security or withholding tax, whereas other checks written to the Crooks brothers, individually for labor in the yard showed such deductions. There would appear to have been ample evidence from which the jury could have inferred that as to the cattle hauling arrangement, the Crooks brothers were not employees. That was all plaintiffs had to prove. If they were either joint venturers with Brown or independant contractors, there was coverage under the policy. (Plaintiffs' Ex. A, Insuring Agreements I, "Exclusions").

Appellant relies particularly on Burlingham v. Gray, supra, and Baugh v. Rogers, supra. In the first case it was pointed out that whether a person's status is that of employee or independent contractor is governed by the right of control which rests in the employer, rather than by his actual exercise of control. A person can still be an employee and have a certain amount of freedom in the carrying out of his duties because of the very nature of the work. The real tests were said to be whether if orders were given they would have to be obeyed and the right of the employer to end the service whenever he sees fit. Appellant has noted that Brown said he expected his orders or directions to Earl or Carol Crooks to be carried out and that he could cancel the arrangement with them at any time. Appellant calls attention to the fact that Brown made the usual "Employer's Report of Industrial Injury" to his compensation carrier, and referred therein to Earl as his employee (Defendant's Ex. C.). Plaintiffs herein also filed with the Industrial Accident Commission their "Application for Adjustment of Claim", reciting that Earl was employed by Brown at the time he was killed, and that his death arose out of and in the course of his employment. (Defendant's Ex. A).

The testimony reviewed by appellant establishes that there is a conflict in the evidence but does not demonstrate that the evidence is subject to but one inference as a matter of law. In Burlingham v. Gray, cited by appellant, a directed verdict was reversed, the court holding that the question of the relationship of the parties therein was a question of fact for the jury. And in Baugh v. Rogers, supra [24 Cal.2d 200, 148 P.2d 637], it was said that "a material and generally conclusive factor is the right of the employer to exercise complete and authoritative control of the manner in which the work is done." Brown testified herein that he exercised no control over the manner in which the Crooks brothers did this work, he simply notified them where the loads were to be picked up and the destinations thereof. An attorney with the State Compensation Fund who represented said Fund and Mr. Brown before the Industrial Accident Commission, testified that after investigation by their Field Adjusters, it was their opinion that there was no employment and that the claim would be denied. After hearing, the matter was taken off calendar or the submission held in abeyance.

[2-4] Appellant maintains that a fair trial was denied to him by the prejudicial acts and conduct of the trial judge. Four excerpts from the transcript are set forth in the briefs as demonstrating the prejudicial manner in which the trial was conducted. In two instances the trial judge repeated testimony of the witness Brown which dealt with the lack of the employment relationship and the existence of a joint venture. While this might be considered as unduly emphasizing such testimony, there is nothing to indicate that the trial judge believed such testimony to be true. None of the incidents now complained of were objected to by appellant at the trial, no assignment of misconduct was made and there was no request that the jury be instructed to disregard them. Appellant, therefore, must be deemed to have waived objection to these remarks. Rednall v. Thompson, 108 Cal.App.2d 662, 665, 239 P.2d 693; Germ v. City & County of San Francisco, 99 Cal.App.2d 404, 415-416, 222 P.2d 122. It is true as appellant says that cautionary instructions to the jury not to infer that the court has an opinion as to what the verdict should be do not cure the prejudicial effect of partisan comments or remarks by the court, Steele v. Wardwell, 57 Cal.App.2d 642, 651-652, 135 P.2d 628, but excerpts from the transcript set forth herein by appellant do not appear to contain such partisan comment. The remarks herein did not cumulatively have the prejudicial effect for which judgment was reversed in Delzell v. Day, 36 Cal.2d 349, 351, 223 P.2d 625, a case in which objection was not made to the conduct of the judge.

Appellant contends that it was reversible error for the trial judge to fail to make a declaration with respect to the relief sought by appellant's cross-complaint. Appellant's answer set up affirmative defenses of an employment relationship, that neither Carol Crooks nor his estate were an "insured" under the policy, that the policy does not cover employers for which the insured is obligated under the Workmen's Compensation Law and that the employer here was so obligated. The cross-complaint again alleges the employment relationship and the applicability of the Workmen's Compensation laws, and then alleges that a controversy exists as to coverage for Carol Crooks or his estate and asks a declaration that neither said estate nor Carol Crooks are an insured within the terms of the policy and that cross-complainant is not liable for the judgment recovered against said estate. The complaint likewise contains a second cause of action for declaratory relief, seeking a declaration that coverage under the policy extends to Carol Crooks and/or the administratrix of the estate of Carol Crooks.

[5, 6] It is very clear that the issue raised by the cross-complaint and by the affirmative defenses in the answer are the same. The trial judge expressed the belief that the cross-complaint was really a special defense comprehended in the complaint and answer, and that the jury had only to determine the status as employment or otherwise. Counsel for appellant made no objection, and did not ask for a ruling. The trial judge may, under section 1061, Code of Civ.Proc. refuse to declare the rights and liabilities of the parties if such declaration is not necessary or proper under the circumstances. Citizens' Committee for Old Age Pensions, v. Bd. of Supervisors, 91 Cal.App.2d 658, 205 P.2d 761; Silver v. Shemanski, 89 Cal.App.2d 520, 551, 201 P.2d 418. It was noted in Kessloff v. Pearson, 37 Cal.2d 609, 613, 233 P.2d 899, 902, that where a complaint is incorrectly entitled an action for declaratory relief, if a cause of action is stated, it should not be dismissed, and if it appear that it has been entitled a declaratory relief action "for the sole purpose of obtaining a preference on the calendar, the court has the power to prevent the accomplishment of that purpose by appropriate order or procedure." As the cross-complaint was a mere repetition of the affirmative defenses, the instant case is distinguishable from those in which the courts have held a failure to make a declaration or finding to be reversible error. Severance v. Knight-Counihan Co., 29 Cal. 2d 561, 576, 177 P.2d 4, 172 A.L.R. 1107; Krum v. Malloy, 22 Cal.2d 132, 136, 137 P. 2d 18; James v. Haley, 212 Cal. 142, 146, 297 P. 920; Gilmore v. Gilmore, 99 Cal. App.2d 186, 187, 221 P.2d 123; Clements v. Lanning, 89 Cal.App.2d 817, 819–820, 202 P. 2d 98.

[7] It is appellant's final contention that error was committed in the giving and refusal of certain instructions. Complaint is first made of the instructions given defining joint venture. Appellant contends that they were inapplicable under the pleadings, the evidence and the law, and that they injected an alien doctrine into the case. While it is true that in the pleadings the issue raised was only whether the Crooks brothers were employees or independent contractors, plaintiffs' counsel raised the issue of joint venture in his opening statement without objection. No objection was made at the trial to any testimony concerning joint venture on the ground that it was outside the issues. In Shook v. Beals, 96 Cal.App.2d 963, 967, 217 P.2d 56, 18 A.L.R.2d 919, it was held that joint venture instructions were proper where the case was tried on that theory without objection even though the issue had not been raised by the pleadings.

[8] In another instruction the trial judge referred to the defendant as "the so-called insurance company" instead of "defendant, Glens Falls Indemnity Company" as appellant had stated in the instruction offered. Appellant says that this was partisan advocacy, that it violated fair play, castigated defendant and was devastating to his case. A few lines subsequent to this the jury was instructed at defendant's request that the defendant was engaged in a lawful business, and in considering plaintiff's claims, they were to bear in mind that an insurance company is entitled "to the same consideration as any independent engaged in any other form of business." We do not think the rather unusual use of the word "so-called" by the trial judge had any prejudicial effect. For he used that word at the trial twice in rather unusual contexts, once in describing an exhibit of plaintiffs as the "so-called photostatic copy" of the insurance policy and again to describe the "so-called special defense set out in the form of a cross-complaint". Both of the references were made in the presence of the jury, and in neither case did he appear to be using the word in a derogatory sense.

[9] Appellant argues that the instruction was erroneous which defined "employee" as "one who is subject to the absolute control and direction of his employer in regard to any act, labor or work to be done in the course and scope of his employment." It is contended that the test is not whether the employer actually *exercises* control but whether he has the *right* of control. There appears to be no error in the instruction. An employee is *subject* to control as stated in the instruction when the employer has the right to control, whether or not such control is being exercised at the moment.

[10] Appellant offered an instruction which stated that the policy here involved did not insure any employee of the Browns for the injury or death of another employee of such employer arising out of an accident in the course of the employment involving the use of an automobile in the business of the employer. The proposed instruction then continued "Therefore, unless you find by a preponderance of the evidence that, at the time of the accident, neither Carol W. Crooks, the driver of the truck of Arthur J. Brown, nor Raymond Earl Crooks, the plaintiffs' decedent, was an employee of Arthur J. Brown, then I instruct you, unless you so find by a preponderance of the evidence, your verdict must be in favor of the defendant."

The last paragraph was modified to read:

"Therefore, if you find by a preponderance of the evidence that, at the time of the accident, Carol W. Crooks, the driver of the truck of Arthur J. Brown, and Raymond Earl Crooks, plaintiffs' decedent, was an employee of Arthur J. Brown, your verdict must be in favor of the defendant."

Appellant maintains that the trial court in modifying the last paragraph of the instruction placed the burden on defendant to prove that the Crooks brothers were employees of Brown, requiring a preponderance of such evidence to establish such fact as a condition of rendering a defendant's verdict. The instruction, it is alleged, ignored plaintiff's burden on this issue; especially in the event that the jury should find the evidence evenly balanced. The modification of the instruction does not go so far as to tell the jury that defendant must establish by a preponderance of the evidence that the Crooks brothers were employees. It is correct as far as it goes. But it is incomplete in that it does not also state that if the evidence is evenly balanced they must find for defendant.

A later instruction, however, told the jury that plaintiffs must prove by a preponderance of the evidence that the Crooks brothers were independent contractors and not employees, and that if the evidence does not preponderate in favor of such contention, the verdict must be for defendant. There was also an instruction that in the absence of contrary evidence, a person performing work and labor for another is presumed to be an employee. The jury was also told that the burden of proof was on plaintiffs to prove their case by a preponderance of the evidence, and "preponderance" was then properly defined. The instruction as offered by appellant was preferable to the instruction as modified, but when the instructions are read as a whole, it does not appear that the jury could have been misled as to the burden of proof.

[11] Finally, it is contended that error was committed in refusing to give an instruction in accordance with Sec. 3360, Labor Code, stating that "Workmen associating themselves under a partnership agreement, the principal purpose of which is the performance of the labor on a particular piece of work are employees of the person having such work executed." The instruction is not applicable to the facts in this case, since there is no evidence that the brothers formed a partnership with the principal purpose of executing this work for Brown. The partnership between the brothers antedated the arrangement with Brown, as is shown by the testimony of the tax accountant who prepared their partnership returns for 1948, as well as by the testimony of Earl's wife. Therefore there was no error in refusing the instruction.

In view of the foregoing we conclude that there is no prejudicial error in the record.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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124 Cal.App.2d 265

TREMBATH v. TREMBATH.

Civ. 15497.

District Court of Appeal, First District,
Division 2, California.

March 30, 1954.

Proceeding to modify interlocutory divorce decree by increasing allowance for support. The Superior Court of the City & County of San Francisco, Eustace Cullinan, Jr., J., granted the relief sought and defendant appealed. The District Court of Appeal, O'Donnell, J., pro tem., held that evidence of the financial circumstances and earning power of the spouses sustained increase of the allowance.

Affirmed.

1. Divorce 🔑245(3)

Evidence of divorced spouses' respective financial circumstances and earning power sustained increase of support money from $1 per month to $90 per month. Civ. Code, § 139.

2. Divorce ⚷235, 286

Allowance for support rests within sound discretion of trial court and its order may not be set aside without clear showing of abuse of discretion. Civ.Code, § 139.

3. Divorce ⚷223

Requiring divorced husband to pay $250 for counsel fees and costs in proceeding to increase allowance for support was not an abuse of discretion, though wife still had approximately $800 of $1,100 awarded her by interlocutory decree.

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Waldo F. Postel, Waldo F. Postel, Jr., San Francisco, for appellant.

Anthony E. O'Brien, San Francisco, for respondent.

O'DONNELL, Justice pro tem.

On March 28, 1951 respondent was granted an interlocutory decree of divorce from appellant. By the terms of the decree respondent was awarded the dwelling and household furnishings of the parties. Appellant was awarded the sum of $2,000 in lieu of his community interest in those properties and also was awarded the family automobile. A bank account of $2,200 was divided equally between the parties. The decree further directed appellant to pay respondent the sum of $1 per month as support money until further order of court.

By an order dated April 11, 1952 the lower court, on respondent's application, modified the interlocutory decree by directing appellant to pay respondent $90 per month for her support. Appellant has appealed from that order. On May 27, 1952, on respondent's application, the lower court ordered appellant to pay respondent's attorney $250 for fees and costs to enable respondent to resist the appeal from the order of April 11, 1952. Appellant has also appealed from the order of May 27, 1952. The two appeals are now before us.

Appellant first contends that the trial court abused its discretion in increasing the amount of respondent's support money from $1 per month to $90 per month. He urges that there is no evidence of such a change in the circumstances of the parties as would justify the order. In fact, says appellant, the evidence discloses that his condition, both physical and financial, is poorer than it was at the time of the trial in March 1951.

Appellant is a licensed beauty operator. He is employed in a beauty shop where he receives, as compensation for his services, fifty per cent of the fees paid by the customers on whom he works. He testified that he has a heart condition which prevents his being much on his feet and that he has not worked since January 1952. He further testified that he has no money nor property, nor income. In 1951 his income was $2,034.49.

However, the evidence also developed the following significant facts: Appellant and one Josephine Fletcher had formerly operated this same beauty shop as partners. In 1948 appellant became financially involved and he transferred his interest in the shop to his brother-in-law. The latter then transferred it to Josephine Fletcher. She has been operating it since that time. Appellant and Josephine Fletcher have been living together. Appellant has access to her safe deposit box. A Mrs. Warren, a private investigator employed by respondent, visited the beauty shop on February 15, 1952. She found appellant there and made an appointment with him for a permanent wave. This was on a Friday. Mrs. Warren saw appellant's appointment book. There were a number of appointments in it. Appellant could not give her an appointment until the following Tuesday. Again on February 26, 1952, Mrs. Warren found appellant seated at a desk in the beauty shop "apparently taking care of the appointment book."

[1] The foregoing facts, taken in the aggregate, were sufficient to justify the inference that at the time of the hearing in April 1952 appellant was gainfully employed and that his circumstances had not worsened. It remains now to be determined whether or not there was any change in respondent's situation.

Respondent had been employed for a period of thirty-two years prior to and during her marriage. She was laid off in 1949. She was not employed at the time of the trial in March 1951, but she took employment immediately thereafter and worked until January 1952 when she was compelled to leave her employment because of ill health. Her only compensation for that employment was room and board. She has been unable to work since January 1952 and has had no income since that time. This evidence was sufficient to support the trial court's finding in its order of April 11, 1952, that respondent's circumstances have changed "in that the plaintiff is now ill and is unable to support herself * * *." It is of course true, as appellant points out, that respondent was not employed at the time of the trial. However, she then had the ability to work—witness her employment immediately following the trial.

[2] Having in mind the well established rule that the modification of an allowance for support under section 139 of the Civil Code rests within the sound discretion of the trial court and that its order may not be set aside without a clear showing of an abuse of discretion, Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697, we are of the opinion that no abuse of discretion appears here.

[3] We turn now to the order of May 20, 1952 directing appellant to pay respondent $250 for counsel fees and costs. Again, appellant urges his inability to pay and also calls attention to the fact that respondent still has approximately $800 of the $1100 that was awarded her by the interlocutory decree. The following language in Baldwin v. Baldwin, 28 Cal.2d 406, 418, 170 P.2d 670, 677, is apropos: "The court is under no duty to require her to first exhaust her own separate and meagre capital resources before it can order defendant to pay her costs and attorneys' fees on appeal (citing case) * * *. While the circumstances would well have supported a contrary determination we are of the view that those same circumstances do not necessarily require the conclusion that the trial court abused its discretion in making the disputed award." To the same effect, see Frazier v. Frazier, 115 Cal.App.2d 560, 252 P.2d 698.

The orders appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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124 Cal.App.2d 46

CIRIMELE v. SHINAZY et al.

No. 15731.

District Court of Appeal, First District, Division 1, California.
March 23, 1954.

Landlord brought action against tenant to recover rent due under lease. The Superior Court, San Mateo County, A. R. Cotton, J., entered judgment for landlord in an allegedly inadequate amount, and landlord appealed. The District Court of Appeal, Fred B. Wood, J., held that where tenant made and landlord accepted certain monthly rent payments in amount less than rent provided for in lease as payments in full of rent, oral agreement for reduction of rent was executed as to such payments, but was unexecuted as to months for which payments were not made.

Judgment reversed with directions.

1. Evidence 🔑**445(3)**

Where tenant made and landlord accepted certain monthly rent payments in amount less than rent provided for in lease as payments in full of rent, oral agreement for reduction of rent was executed as to such payments, but was unexecuted as to months for which payments were not made. Civ.Code, §§ 1661, 1698.

2. Appeal and Error 🔑**173(9)**

Where element of estoppel was never put in issue by defendant on the trial, defendant could not rely on estoppel on plaintiff's appeal.

3. Landlord and Tenant 🔑**231(8)**

In action by landlord against tenant to recover rent due under lease, wherein tenant contended that rental rate was modified by an executed oral agreement providing for reduction of rent, evidence was insufficient to sustain finding that rental rate was modified by executed oral agreement with respect to the last 3½ months of tenant's occupancy.

4. Costs 🔑**42(1)**

Attachment by defendant to answer of check for amount of money sued for by plaintiff, is not a tender "before commencement of action" within statute providing that when defendant tenders to plaintiff amount owed "before commencement of action", plaintiff cannot recover costs, but must pay costs to defendant. Code Civ. Proc. § 1025.

See publication Words and Phrases, for other judicial constructions and definitions of "Before Commencement of Action".

5. Costs ⚷42(1)

Where note provides for payment of reasonable attorney fee if note is collected by suit, attorney fee is not "costs" within statute providing that if defendant tenders to plaintiff before commencement of action amount owed plaintiff, plaintiff cannot recover "costs" but must pay "costs" to defendant. Code Civ.Proc. § 1025.

See publication Words and Phrases, for other judicial constructions and definitions of "Costs".

6. Costs ⚷173(1)

Where a statute authorizes allowance of an attorney's fee, fee is not technically regarded as part of the "costs."

7. Costs ⚷42(4)

Attorney fee is not "costs" within statute providing that if plaintiff rejects defendant's offer to allow judgment to be taken against defendant, and if plaintiff fails to obtain a more favorable judgment, he cannot recover "costs" but must pay defendant's "costs" from time of offer. Code Civ.Proc. § 997.

8. Landlord and Tenant ⚷238

Where lease provided that in case suit should be brought for recovery of any rent due under lease, tenant would pay landlord a reasonable attorney's fee, and tenant attached his check to his answer when filed, but check was for a lesser amount than amount of rent due, landlord was entitled to a reasonable attorney fee.

9. Costs ⚷18

Amount of attorney fee which landlord was entitled to recover in superior court under provisions of lease, was part of the damages recoverable in action against tenant to recover rent due under lease, and was to be considered in determining whether action could have been brought in inferior court rather than in superior court within statutory provision that no costs can be allowed plaintiff in superior court when judgment is one which could have been rendered by a municipal or inferior court within county, or city and county, in which judgment is entered. Code Civ.Proc. § 1032.

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Thomas L. Bocci, Jr., Daly City, W. L. A. Calder, Abraham Glicksberg, San Francisco, for appellant.

Fahey, Castagnetto & Gallen, Thomas B. Brown, Jr., Daly City, for respondent George Shinazy.

FRED B. WOOD, Justice.

Plaintiff as lessor and defendants as lessees executed a written lease of a garage and service station for a term of five years from March 1, 1949, at a rental of $300 per month for the first six months, $325 per month for the next three, $350 per month for the next three, and thereafter $375 per month, defendant paying the last month's rent as a deposit.

In April, 1951, plaintiff filed his complaint herein, alleging that defendants withdrew from occupancy January 1, 1951, owing 4 months' rent but that they were entitled to a credit of $450, including the amount of the $375 deposit. He also sought a reasonable attorney fee under a clause of the lease which provided therefor in case suit be brought for the recovery of any rent due under the provisions of the lease.

Defendant George Shinazy[1] pleaded that the terms of the lease had been modified by an executed oral agreement reducing the rental rate during 1950 to $325 per month; that he surrendered possession December 15, 1950, by agreement and with the consent of the plaintiff; and that but $612.50 remained due (after applying the $450 credit and $75 for work done by the defendants) which amount defendants tendered to plaintiff by check accompanying their answer to the complaint.

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[1] The other defendant, Ralph Shinazy, did not enter an appearance. The record does not indicate that he was served with summons.

The trial court found for the defendant on these issues; disallowed plaintiff's claim for attorney fees; gave plaintiff judgment for $612.50; and awarded defendant his costs of suit.

Plaintiff has appealed from the judgment, claiming (1) that the oral agreement reducing the rental rate in 1950 was executed only as to the first 8 months of that year, not as to the last 3½ months of the period of occupancy;[2] and (2) error in allowing defendant's costs and in disallowing plaintiff's costs and attorney fees, asserting that defendant made neither a tender of payment before commencement of the action nor a deposit in court as provided in section 1025 of the Code of Civil Procedure, nor did defendant make an offer pursuant to the provisions of section 997 of the code.

I. As to the Modification of the Rental Rate

The parties testified that late in 1949 they orally agreed to reduce the rental rate to $325 per month.

Defendant said they agreed to reduce it by $50 a month during 1950, until he should change to another line of products; that it was not contingent upon his actually making those rental payments; that when he sent plaintiff those $325 checks, the latter received and cashed them and made no objection.

Plaintiff testified: "The only thing I told him [defendant] in 1950 when he was giving me those checks I told him I would knock off $50 a month on the rent providing that they should pay me every month, which they didn't live up to"; that when defendant said he could not pay the rent plaintiff replied, "I will give you a break and I will knock off $50 a month provided you can pay"; and, "between him and I there was an agreement if he pays me up I would knock off $50 a month, but he didn't, so I thought I ought to be entitled to that $50 a month more."

The rental payments made in 1950 were as follows: None in January; $325 each in February, March and April; two payments of $325 in May; none in June; $325 each in July and August; $150 in September; $250 in October; none later. Plaintiff applied these moneys to the rent for the period of January to August, inclusive, 1950, crediting the remaining $75 and the $375 deposit against the rent due for the balance of the period of occupancy, which he claims should be computed at the rate stipulated in the lease.

[1] Except as to the first eight months of 1950, these facts do not support a finding that the rate specified in the lease was reduced to $325 by an executed oral agreement. In respect to those eight months the oral agreement was executed by the payments made. Julian v. Gold, 214 Cal. 74, 3 P.2d 1009. It remained unexecuted as to the remaining months of the period in question. Stoltenberg v. Harveston, 1 Cal. 2d 264, 266, 34 P.2d 472; Taylor v. Taylor, 39 Cal.App.2d 518, 522, 103 P.2d 575.

Defendant contends that plaintiff could not receive these payments (made pursuant to an oral agreement for a reduced rent), make no objection, assert no claim of right to a higher rate, and thus suffer defendant to continue in possession in the belief that he is doing so upon the basis of $325 instead of $375 per month. He speaks also of "substantial performance" of the oral agreement for a lower rental, saying that he paid all but $612.50 of the amount which fell due pursuant to the oral modification.

Such an argument reflects a misconception of what is an "executed oral agreement" which, under § 1698 of the Civil Code, may alter a written contract. "An executed contract is one, the object of which is fully performed. All others are executory." Civ.Code, § 1661.

The distinction between the actual payment and acceptance of rental installments in reduced amounts pursuant to an oral agreement and the accrual of further installments which are not actually paid, we find cogently expressed in Stoltenberg v. Harveston, supra, 1 Cal.2d 264, at page 266, 34 P.2d 472, at page 472: "In so far as the payments of rent made under the oral agreement of the parties are concerned, there can be no question that, as to those payments actually made and accepted as rent in full for the period covered by them, the oral agreement reducing the rent was executed and no claim for the recovery of rent during the period covered by said payments can be maintained. Julian v. Gold, 214 Cal. 74, 3 P.2d 1009. As to the monthly payments of rent due under said lease and not actually paid by the lessees, a different rule governs. As to such payments the oral agreement to accept amounts less than those called for in the written lease had not been executed. In the case of Klein Norton Co. v. Cohen, 107 Cal.App. 324, 330, 290 P. 613, 616, it was held that, 'an agreement, in order to be executed, must be fully performed on both sides.' It is further stated in this opinion that, 'This principle is strictly enforced when an attempt is made to set up a modification of a written contract by an oral one under section 1698 of the Civil Code.'"

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[2] Plaintiff does not now challenge the finding that the lease was terminated December 15 instead of December 31, 1950, as originally claimed by him.

In the Stoltenberg case the lessee paid and the lessor accepted payments of $300 a month in lieu of the stipulated $625 per month, through April, 1942. In May, the lessee tendered $300 but the lessor refused to accept less than $675, brought an unlawful detainer action against the tenant and prevailed. "Until the amount had been accepted by the landlord as rent for the month for which it was tendered, it could not be said that his oral agreement to lower the rent had been performed by the landlord, and, until it was so performed by him, he was not bound by its terms." At pages 266 and 267 of 1 Cal.2d, at page 472 of 34 P.2d.

[2] If by his argument upon this appeal defendant seeks to preclude plaintiff from relying upon the requirements of § 1698, a complete answer is that the element of estoppel was never put in issue.

Defendant did not plead estoppel and there is nothing on the face of the complaint to indicate the existence of any facts upon which an estoppel might be based. See Reed v. Norman, 41 Cal.2d 17, 256 P.2d 930, and Phoenix Mutual Life Ins. Co. v. Birkelund, 29 Cal.2d 352, 363, 175 P.2d 5.

Also, at the trial the parties by stipulation limited the issues and did not include estoppel as an issue. They stipulated that according to the terms of the lease, $4,425 became due during the year 1950, $350 each for the first three months and $375 each for the last 9 months; that defendant paid $2,675 during that year; that he had a credit of $375, paid for the last month of the term as security for performance upon his part, allowable to him only if there was no damage to the premises; and that the following were "the only issues before the court to be determined"; (1) whether in fact the oral agreement as to the allowance of $50 under the terms of the lease was actually executed, (2) whether the $375 deposit should be retained by plaintiff in view of his claim that defendant left the premises in disrepair, imposing upon plaintiff the cost of repair,[3] and (3) the reasonableness of the attorney fees to be allowed the plaintiff.

[3] We conclude, therefore, that the evidence lends no support to the finding that as to the last 3½ months of defendant's occupancy the rental rate was modified by an executed oral agreement. It would support a finding that during that period rent accrued at the rate of $375 per month. It would support no other finding in that regard. Such a finding would lead to the inevitable conclusion that defendant became and is indebted to plaintiff in the sum of $1,312.50, less the $450 credit, a net of $862.50 instead of $612.50[4] which the trial court found.

II. As to Attorney Fee and Costs

The lease provided that "in case suit shall be brought * * *, for the recovery of any rent due under the provisions of this lease, * * * the lessee will pay to the lessor a reasonable attorney's fee which shall be fixed by the judge of the court as part of the costs of such suit."

The trial court found that "counsel fees in this case are neither necessary or reasonable since defendant * * * tendered the full amount due pursuant to the provisions of Section 1025 of the Code of Civil Procedure." This finding was erroneous for several reasons.

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[3] The court found against plaintiff on this issue, a finding which he does not now challenge.

[4] Incidentally, the $612.50 is $75 low even under defendant's theory; possibly the result of an inadvertent inclusion of $75 for work done by defendant, alleged in the answer but not included in the issues specified in the stipulation.

[4-6] Defendant's tender of $612.50 was not a tender of the "full amount" due, as we have seen. Nor was the tender, by attaching his check to his answer when filed, made "before the commencement of the action" as required by § 1025. Nor is the allowance of an attorney fee in such a case as this an element of the "costs" which § 1025, if the prescribed tender had been made, would preclude the plaintiff from recovering. Thus, when a promissory note provides for payment of a reasonable attorney fee if the note is collected by suit the amount properly to be allowed for such fee "is a special damage, expressly authorized by the contract to be recovered in addition to general damages" and the "rules of pleading require such damages to be specially averred." Prescott v. Grady, 91 Cal. 518, 522, 27 P. 755, 756. (It was so pleaded in this case.) Similarly, where a "statute authorizes the allowance of an attorney's fee, the fee is not technically regarded as part of the costs. (Schallert-Ganahl Lumber Co. v. Neal, 94 Cal. 192, 29 P. 622." In re Estate of Bevelle, 81 Cal.App.2d 720, 722, 185 P.2d 90, 92.

[7] Defendant now concedes that his tender did not meet the requirements of § 1025 but claims it did comply with § 997 of the Code of Civil Procedure. Even if defendant's tender of his check when he filed his answer (which prayed that the "action be dismissed upon the receipt of * * * $612.50 * * * by the plaintiff") were deemed an "offer to allow judgment to be taken against him" for the amount so specified, which is doubtful, § 997 still does not operate to disallow the attorney fee. It provides, merely, that if the plaintiff "fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer." The attorney fee was not an element of plaintiff's "costs" which § 997 under appropriate circumstances would disallow. Moreover, the judgment to which plaintiff is entitled is "more favorable" than the $612.50 which defendant tendered.

[8] The conclusion is inescapable that plaintiff is entitled to a reasonable attorney fee which, upon remand of the cause, the trial court will fix and determine.

As to the allowance of defendant's costs and the disallowance of plaintiff's costs, no basis therefor is furnished either by § 1025 or by § 997 of the Code of Civil Procedure. The requirements of those sections have not been met, as we have seen.

[9] Defendant suggests another basis for disallowance of plaintiff's costs. He invokes the proviso of subdivision (a) of § 1032 of the Code of Civil Procedure as it read in 1952: "* * * the plaintiff shall not recover costs when the judgment is one which could have been rendered by a municipal or justice [formerly "inferior"] court within the same county * * *." He says that the judgment herein for $612.50 was obviously less than the jurisdictional $1,000 maximum of a Class A justice court in San Mateo county at the time this suit was filed. True, but that was an erroneous judgment and must be reversed. A judgment in the correct amount ($862.50 plus a reasonable attorney fee) may or may not exceed $1,000, depending upon the amount of the attorney fee yet to be fixed. The amount of such a fee, as we have seen, is a part of the damages recoverable, hence must be included in the calculation when determining whether or not the proviso of § 1032 is applicable. See Garcia v. Ebeling Motor Co., 89 Cal.App.2d 688, 694, 201 P.2d 854; Holm v. Davis, 8 Cal.App.2d 328, 330, 47 P.2d 537.

The judgment must be reversed but there is no need for a retrial except to determine the amount of a reasonable attorney fee.

The judgment is reversed with directions that the trial court ascertain and determine the amount of a reasonable attorney fee as a part of plaintiff's damages, amend the findings of fact and conclusions of law in accordance with this decision, including an award of $862.50 (instead of $612.50 and in addition to the attorney fee) for moneys due plaintiff from the defendant, and thereupon to enter judgment in accordance with the findings and conclusions as thus amended.

PETERS, P. J., and BRAY, J., concur.

PRICE
v.
ATCHISON, T. & S. F. RY. CO.
L. A. 22934.

Supreme Court of California.
In Bank.
March 31, 1954.
Rehearing Denied April 28, 1954.

Action for damages for personal injuries under the Federal Employers' Liability Act. The Superior Court of Los Angeles County, Roy L. Herndon, J., granted the motion of the defendant to dismiss on the ground of forum non conveniens and plaintiff appealed. The Supreme Court, Schauer, J., held that under the doctrine of forum non conveniens the California court was authorized to refuse to exercise jurisdiction over a cause of action under the Employers' Liability Act which arose outside the state boundaries.

Judgment reversed as to the first cause of action and affirmed as to the second cause of action.

Carter, J., dissented.

Prior opinion 259 P.2d 664.

1. Courts 🔑28

The rule of "forum non conveniens" is an equitable one embracing the discretionary power of a court to decline to exercise jurisdiction it has over a transitory cause of action, when it believes that the action before it may be more appropriately and justly tried elsewhere.

See publication Words and Phrases, for other judicial constructions and definitions of "Forum Non Conveniens".

2. Courts 🔑28

The principle of "forum non conveniens" is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.

3. Constitutional Law 🔑207(3)

In refusing to exercise jurisdiction under doctrine of forum non conveniens, the state may not by the privileges and immunities clause, allow suits in its own court by its own nonresident citizens for liability under the Federal Employers' Liability Act arising outside that state and discriminatorily deny access to its courts to a nonresident who is a citizen of another state, but it may choose to prefer residents and to deny access to all nonresidents. U.S.C.A.Const. art. 4, § 2; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Constitutional Law 🔑207(3)

California has no policy either statutory or court made, of discrimination against either noncitizens of California or against Federal Employers' Liability Act actions in determining when a nonresident will be given access to state courts to litigate a cause of action which arose elsewhere. U.S.C.A.Const. art. 4, § 2; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

5. Courts 🔑28

California courts acting upon equitable principles and within constitutional limits may exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere. U.S.C.A. Const. art. 4, § 2.

6. Master and Servant 🔑253

Where action was brought under the Federal Employers' Liability Act for injuries occurring in New Mexico and both parties were nonresidents and all witnesses resided in New Mexico and great expense would be incurred by defendant in moving the witnesses from New Mexico to California and difficulty of procuring professional witnesses would be great, California court, under the doctrine of forum non conveniens was authorized to decline jurisdiction and to grant defendant's motion to dismiss. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.; U.S.C.A.Const. Amend. art. 4, § 2.

7. Appeal and Error 🔑1172(3)

Where statute of limitations would have run with respect to first cause of action under the Federal Employers' Liability Act and defendant stipulated that the judgment should be reversed as to such cause in order to avoid the bar of limitations and in view and until the present decision it had been declared to be the law of California by another decision that California courts were compelled to reject the doctrine of forum non conveniens with respect to such actions, Supreme Court would reverse the judgment as to the first cause of action.

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Hildebrand, Bills & McLeod and D. W. Brobst, Oakland, for appellant.

Robert W. Walker, Frederic A. Jacobus and J. H. Cummins, Los Angeles, for respondent.

SCHAUER, Justice.

This case presents the question of the availability in California of the doctrine of *forum non coveniens* as a ground for refusal by a court to exercise jurisdiction over a cause of action which arose outside the State's boundaries. We have concluded that upon a proper showing and within the limitations imposed by the privileges and immunities clause of the federal Constitution (art. IV, § 2) the doctrine may be applied in this State.

Plaintiff filed this action in the superior court in Los Angeles, under the provisions of the Federal Employers' Liability Act (45 U.S.C.A. § 51 et seq.), hereinafter termed the FELA, to recover for personal injuries allegedly sustained by him on two different occasions while employed by defendant railroad company in interstate commerce. Both accidents occurred in New Mexico. Defendant answered with a general denial, and also pleaded contributory negligence by plaintiff,[1] and a settlement and release agreement made with plaintiff in New Mexico with respect to the first accident. Defendant further pleaded a special defense based on the doctrine of *forum non conveniens,* and in addition moved under that doctrine to dismiss the complaint. Following a hearing, the trial court granted defendant's motion, judgment of dismissal was entered accordingly, and this appeal by plaintiff followed.

From the pleadings and affidavits upon which defendant's motion to dismiss was based, the following facts appear: Plaintiff was a resident and citizen of the State of New Mexico both at the time of the accidents and when this action was brought in Los Angeles. Defendant is a Kansas corporation doing business in both New Mexico and California. All of the witnesses to the accidents reside in New Mexico rather than in this State. In order to defend the action in Los Angeles defendant will be compelled to attempt, at great expense and inconvenience, to bring approximately eighteen witnesses distances of some 900 to 1,000 miles from three cities in New Mexico, and to pay their travel, lodging, meals and miscellaneous expenses and for their time, including professional fees of some five doctors who treated plaintiff in New Mexico. It was uncertain, however, whether any of the doctors would find it possible to leave their practice to attend a trial in Los Angeles, and if not then defendant would be obliged to present their testimonies by deposition, at the loss of the effectiveness of their personal appearance as witnesses. Defendant estimated that the trial would last approximately five to seven days and that the total extra cost of defending the action in Los Angeles rather than in New Mexico would be $4,650. During the years 1947 through and including October 30, 1952, the firm of attorneys which filed this action for plaintiff filed in the superior court in Los Angeles some sixty-seven actions against defendant based upon causes of action arising in other states under the FELA, and also filed twenty-one of such imported cases in the federal district courts in this State. None of the above related facts are denied by plaintiff or his counsel.

[1, 2] As declared in Leet v. Union Pac. R. R. Co. (1944), 25 Cal.2d 605, 609, 155 P.2d 42, 158 A.L.R. 1008, "The rule of *forum non conveniens* is an equitable one embracing the discretionary power of a

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[1] In diminution of damages under the comparative negligence doctrine applicable to FELA actions. (45 U.S.C.A. § 53.)

court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action before it may be more appropriately and justly tried elsewhere." And in Gulf Oil Corp. v. Gilbert (1947), 330 U.S. 501, 504, 507, 67 S.Ct. 839, 91 L.Ed. 1055, 1062, it is stated that "As formulated by Mr. Justice Brandeis, the rule is: '* * * Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.' Canada Malting Co., Ltd., v. Paterson Steamships, Ltd. [1932], 285 U.S. 413, 422, 423, 52 S.Ct. 413, 76 L.Ed. 837. * * * The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." (See also cases cited in dissenting opinion of Mr. Justice Frankfurter, Baltimore & Ohio R. Co. v. Kepner (1941), 314 U.S. 44, 55, 62 S.Ct. 6, 86 L.Ed. 28, 34.) It is conceded that under section 6 of the FELA (45 U.S.C.A. § 56[2]) the California court has jurisdiction of both the subject matter and the parties involved in this action.

In the Leet case we held that a court of this State having jurisdiction over an action under the FELA could not refuse to exercise it. Our holding was based primarily upon our view that the decision of the United States Supreme Court in Miles v. Illinois Central R. R. Co. (1942), 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, was "completely decisive that the doctrine of *forum non conveniens* is no justification for a state court to refuse jurisdiction of an action under the Federal Employers' Liability Act. Likewise, it is conclusive that the state court *must* take jurisdiction. It has no choice in the matter and no rule or policy on its part alters the situation [pages 612–613 of 25 Cal.2d page 46 of 155 P.2d] * * * From the foregoing it is clear that the California court had jurisdiction to proceed with the trials of the above entitled causes and was required to exercise such jurisdiction. [25 Cal.2d at page 616, 155 P.2d at page 48] * * *" It now appears, however, that since our decision in the Leet case the United States Supreme Court has considered the question in Southern R. Co. v. Mayfield (1950), 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed. 3, 6, and has declared that the Miles case did not limit "the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially * * * so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution," and that if a State court held to the contrary "because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion." The court further expressly recognized the power of each State "According to its own notions of procedural policy * * * [to] reject, as it may accept, the doctrine [of *forum non conveniens*] for all causes of action begun in its courts," including those arising under the FELA, so long as it discriminates against neither citizens of sister States nor FELA actions.

[3] In other words, as declared in the Mayfield case, in refusing to exercise jurisdiction under the doctrine of *forum non conveniens*, a State may not, by reason of the Privileges and Immunities Clause of the federal Constitution (art. IV, § 2), allow suits in its courts by its own non-resident citizens "for liability under the Federal

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[2] Section 56: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

Employers' Liability Act arising out of conduct outside that State and discriminatorily deny access to its courts to a nonresident who is a citizen of another State. But if a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control. This is true also of actions, for personal injuries under the Employers' Liability Act. Douglas v. New York, N. H. & H. R. Co. [1929], 279 U.S. 377, 387, 49 S.Ct. 355, 73 L.Ed. 747. Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens,* a question of State law not open to review" by the United States Supreme Court, provided the State "enforces its policy impartially * * * so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution." (Pages 3–4 of 340 U.S. pages 2–3 of 71 S.Ct.) In the Douglas case the court declared (page 387 of 279 U.S. page 356 of 49 S.Ct.), "There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned."

It is unquestioned that the courts of this State have accepted and exercised jurisdiction over transitory causes of action, which arose outside of California in favor of citizens of other jurisdictions, nonresident in California, whether based on the common-law or a statute of a sister State or a statute of the United States (see Schultz v. Union Pacific R. R. Co. (1953), 118 Cal. App.2d 169, 178, 257 P.2d 1003, 1009, and authorities cited in footnote 17), provided the law of the sister State is not in direct conflict with the express provisions of the law or the public policy of California, and is not contrary to fundamental principles of justice or good morals, or injurious to the welfare of the people. (Loranger v. Nadeau (1932), 215 Cal. 362, 366, 10 P.2d 63, 84 A.L.R. 1264; Hudson v. Von Hamm (1927), 85 Cal.App. 323, 326–331, 259 P. 374; Thome v. Macken (1943), 58 Cal.App. 2d 76, 136 P.2d 116.) California courts have also accepted jurisdiction of FELA cases both as to causes of action which arose in this State, and as to those which arose outside California in favor of non-resident noncitizen plaintiffs against a foreign corporation doing business in this State. (See Leet v. Union Pac. R. R. Co. (1944), supra, 25 Cal.2d 605, 155 P.2d 42; Estate of Waits (1944), 23 Cal.2d 676, 678–679, 146 P.2d 5.)

[4, 5] It is thus clear that this State has no policy, either statutory or court made, of discrimination against either noncitizens of California or against FELA actions in determining when a nonresident of this State will be given access to State courts to litigate a cause of action which arose elsewhere, and any contrary implications in Schultz v. Union Pacific R. R. Co. (1953), supra, 118 Cal.App.2d 169, 179, 181, 257 P.2d 1003, 1008, 1010, are disapproved. The Leet case, discussed hereinabove, appears to have presented the first instance in which the doctrine of *forum non conveniens* has been considered and discussed by this court, and as already mentioned we rejected it in connection with the FELA litigation there involved because of our belief that we were so compelled by the decision of the United States Supreme Court in the Miles case. But since that court, in the Mayfield case, has now lifted that compulsion (if it ever intended any), we perceive no reason why the doctrine should not be available in this State, upon a proper showing and without discrimination against either noncitizens of California or against FELA cases. So far as concerns the FELA, Congress in 1948 empowered the federal district courts to transfer "any civil action," including those based on the FELA, to any other district or division where it might have been brought "for the convenience of parties and witnesses, in the interest of justice." (28 U.S.C.A. § 1404; see Ex parte Collett (1949), 337 U.S. 55, 69 S.Ct. 944, 959, 93 L.Ed. 1207; Boyd v. Grand Trunk Western R. Co. (1949), 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55; Pope v. Atlantic

Coast Line R. Co. (1953), 345 U.S. 379, 73 S.Ct. 749, 97 L.Ed. 1049.) Although there is no statutory authorization for such transfer by State courts, and although under the doctrine of *forum non conveniens* a cause arising outside California will be dismissed rather than transferred, we are of the view that the injustices and the burdens on local courts and taxpayers, as well as on those leaving their work and business to serve as jurors, which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this State (see discussion 35 Cal. L.Rev. 402–415) require that our courts, acting upon the equitable principles and within the Constitutional limits hereinabove stated, exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere. (See Leet v. Union Pac. R. R. Co. (1944), supra, 25 Cal.2d 605, 609, 155 P.2d 42.) A contrary policy would result in the anomaly that a federal district court situated in California could in the interest of justice transfer to another district or division an FELA action filed here, whereas regardless of the equities involved State courts would be powerless to decline to exercise jurisdiction over comparable actions brought in those courts. We are persuaded that such a result would be promotive of neither fairness, justice, nor Congressional intent when removal power was bestowed upon the federal district courts.

With respect to particular situations in which a court is justified in dismissing an action under the doctrine of *forum non conveniens,* it was pointed out in Gulf Oil Corp. v. Gilbert (1947), supra, 330 U.S. 501, 507–509, 67 S.Ct. 839, 91 L.Ed. 1055, in sustaining the power of a federal district court in New York to dismiss a diversity of citizenship case based upon a tort which occurred in Lynchburg, Virginia,[3] that "Many of the states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice. The federal law contains no such express criteria to guide the district court in exercising its power. But the problem is a very old one affecting the administration of the courts as well as the rights of litigants, and both in England and in this country the common law worked out techniques and criteria for dealing with it.

"Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.

"If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." In determining that in applying the doctrine the district court had exercised a sound discretion, the court noted that defendant was a Pennsylvania corporation doing business in both Virginia and New York, and (330 U.S. at pages 509–511, 67 S.Ct. at pages 843–844) that neither the plaintiff nor any witness, with the possible exception of experts, lived in New York; that no one connected with plaintiff's side of the case save counsel for plaintiff resided there; that plaintiff's only justification for seeking trial in New York was the argument, rejected by both the district court and the United States Supreme Court, that the size of the recovery sought by him (some $400,000) might more readily "stagger" a jury from Lynchburg, Virginia, than one from New York; that Lynchburg, the source of all proofs for either side, except possibly experts, was some 400 miles from New York; and that "to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants."

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[3] As noted hereinabove, removal power was by statute given to the federal district courts the following year (1948).

[6] As already noted hereinabove, in the present case plaintiff does not controvert the facts alleged by defendant as a basis for invoking the doctrine of *forum non conveniens*. Moreover, the only ground urged by plaintiff for trial in this State is his claim of an absolute right thereto, a right which, as we have seen, has been negated by the holding of the United States Supreme Court in the Mayfield case. Under such circumstances, we are of the opinion that although as in the Gulf Oil Corp. case (330 U.S. 501, 507–509, 67 S.Ct. 839) from which we have just quoted, there is no "express [statutory] criteria to guide the * * * [trial] court in exercising its power," nevertheless that court here properly acted within its discretion in granting defendant's motion to dismiss. The difficulties and inconvenience to defendant, to the court, and to jurors hearing the case, of attempting to proceed where witnesses are not amenable to process, and where testimony may have to be presented by deposition, are apparent. The added expense to defendant of either attempting to bring witnesses from New Mexico to Los Angeles or of having to take their depositions, when not counterbalanced by even a claim of advantage or convenience to plaintiff, was another factor properly to be taken into consideration. And as already mentioned, the expense and burden resulting to local taxpayers, courts, and jurors, of providing a forum for the trial of imported cases also weigh against plaintiff.

[7] The suggestion (although not advanced by plaintiff here) that the doctrine should not apply because if an action filed by a nonresident plaintiff is dismissed by the California courts his rights may be barred by limitations statutes is without merit; if plaintiff chooses without justification to bring his action under circumstances warranting application of the doctrine it is a deliberate risk assumed by him and he must be prepared to meet any losses sustained as a result. Moreover, as to FELA cases, any such risk could be obviated by filing in a federal district court, in which the action would be subject to removal "for the convenience of parties and witnesses, in the interest of justice," rather than to dismissal (28 U.S.C.A. § 1404). In the present case, however, the statute of limitations will, on February 15, 1954, have run with respect to the first cause of action and, solely in order to avoid on plaintiff's behalf the bar of the statute of limitations, defendant has entered into a stipulation with plaintiff that

the judgment of the trial court herein shall be reversed as to the first cause of action. In view of such stipulation and of the fact that until this present decision it had been declared to be the law of this State (in Leet v. Union Pac. R. R. Co. (1944), supra, 25 Cal.2d 605, 609, 155 P.2d 42) that our courts were compelled to reject the doctrine of *forum non conveniens* with respect to FELA cases, and in order that as to the first cause of action plaintiff may not through reliance upon the Leet decision be barred by the statute of limitations, we have concluded that the judgment should be reversed as to that cause of action.

Accordingly, for the reasons stated, the judgment is reversed as to the first cause of action, and is affirmed as to the second cause of action, neither party to recover costs on appeal.

SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The holding of the majority in this case injects into the law of this state for the first time in its entire judicial history the most monstrous weapon for obstructing the administration of justice ever conceived by any court or judicial tribunal. This holding places it within the power of a trial court to dismiss a transitory action which arose out of this state, even though plaintiff was a citizen of this state, and had a statutory right to prosecute such an action in the courts of this state. This must be so because the Fourteenth Amendment to the Constitution of the United States provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". Therefore, a statute, or court-made rule of law which would permit a trial court to dismiss an action brought by a citizen of another state upon a cause of action arising out of this state would be invalid unless it was applied equally against citizens of this state. Douglas v. New York N. H. & H. R. Co., 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747.

While it may be true that a state could refuse to confer jurisdiction upon its courts to handle such cases, it may not deny the privilege to some citizens of the United States and not to others. We then have this anomalous situation created by the majority decision in this case. A citizen of this state is injured in another state. He commences an action in this state for redress of such injury. A motion to dismiss on the ground of forum non conveniens is made. If he resists the motion he is faced with the prospect of going through a trial and upon an appeal to this court having a judgment in his favor reversed because the trial court refused to grant such motion. It must then follow that his action would be dismissed and in the meantime the statute of limitation has run in the state where the cause of action arose. In response to his outcry against this travesty on justice, the majority of this court say to him: "It is just too bad. You should have guessed what we would do—whenever we don't like what the trial court does, we just say, it abused its discretion and we reverse its decision." Holm v. Superior Court, Cal.Sup., 267 P.2d 1025; Carroll v. Superior Court, Cal.Sup., 267 P.2d 1037; Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324, 29 A.L.R.2d 1185; Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335; Cary v. Wentzel, 39 Cal.2d 491, 247 P.2d 341; Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910.

And so, in effect, the holding of the majority here means, that it will never be safe for any citizen of the United States to prosecute in the courts of this state, a cause of action which arose in another state or territory. The plaintiff runs the risk, first, of a judgment of dismissal by a trial court, and even if he prevails there, he is faced with the prospect of a reversal by this court with direction to the trial court to dismiss the action. Every lawyer who has had experience in the trial of cases knows that the ultimate outcome of any case of this character depends upon the leaning of the members of the court which has the last say and there can never be a rule to guide the course which he should pursue.

The majority holding is based on two major premises, and it is not clear which is controlling here. First, the majority discusses the inconvenience and expense to the defendant to present its defense to the action if tried in Los Angeles County. Second, the burden upon the courts and people of this state to hear and determine cases of this character. First, since the plaintiff has a statutory right to prosecute such an action in a state court regardless of the inconvenience to the defendant, he should not be deprived of such right by a court-made rule. If there is to be a change in the rule it should be made by the Legislature and not by the courts. Second, if the doctrine of forum non conveniens is applied on the ground that such actions are a burden upon the courts and the people of this state, then all causes of action arising out of this state must be barred. Certainly, if it may be said that causes of action arising out of this state are a burden on our courts and the people of this state, the courts cannot say that some of such actions may be tried in our courts and others not. In other words, so far as the burden upon our courts is concerned, they must be open to all citizens of the United States who have such causes of action to prosecute, or to none at all. Otherwise the privileges and immunities clause of the Fourteenth Amendment is meaningless. Yet the majority opinion conveys the inference that this latter ground is also within the discretion of the court in ruling on a motion to dismiss on the ground of forum non conveniens. Obviously this cannot be so. However, it remains to be seen whether or not the only cases to which the doctrine is applied by the majority of this court are those arising under the Federal Employers' Liability Act.

The majority concedes that the courts of this state may not apply the doctrine of forum non conveniens discriminately against Federal Employers' Liability Act cases. In view of the fact that there are more than 235 superior judges sitting in the various counties of this state, it is obvious that the doctrine will be applied by some and not by others in cases of similar factual background. It is far from probable that there will be any uniformity in its application. Since these cases constitute by far the largest group of out-of-state cases which are prosecuted in our courts it is not unlikely that they will be the only cases in which the doctrine is applied. But how and when may this be determined? Must a plaintiff have to wait one, two or more years and then make an examination of the register of actions in all of the superior courts of this state in order to determine whether or not there has been discrimination against this class of cases? At this writing the task of showing such discrimination would seem to me to be an impossible burden to place upon any litigant or group of litigants, especially injured working men who are seeking redress for their injuries under the Federal Employers' Liability Act. And yet, the majority of this court, in utter disregard of these considerations, announces a rule here which can only result in depriving the plaintiffs in Federal Employers' Liability Act cases, arising out of this state, from seeking redress in the courts of this state pursuant to the provisions of said act.

It may be reminiscent of a few decades ago that the railroad companies have been able to accomplish through the majority decision in this case what they have been unable to accomplish through the legislative and executive branches of both the state and federal governments. At the 1953 session of the California Legislature two bills were introduced which purported to incorporate the doctrine of forum non conveniens into the law of this state. These bills were Senate Bills Nos. 789 and 1960. They passed both houses of the Legislature and Senate Bill No. 789 was vetoed by the then Governor Earl Warren, now Chief Justice of the Supreme Court of the United States. In his veto message on this bill he stated: "If we are to whittle away in this manner the benefits conferred by the Federal Employers' Liability Act, it would soon lose its national uniformity and could at least substantially weaken the purposes for which the act was originally designated. I am not advised that other states have enacted such legislation. The fact that this act has been in effect since 1908 without similar legislation being enacted in other states would indicate a nationwide appreciation of the desirability for this uniformity. At all events if any of the provisions of the act result in a denial of justice to either plaintiffs or defendants, the situation could be remedied nationwide by a simple act of Congress." Senate Bill No. 1960 was passed during the closing days of the legislative session and did not become effective because of lack of executive approval.

It appears from the Congressional Record that at the time Congress enacted section 1404(a) of 28 U.S.C.A., which in effect incorporated the doctrine of forum non conveniens in federal courts, it refused to enact a bill which would have amended section 6 of the Federal Employers' Liability Act, by limiting the employee's choice of venue to the place of his injury or to the place of his residence. The language used by Governor Warren in his veto message on Senate Bill No. 789 is almost the precise language used by the Supreme Court of the United States in the very recent case of Pope v. Atlantic Coast Line R. Co., 345 U.S. 379, 73 S.Ct. 749, 753, 97 L.Ed. 1094, where that court held that a non-resident could not be foreclosed from filing an action under the Federal Employers' Liability Act. In that case the Supreme Court said: "Congress might have gone further; it might have vested state courts with the power asserted here. In fact, the same Congress which enacted § 1404(a) [re forum non conveniens in federal courts] refused to enact a bill which would have amended § 6 of the Federal Employers' Liability Act by limiting the employee's choice of venue to the place of his injury or to the place of his residence.

"This proposed amendment—the Jennings Bill—focused Congress' attention on the decisions of this Court in both the Miles and the Kepner cases. The broad question—involving many policy considerations—of whether venue should be more narrowly restricted, was reopened; cogent arguments—both pro and con—were restated. Proponents of the amendment asserted that, as a result of the Miles and Kepner decisions, injured employees were left free to abuse their venue rights under § 6 and 'harass' their employers in distant forums without restriction. They insisted that these abuses be curtailed. These arguments prevailed in the House which passed the Jennings Bill, but the proposed amendment died in the Senate Judiciary Committee, and § 6 of the Federal Employers' Liability Act was left just as this Court had construed it."

The Jennings Bill was the same type of bill as Senate Bill No. 1960. Had the Congress of the United States intended that the jurisdiction in federal employers' liability cases was to be restricted to the states where the cause of action arose or where the plaintiff resided it would have enacted the Jennings Bill. The Congressional Record discloses that in recent years several attempts have been made by the railroad companies to induce Congress to adopt similar bills and each of such attempts has resulted in failure. This should constitute conclusive evidence that the statute as it now exists does not work an undue hardship upon the railroad companies affected by its provisions or is out of harmony with considerations of justice underlying the basic concept of the Federal Employers' Liability Act.

On May 2, 1953, the District Court of Appeal, Second Appellate District, Division Three, in its decision in Schultz v. Union Pacific R. R. Co., 118 Cal.App.2d 169, 257 P.2d 1003, 1011, after an exhaustive review of all of the authorities followed the decision of the Pope case and again stated that the jurisdiction conferred by the Federal Employers' Liability Act should not be interfered with by the courts or by state legislation. In the Schultz case the District Court of Appeal said: "The Congress having given the right under the Federal Employers' Liability Act to an injured party to maintain an action for damages in the courts of the district where the defendant is doing business at the time the suit is commenced, the privileges of venue thus granted cannot be frustrated for reasons of convenience or expense. We are not concerned with the justice or the wisdom of such legislation. The province of the courts is to interpret the laws passed by the Congress and not to seek to correct legislative enactments or to change laws because they have given rise to consequences which may not have been contemplated by the Congress, no matter how dire the results." "We hold that the courts of California may not, consistently with the Constitution of the United States, decline on the basis of *forum non conveniens* to take jurisdiction of an action under the Federal Employers' Liability Act, founded on a cause of action which arose without the state, brought by a noncitizen and nonresident against a foreign corporation doing business within the state." This court denied the petition of the railroad company for a hearing in that case and it remained the law of this state until today when the majority of this court by its decision in the case at bar expressly disapproved the Schultz case.

Since this court decided Leet v. Union Pac. R. Co., 25 Cal.2d 605, 155 P.2d 42, 158 A.L.R. 1008, relying upon Miles v. Illinois Cent. R. Co., 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, and Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, holding that a state court has no power to refuse to exercise jurisdiction in a federal employers' liability case by use of the doctrine of forum non conveniens or otherwise, the United States Supreme Court ignored those cases in deciding Southern R. Co. v. Mayfield, 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed. 3. The court held in the Mayfield case that a state court could refuse to determine a federal employers' liability case under the doctrine of forum non conveniens as long as it treated all transitory actions and citizens and non-citizens of the state similarly. In a later case the court held that the courts of the state in which the injury occurred and in which plaintiff was a resident could not, in an action by the railroad, enjoin plaintiff from maintaining a federal employers' liability action in the court of another state although the latter state court was not a convenient forum. The basis of the holding was that the Federal Employers' Liability Act, 45 U.S.C.A. § 56, gave the injured person a right to sue in the latter court and the former court could not take it away. Pope v. Atlantic Coast Line R. Co., 345 U.S. 379, 73 S.Ct. 749, 97 L.Ed. 1094. The court further held that the amendment to the federal law, 28 U.S.C.A. § 1404(a), authorizing a federal district court to transfer a federal employers' liability action to another federal court on the ground of convenience did not confer power to enjoin on a state court. I point these things out preliminarily because the Pope case casts considerable doubt on the soundness of the Mayfield case, and the rule there that a state could use the doctrine in federal employer liability actions, for if *by reason of the liability act* giving a *right* to the injured person to sue in the state courts, one state court cannot grant an injunction, the forum should not be empowered to dismiss for inconvenience. In addition to that, however, the reasoning in the majority opinion is contrary to the Pope case. The majority states that the federal policy has been expressed in the federal law that permits a transfer from one federal court to another on the ground of convenience, 28 U.S.CA. § 1404(a), and hence a state court should adopt the doctrine for otherwise we would have the anomalous situation of its application in the federal but not state courts in federal employers' liability cases. That same argument was made in favor of the injunction in the *dissent* by Justice Frankfurter in the Pope case. It was rejected by the majority opinion. There is no policy expressed by section 1404(a) which is applicable to state courts.

Assuming, however, that it is permissible for a state court to dismiss federal employer liability actions on the basis of the doctrine, I do not believe that it should be followed in this state in such actions or in any other transitory actions.

This state has never adopted the doctrine. In Leet v. Union Pac. R. Co., supra, 25 Cal. 2d 605, 155 P.2d 42, we held no more than that if such a doctrine were the law in this state it could not under federal law be applicable to federal employers' liability cases. To announce the doctrine as the law of this state is wholly out of harmony with the established policy of this state for its courts to entertain, regardless of convenience, transitory causes of action. Indeed it is the court's duty. It has been repeatedly held that a court has a mandatory duty to consider and determine on the merits all cases over which it has jurisdiction. Gering v. Superior Court, 37 Cal.2d 29, 230 P.2d 356; Robinson v. Superior Court, 35 Cal.2d 379, 218 P.2d 10; Turesky v. Superior Court, 97 Cal.App.2d 838, 218 P.2d 784; City of San Diego v. Andrews, 195 Cal. 111, 231 P. 726. And the court does and should exercise jurisdiction in transitory causes of action arising elsewhere. McKee v. Dodd, 152 Cal. 637, 93 P. 854, 14 L.R.A.,N.S., 780; Ryan v. North Alaska Salmon Co., 153 Cal. 438, 95 P. 862; Luikart v. McDonald, 11 Cal.App.2d 433, 53 P.2d 1012; Faras v. Lower California Dev. Co., 27 Cal.App. 688, 151 P. 35; Roberts v. Dunsmuir, 75 Cal. 203, 16 P. 782; Loranger v. Nadeau, 215 Cal. 362, 10 P.2d 63, 84 A.L.R. 1264; Hudson v. Von Hamm, 85 Cal.App. 323, 259 P. 374. As expressed in Loranger v. Nadeau, supra, 215 Cal. 362, 366, 10 P.2d 63, 65: "It is the general rule in tort actions that the court will, if it has jurisdiction of the necessary parties and can do substantial justice between them in accordance with its own forms of procedure, enforce the foreign law if it is not contrary to the public policy of the forum, to abstract justice, or pure morals, or injurious to the welfare of the people of the state of the forum. * * * In Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198, 202, it was said: 'The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, *to suit the individual notion of expediency or fairness.* They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.' In Reynolds v. Day, 79 Wash. 499, 140 P. 681, 683, L.R.A.1916A, 432, it was said: 'Under the rule of comity, rights which have accrued by the law of another state or nation are treated as valid everywhere. When the action is transitory and the jurisdiction of the parties can be obtained by service of process, the foreign law, if not contrary to the public policy of the state where the action is brought, nor contray to abstract justice or pure morals nor calculated to injure the state or its citizens, will be recognized and enforced. This rule applies alike to actions *ex contractu* and actions *ex delicto*. In all such cases, the right to recover is governed by the *lex loci* and not by the *lex fori.*'" (Emphasis added.) With respect to the duty of our courts to enforce federally created rights (the Federal Employers' Liability Act is such), this court, contrary to the majority opinion, considers it their mandatory duty and is not concerned with the imagined overcrowding of our courts with such cases. In Miller v. Municipal Court, 22 Cal.2d 818, 142 P.2d 297, 315, 316, we had before us the question of whether the state municipal court was required to enforce the federal emergency price control law. We held that it was, stating: "As Congress, in the lawful exercise of a constitutional power, by its statutes declares the policy for both the people and the states (see Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.), supra, 223 U.S. [1 at] page 57, 32 S.Ct. 169, 56 L.Ed. 327), so does it declare the policy of the people and of the states with regard to the enforcement of a law such as the Emergency Price Control Act of 1942 [50 U.S.C.A.Appendix, § 901 et seq.]. In enforcing that act by assuming jurisdiction of a consumer action pursuant to congressional mandate, in the course of the exercise of its ordinary jurisdiction, a state court is not entertaining an action created by a totally unrelated sovereign, but is merely yielding to the superior exercise of a lawful right granted Congress by the United States Constitution.

"* * * But, considering the intent of the framers of the Constitution, the acts of the early Congresses, and the provisions of article VI establishing the supremacy of federal law, it seems clear that a state court, otherwise competent to exercise jurisdiction over the subject matter, the parties, and the amount in controversy, *must assume jurisdiction* of an action created by federal law enacted pursuant to a legitimate federal function, * * *.

"Any argument of hardship which, it may be asserted, will result from the additional burden of litigation in state courts, must be considered settled by the Supreme Court of the United States. 'We are not disposed,' the court observed, 'to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, *it affords no reason for declining a jurisdiction conferred by law.* The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication.'" (Emphasis added; Miller v. Municipal Court, 22 Cal.2d 818, 850–851, 142 P.2d 297.) Thus there is no basis for the comments in the majority opinion about the supposed burden of determining transitory actions. It is the fixed policy of this state to enforce at least federally created rights without regard to convenience. Unless the Miller case is overruled the majority opinion cannot stand; in any event, any repudiation of it should be done by the Legislature, not by this court.

The difficulty of stating properly the circumstances under which the doctrine should or should not result in dismissal (later discussed), is an additional reason why it should not be adopted—why it is more appropriately a legislative problem. Questions of venue to which the present problem is analogous have been traditionally a legislative or constitutional matter. People v. Zegras, 29 Cal.2d 67, 172 P.2d 883; San Jose I. & C. Storage Co. v. City of San Jose, 19 Cal.App.2d 62, 64 P.2d 1099, 65 P.2d 1324; Perkins v. Winder, 123 Cal.App. 467, 11 P.2d 394; People v. Spring Valley Co., 109 Cal.App.2d 656, 241 P.2d 1069.

The confusion and injustice which have resulted from the vague doctrine is ably pointed out in discussing its application to transfers of actions in the federal courts under the federal law: "A close review of cases involving Section 1404(a) reveals the extent of doubt, uncertainty, and confusion which has grown up within our courts since this section became law. At first the courts were wont to declare, as in Hayes v. Chicago, R. I. & P. R. [Co., D.C., 79 F.Supp. 821, 824], that:

> "'There is no basic reason why plaintiffs in cases under the Federal Employers' Liability Act should not be subject to the same equitable doctrine of transfer as applies to all other civil cases now that Congress has enacted a statute which indicates no exception to the application of that principle.'

"However, it has lately been held that its purpose was to correct abuses and that relief under it was warranted only in exceptional cases. In Naughton v. Penn[sylvania] R. [Co., D.C., 85 F.Supp. 761, 764], the court said:

> "'* * * After all, Section 6 of the Federal Employers' Liability Act was designed to give the injured employee a wide choice of forum in which to bring his action. It has not been repealed and the underlying policy remains and should be carried out whenever possible unless serious inconvenience or injustice to the defendant will result. * * *'

"And in Boyd v. Grand Trunk Western R. R. [Co., 70 S.Ct. 26, 27]:

> "'* * * We hold that petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5 of the Liability Act: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void * * *." The contract before us is therefore void.'

"Thus the injured man has a right in the choice of his forum, so substantial that he cannot contract it away. No other litigant in any civil case has any such right to choose the forum in which to have the case heard. That, at least, is one reason for holding that he should not be 'subject to the same equitable doctrine of transfer as applies in other civil cases.'"

"The incidental injustice to a railroad in an isolated or exceptional case resulting from the exercise of the right to choose forum is as nothing compared to the chaos, confusion, and gross injustice that results in cases where the plaintiff must first litigate for months on end his venue selection, with affidavits, motions, briefs, hearings, and numerous delays, and with one judge in one particular case sustaining jurisdiction over a certain railroad company and another judge in the adjoining courtroom denying it. To have the venue of actions determined by such a system is not rule by law, but rule by whim and caprice. On the same identical state of facts conflicting and varying decisions may be handed down by different courts and a great volume of litigation is thus bound to rise over preliminary questions.

"A district judge in United States v. E. I. Du Pont De Nemours & Co. [D.C., 87 F.Supp. 962, 965], after wrestling with the problems involved in deciding a motion to transfer, stated:

> "'* * * To attempt to resolve the niceties involved in balancing the relative conveniences and inconveniences of all of the parties to any degree of certainty, resort must be had to an apothecary's scale and a crystal ball; neither of which implements are available to this court.'

"Utter confusion is present in the law. * * *

"The courts have all taken the attitude in cases decided under Section 1404(a) that no set standard or policy can be promulgated by them. The attitude of the courts is reflected in a quotation from Spence v. Norfolk & W. Ry. [Co., D.C., 89 F.Supp. 823, 824]:

> "'The petition of defendant for rehearing seeks "a clarification of the policy of the Court with respect to cases of this character brought against it in the Northern District of Ohio." Let it be clearly understood that the Court is not by the present ruling, providing parties in litigation with a slide rule to enable them to calculate with mathematical precision the result that will be reached on motions to transfer that may be filed in other cases. All cases will be heard and decided on their particular facts. The very phraseology of the statute under which this motion is filed clearly demonstrates the logic of this conclusion. The only policy of the Court, in respect of this case or any other case, which may be announced is that the law must be followed. "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055.'

"The widespread confusion in the law resulting from the present more or less universal practice of filing either motions to transfer or dismiss has reacted to the special disadvantage of railroad men caused to suffer injuries not fatal or permanently crippling and especially when injury occurred in sparsely settled communities, and when the injured employee resides at a railroad point or division where it is impossible to obtain competent counsel or to have the case tried and heard in a court experienced in trials of this class. The threat of using and employing these motions is a form of mental coercion or compulsion decidedly advantageous to the railroad and disadvantageous to the employee. Many lawyers will not undertake the prosecution of these cases knowing of the difficulties and the expense, time, and effort of trying in effect several lawsuits. Therefore, the railroads are able to settle, especially in this western country, this class of cases on their own terms. * * *" (Parnell Black and John L. Black, Injustices in the Federal Forum Non Conveniens Rule, 3 Utah L.Rev. 314, 317–320; see, also, 41 Cal.L.Rev. 507; 38 Va.L. Rev. 569.)

Substantial authority in other states has rejected the doctrine. (See cases collected 35 Cal.L.Rev. 380, 388.)

Assuming the doctrine is available, difficult problems develop, such as the circumstances relevant to whether a dismissal is proper, the review of the trial court's determination of the question, and the injustices inherent in its application.

Among the circumstances justifying a dismissal the majority opinion relies heavily on the inconvenience to our courts—congested calendars and the use of our courts by nonresidents. I have above pointed out that this factor can have no significance in view of our decision in Miller v. Munncipal Court, supra, 22 Cal.2d 818, 142 P.2d 297.

In addition to that, however, the federal courts have not considered it is a factor in applying the transfer provisions of the federal law which are based on convenience. It is stated with supporting authority that: "However, a striking demonstration of the novelty in the new federal doctrine of forum non conveniens based on 1404(a) is that inconvenience to the court appears to play no part in the exercise of discretion to transfer. The most crowded district court in the nation, that of the Southern District of New York, has retained cases (some of which promised large expenditures of time and effort) without considering its own convenience in its ascertainment of the most suitable forum. A similar course has been followed by other burdened courts. On the other hand, cases have been transferred from current or relatively uncrowded dockets to overburdened courts which were more convenient for litigants and witnesses.

"The language of some opinions seems to indicate that convenience to the court is indeed an important factor under 1404(a), but an analysis of the facts meriting transfer in these cases indicates that convenience to the court was really unimportant." (Factors of Choice for Venue Transfer Under 28 U.S.C.A. § 1404(a) 41 Cal.L.Rev., 507, 518–519.

The majority opinion states that whether the statute of limitations may have run pending the commencement of the action in a state court and its proposed dismissal, is not a circumstance to be considered; that plaintiff takes and should take the risk of choosing the right forum. This is indeed harsh. He is forced to speculate not only on how the trial court may decide the question but also what the views of an appellate court may be. As evident from the confusion in the federal case above discussed, such an impossible burden should not be placed upon him. Suppose a case where the location of the witnesses is equally divided between the state of the chosen forum and another or other factors are equally balanced, the plaintiff has no means of predicting the court's decision. He is left at the mercy of the defendant—must have his prior approval of a particular court. Plaintiff having the right to have a particular court exercise its jurisdiction, and that court having jurisdiction, should be able to have the dismissal denied in any case where the statute of limitations will have run by the time that issue is finally determined. As said by a writer on the subject: "And all cases hold that jurisdiction must be assumed if the defendant is not subject to process, *or the statute of limitations has run,* in the state that he claims is more appropriate." (Emphasis added; Barrett, The Doctrine of Forum Non Conveniens 35 Cal.L.Rev. 380, 419–420.)

The review on appeal of the trial court's decision on the motion to dismiss presents many problems. If the motion is denied it would be an interlocutory order and not appealable but would be reviewable on the appeal from the judgment. If plaintiff had obtained judgment the case would have, of course, been tried with all the expense, time and inconvenience of witnesses involved. Yet presumably the appellate court could reverse the judgment because it thought the motion to dismiss should have been granted. In arriving at that conclusion it would be in the awkward position of declaring that the trial court was not the convenient forum yet be faced with the fact that the inconvenience had already been endured. Its reversal, so far as the convenience question is concerned, would fall short of achieving any just purpose. If the motion is granted, an appeal could be taken from the judgment of dismissal, but that places it in the hands of the defendant to delay and harass the plaintiff. When the question is reviewed it will be difficult to ascertain whether the trial court abused its discretion. In view of the trend of recent decisions of this court in this field, the power conferred upon a trial court to exercise its discretion in cases of this character, is almost non-existent. See, Holm v. Superior Court, Cal.Sup., 267 P.2d 1025; Carroll v. Superior Court, Cal.Sup., 267 P.2d 1037; Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324, 29 A.L.R.2d 1185; Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335; Cary v. Wentzel, 39 Cal.2d 491, 247 P.2d 341; Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910.

The question here presented is one of great magnitude. It involves considerations of public policy of great importance not only to those who may wish to prosecute out-of-state causes of action in our courts, but to our courts as well, where the impact upon our court procedure of numerous motions to dismiss such actions in trial courts, and a review by our appellate courts of rulings on such motions, is bound to create perplexing problems. It seems to me that if the doctrine of forum non conveniens is to be adopted in this state, it should be by legislation where ample safeguards could be provided to protect those plaintiffs who in good faith, and after proper advice, seek redress in our courts on out-of-state causes of action.[4] If such a statute were enacted, it could, and undoubtedly would, embrace rules of procedure to guide the courts in the application of such doctrine. The majority here appear to be oblivious to these considerations.

For the foregoing reasons I would reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

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[4] Some of such safeguards were contained in Senate Bill No. 1960 which was passed by the 1953 California Legislature and did not become effective because of lack of executive approval. Said bill sought to amend section 581 of the Code of Civil Procedure by adding thereto the following: "5. By the court, upon motion of the defendant made at or before the time of demurring or answering, when it appears from affidavits or otherwise that the cause of action did not arise within this State, and that at the time the cause of action arose the plaintiff was not a resident of this State, and that a court of this State is not a convenient forum for the parties and witnesses and that the dismissal of the action will serve the interests of justice. If the court determines to grant the motion, it shall make an interlocutory order which shall impose such conditions as the court in its discretion deems just and reasonable, but, in any event, such interlocutory order shall require that there be filed in the action a written agreement executed by the moving defendant and such other defendants as the court shall determine, which agreement as to each such defendant shall contain

"(a) Such stipulations as may be necessary to provide effectively that plaintiff may bring and maintain an action upon the same cause of action in such jurisdiction or jurisdictions as the court shall determine or, if such action cannot be brought and maintained in any such jurisdiction, that the interlocutory order and any final dismissal shall be vacated and that the time within which the action must be brought to trial shall commence on the date when the interlocutory order or dismissal is so vacated; and

"(b) Such stipulations as may be necessary to suspend effectively all statutes of limitations which have not expired at the time the action was commenced for a period sufficient to make effective the provisions of the foregoing subdivision (a) which period shall be not less than 180 days after the dismissal shall become final; and

"(c) Such stipulations as may be necessary to assure that the moving defendant, and such other defendants as the court shall determine, will voluntarily make a general appearance in, or be subject to the process of a court in the jurisdiction or jurisdictions determined by the court as provided in subdivision (a).

"Upon proof that the conditions of the interlocutory order have been performed within the time allowed, the court, upon motion, shall thereupon enter a judgment of dismissal. If the conditions are not performed, the court, upon motion, shall vacate the interlocutory order and enter an order denying the motion or make such other order as is just. An interlocutory order hereunder is an appealable order.

"The party making the motion shall have the burden of proof that the cause of action did not arise within this State, that a court of this State is not a convenient forum for the parties and witnesses and that dismissal will serve the interests of justice."

42 Cal.2d 657

TOSHIKUNI TAENAKA
v.
STATE BOARD OF EQUALIZATION et al.

L. A. 22903.

Supreme Court of California.
In Bank.
April 2, 1954.

Rehearing Denied April 28, 1954.

Mandamus proceeding brought to require state board of equalization to restore an off sale liquor license to petitioner. The Superior Court, Los Angeles County, Frank G. Swain, J., granted the relief sought and the board appealed. The Supreme Court, Carter, J., held that since there had been no substantial change in the neighborhood at time of petitioner's application as compared with the time his license was revoked on ground of his Japanese ancestry, restoration would follow automatically, although an additional license had been granted to premises in the neighborhood after revocation of petitioner's license.

Judgment affirmed.

Shenk, Edmonds and Schauer, JJ., dissented.

Prior opinion, 258 P.2d 1079.

1. Intoxicating Liquors ⚿58

Statute providing for restoration of licenses to persons of Japanese ancestry is remedial and legislative purpose was to rectify what legislature felt was an injustice when persons of Japanese ancestry were deprived of liquor licenses held by them upon the ground of their ancestry. Gen.Laws, Act 3796, §§ 7.1, 38f.

2. Intoxicating Liquors ⚿58

Under statute providing for restoration of liquor licenses to persons of Japanese ancestry, where the neighborhood has remained substantially the same as when the license was revoked, restoration follows automatically. Gen.Laws, Act 3796, §§ 7.1, 38f.

3. Intoxicating Liquors ⚿58

Under statute providing for restoration of liquor licenses to persons of Japanese ancestry, where there had been no substantial change in the neighborhood at time of petitioner's application as compared with the time his license was revoked on ground of ancestry, petitioner was entitled to issuance of a license, although an additional license had been granted to premises in the neighborhood after revocation of petitioner's license. Gen.Laws, Act 3796, §§ 7.1, 38f.

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Edmund G. Brown, Atty. Gen., and Alexander Googooian, Deputy Atty Gen., for appellants.

James K. Mitsumori, Los Angeles, for respondent.

CARTER, Justice.

The State Board of Equalization, respondent in mandamus proceedings in the Superior Court, appeals from a judgment of that court granting a peremptory writ of mandate ordering the board to restore to Taenaka, petitioner, an off-sale liquor license at his premises on East 103rd Street in Los Angeles.

According to the findings, petitioner is a United States citizen of Japanese ancestry. He owns the above-mentioned premises, and in 1941, he held an off-sale liquor license at said premises regularly issued to him by respondent, and operated a liquor business thereunder. After the outbreak of the second World War and in May, 1942, respondent revoked and cancelled petitioner's license on the ground of his Japanese ancestry. In 1951, the Legislature added a section to the Alcoholic Beverage Control Act, Stats.1935, p. 1123, as amended,[1] and pursuant thereto on September 4, 1951, petitioner applied to the board for a license. On November 15, 1951, the board, after hearing, granted the application and ordered the issuance of the license "provided no protests have been filed against the issuance of such license," At that time no protests had been filed. Thereafter, on November 26, 1951, protests were filed by a church, the Parent-Teachers Association, and John J. Hicks, president of South East Minister's Alliance, on the ground that the premises were too close to a school and churches. At a meeting of the board on December 13, 1951, the matter of setting the protests for hearing was discussed in the presence of petitioner's counsel and Hicks. After some discussion in which one of the board members expressed his belief that there had been a fraud perpetrated on the board in the issuance of the license on November 15, 1951, because of petitioner's counsel's assurance at the hearing thereon that no protests had been filed, a resolution was adopted that petitioner be requested to deliver his license to the custody of the state liquor administrator, and if he refused, proceedings for revocation of the license be initiated. Thereafter the same board member suggested that as petitioner was going into military service the board keep custody of the license for a year. Petitioner's counsel said he would cooperate and recommended the procedure to his client but demanded a hearing on the protests. At his counsel's suggestion petitioner handed the license to the board. Hearings were held thereafter to consider the protests on the basis of petitioner's application for a license rather than as a basis for its revocation. All of the protests were withdrawn except that of Hicks which was on behalf of a church which moved into the area 400 feet from petitioner's premises and next door to a liquor store shortly before the license was issued on November 15, 1951, but had not yet opened as a church. In March, 1952, the board "denied" petitioner's application for a license on the basis that it would be contrary to "public welfare and morals" because of the proximity of the premises to churches and a school.

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[1] "Any individual, who held a license under this act on December 7, 1941, and whose license was thereafter revoked because of the Japanese ancestry of the licensee, or surrendered, or was permitted to expire by such Japanese, may at any time within six months after the effective date of this section file an application for a similiar [sic] license, and the board shall issue such a license upon the payment of the current fee therefor. The provisions of Section 38f shall not

The court found that petitioner had been forced to deliver his license to the custody of the board; that it had not acted pursuant to law and petitioner's license had not been revoked. It ordered the board to restore petitioner's license to him.

Petitioner's main contentions in support of the writ of mandate are: (1) That under section 7.1, supra, he was entitled to a license as a matter of right as long as the neighborhood was substantially the same with reference to churches and schools when he applied as when he had a license in 1941 and prior thereto; (2) that he did not lose his license by delivering it to the custody of the board because he was forced to make the delivery and that it did not constitute a revocation of it by the board; that where protests to the issuance of a license are filed after it is granted, as here, the board must bring and follow revocation proceedings as set forth in the act and this was not done.

[1, 2] Section 7.1 is a remedial provision in which the legislative purpose was to rectify what the Legislature felt was an injustice, that is, the deprivation of persons of Japanese ancestry of liquor licenses held by them upon the ground of their an-

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apply to licenses issued to such persons. No license shall be issued pursuant to this section to a person who is not qualified to hold a license at the time of filing his application hereunder, and the issuance of such a license shall be subject to the approval of the board and other provisions of this act. The acceptance of a license issued pursuant to this section shall constitute a release of any and all claims for damages, if any there be, which the person to whom the license is issued may have against the State by reason of the revocation, cancellation, or expiration of any license previously issued to or held by such person under this act; and provided further, that no such license or interest therein shall be subject to transfer by such person to any other transferee for a period of one year and thereafter only if such individual to whom such license has been restored hereunder has during such year as sole owner conducted the business operated under such license and personally, unless prevented by causes beyond his control, worked in the actual operation of said business." Alcoholic Beverage Control Act, § 7.1, as added Stats., 1951, Ch. 1457, § 1.

cestry. The patent object of this legislation was to restore such licenses to their former owners at positions formerly occupied by them. While the first part of the section speaks of application by the person for a license the latter part mentions restoration of it, plainly indicating that the main purpose is that the former licensee shall be restored to his former status. This is further evinced by the provision that states a license "shall" be issued to him upon the payment of the "current fee therefor", and that section 38f of the act shall not apply to such licenses. That section declares it to be for the public welfare and morals to limit the number of licenses in a given area. Plainly the section (7.1) would not accomplish its purpose if that limitation applied to those licenses because in most localities the quota of licenses would have been filled since the revocation in 1941 and 1942 of licenses held by those with Japanese ancestry. There would be no room for any more and hence very few, if any, restorations could be made. The same is true in regard to the character of the neighborhood in which the license is sought with reference to schools and churches. If the license is to be restored, and that is the declared policy of the section, then restoration should be effected where the neighborhood has remained substantially the same as when the license was revoked. If there has been no substantial change then restoration follows automatically. That is the plain intent of section 7.1, supra. While it is provided in the section that the issuance of a license shall be subject to the rest of the act and the approval of the board, the rest of the section and its declared purpose show that it deals with matters other than the character of the neighborhood in which the licensee proposes to operate a liquor store under his license.

[3] Here there is no question of petitioner's qualifications and it is clear that there had been no substantial change in the neighborhood at the time of his application as compared with the time his license was revoked. Churches and schools were in the vicinity at all times and most of the time since 1941 a license has been held by the occupant of his premises. One church had taken some steps to locate in the vicinity, but had not yet become established and its proposed location is next door to a liquor store. It is true, as pointed out by respondent, an additional license has been granted to premises in the neighborhood, but as heretofore mentioned, that is not a factor to be considered under the express wording of section 7.1, supra. We conclude, therefore, that the trial court's judgment was correct in determining that the board acted arbitrarily and abused its discretion in refusing to issue petitioner a license or in refusing to deliver back to him the license issued on November 15, 1951.

Petitioner urges that where a license is issued and thereafter protests to its issuance are filed, the only proper steps are for proceedings to revoke the license, and therein the protests are considered as the complaint for revocation (Alcoholic Beverage Control Act, Section 39); that such was the case here because the license was issued on November 15, 1951, and the protests were filed thereafter; that the procedure under section 39 was not followed; (what was done has heretofore been indicated) that he was coerced by the board in delivering the issued license to its custody and continuing with the improper proceedings and thus he did not waive his right to complain. Respondent contends that petitioner was not coerced, and has waived and is estopped to complain of the procedure followed. No doubt the procedure followed by the board was irregular and it should be noted that there was no occasion for it, in effect, to threaten petitioner with revocation because of alleged false representations at the hearing leading to the issuance of the license on November 15, 1951. The only representation of any consequence made, was that no protests to the issuance of the license had been filed. That was true. In view, however, of the result reached, that is, that petitioner is entitled to a license, it becomes unnecessary to pass upon those contentions. Presumably the license issued on November 15, 1951, was still in the custody of the board, and while his "application" was later "denied" after the subsequent hearings, there has been no order revoking it. But even if we consider that he surrendered it, then he is entitled to have a new one issued.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

SHENK, Justice.

I dissent. Under Section 22 of Article XX of the Constitution as amended in 1934 the State Board of Equalization has the "exclusive power to license" the "sale of intoxicating liquors in this State" and has "the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." The majority opinion correctly states that "the board 'denied' petitioner's application for a license on the basis that it would be contrary to 'public welfare and morals' because of the proximity of the premises to churches and a school."

Whatever may have theretofore transpired it is stated and conceded by the majority that the proceedings before the board were conducted on the basis of an application by the petitioner for a license and a hearing thereon in the presence of protests rather than on the basis of the revocation of a license theretofore granted. The question of the discretion of the board in denying the license is in the very heart of the whole proceeding. The evidence before the board was abundantly sufficient to support the conclusion of the board that the granting of the license would be contrary to public welfare and morals. There is no evidence that the board acted arbitrarily or capriciously. The District Court of Appeal of the Second Appellate District, Division 2, reversed the judgment herein relying largely on the case of Weiss v. State Board of Equalization (not mentioned in the majority opinion), wherein this court in April, 1953, 40 Cal.2d 772, 256 P.2d 1, outlined the discretionary powers of the board and upheld its action in denying a liquor license on premises in the proximity of a public school. For the foregoing reasons and the additional reasons stated in the opinion of the District Court of Appeal written by Mr. Justice Fox and reported in 258 P. 1079, I would reverse the judgment and thus uphold the action of the board in denying the license.

EDMONDS and SCHAUER, JJ., concur.

Rehearing denied; SHENK, EDMONDS and SCHAUER, JJ., dissenting.

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42 Cal.2d 663

PEOPLE v. WOLFE et al.

Cr. 5532.

Supreme Court of California.
In Bank.
April 2, 1954.

Defendants were convicted of murder in first degree. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgments, and defendants appealed therefrom and from orders denying their motions for new trial. The Supreme Court, Carter, J., held, inter alia, that evidence sustained convictions.

Judgments and orders affirmed.

1. Criminal Law 🔑1171(1)

In murder prosecution, the propounding of a question by prosecuting attorney to defendant as to whether defendant left his knife in the victim's back, to which there was no objection by defense counsel, nor motion to strike, was not prejudicial error.

2. Criminal Law 🔑1186(4)

In murder prosecution, conduct of prosecuting attorney in commenting, during closing argument, on failure of defense to produce certain witnesses and in stating that such witnesses, if produced, would have been too honest to perjure themselves for the defendants and afraid to testify for the People, was highly improper, but, in view of overwhelming evidence of guilt, was not sufficiently prejudicial to warrant reversal. Const. art. 6, § 4½.

3. Criminal Law ⚿1173(2)

In murder prosecution, although it would have been better practice to have instructed jury as to admissions and confessions, no prejudice could have resulted from failure to so instruct, in view of fact that defendants testified at trial in same vein as answers they had given just after commission of crime, and defense counsel testified that he had no objection to reading of transcripts of defendants' statements.

4. Homicide ⚿253(1)

Evidence, independently of defendants' confessions or admissions, sustained conviction for murder in first degree.

5. Homicide ⚿309(6)

In murder prosecution, evidence was insufficient to warrant an instruction on manslaughter.

6. Criminal Law ⚿814(1)

Instructions must be responsive to the issues which are determined by the evidence.

7. Homicide ⚿308(3)

In murder prosecution, evidence was insufficient to support a conclusion, or to justify an instruction, to effect that there was sufficient provocation to reduce degree of crime to second-degree murder.

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Anthony J. Scalora, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., J. Francis O'Shea, Dist. Atty., and Edward L. McCarthy, Deputy Dist. Atty., Sacramento, for respondent.

CARTER, Justice.

Defendants James Franklin Wolfe and Joseph Johansen, while confined in Folsom State Prison serving life sentences, were charged by indictment with the murder, on May 8, 1953, of one Harold Stricker, also an inmate of Folsom, and in Count II with a violation of section 4500 of the Penal Code. They entered pleas of not guilty, and not guilty by reason of insanity, to Count I, and trial by jury was ordered. Subsequently, the plea of not guilty by reason of insanity was withdrawn, and Count II was, upon motion, set aside. After trial by jury a verdict of murder of the first degree was returned as to both defendants and the penalty was fixed at death. Defendants' motions for a new trial were denied. The appeal is automatic, Pen.Code, § 1239(b).

On May 7, 1953, Stricker and Johansen had an argument over a game of dominoes. Stricker, at that time, was apparently very angry and threatened to slap and strike Johansen, and to "get" both Johansen and his cellmate, Wolfe, if they came out in the yard the next morning. Stricker called both defendants vile names and told Johansen he would "slap the * * * out of him." That night in their cell both defendants talked the matter over; another inmate informed them that Stricker had a knife and was going to "get" both of them the next morning. Defendants discussed getting knives with which to kill Stricker; the possibility of being caught at it and receiving the death penalty was discussed between them. They testified that they had decided that, despite the penalty, they thought it was better to get Stricker before he got them. The next morning they procured knives from an unidentified source and, after again talking it over, walked around the prison yard watching Stricker who was playing dominoes. The only conversation defendants had with Stricker that morning was when Wolfe asked him if he were going to play dominoes and Stricker's reply that he was. They testified that they saw Stricker go in one of the prison buildings and come out with a jacket on; that they thought he had gotten a knife; that they walked around and finally decided they would get Stricker before he got them. The defendants approached Stricker, who was sitting down with his back toward them, and between the two of them stabbed him some seven times. Medical testimony showed that any one of these knife wounds could have caused death. Johansen's knife was found in the back of the deceased. Several guards were present at the time of the crime and testified to the manner in which defendants stabbed Stricker, and that no knife was found in Stricker's possession. Defendants testified that they knew the guards were there and watching them; that they decided it was better to get Stricker at that time because if they were caught with the knives it would mean six or seven months in "segregation" and that Stricker would then build up his reputation for violence by saying they were "weak" and "scared" and that when they got out of segregation, he would still get them. Several inmates testified to the domino argument on the 7th and that Stricker's reputation for violence was bad and that he was very belligerent.

[1] Defendants argue that the prosecuting attorney was guilty of prejudicial misconduct in two instances. Their first contention that it was prejudicial error for the prosecution to ask defendant Johansen if he left his knife in the victim's back, is without merit. The deputy district attorney asked Johansen, "[W]hat happened to your knife?" to which Johansen replied, "It was left in the *victim's* back." The next question was, "Did you leave it in the victim's back?" to which defendant Johansen replied, "Yes." There was no objection by defense counsel, nor was there any motion to strike. It is next argued that the use of the quoted expression assumes the guilt of the defendant. People v. Williams, 1860, 17 Cal. 142, relied upon by defendants is not in point. There, the trial court, in instructing the jury, said, "The fact that the deceased was a Chinaman gave the defendant no more right to take his life than if he had been a white person; nor did the fact, if you so find, that the defendant was seeking to enforce the collection of taxes against another Chinaman, *or even against his victim,* give the defendant any right to take his life. * * *" (Emphasis added.) This court, in reversing, held that the instruction assumed that the deceased was wrongfully killed when that very issue was involved and that "even an equivocal expression coming from the *judge,* may be fatal to the prisoner." (Emphasis added.) In the present case, the expression did not come from the judge, but from the prosecuting attorney without objection by defense counsel or motion to strike being made, and the jury was instructed that it was the sole judge of the value and effect of the evidence; that it could not convict a defendant upon mere suspicion; that the prosecution was "bound to establish the guilt of a defendant beyond a reasonable doubt, and unless the prosecution does so, then it is your duty to find the defendant not guilty."

[2] The second instance in which the prosecution is said to be guilty of prejudicial misconduct was in the closing argument to the jury. The following portion of the argument was made over repeated objections by defense counsel that it constituted prejudicial error. "Ladies and gentlemen, in relation to that alleged argument that occurred on the afternoon of May 7th, the one in which Wolfe and Johansen say led up to this killing, they said they had Mr. Farrington, Marty Farrington, come down and testify and he said he was playing dominos, Mr. Stricker was playing dominos, a man by the name of Jack Garner was playing dominos. They were all together when this argument also took place. Why was not Mr. [G]arner brought down by the defense to testify as to what occurred, to testify as to the argument? He was seated right at the table there. Is it possible, ladies and gentlemen, that Mr. Garner was honest enough that he wouldn't come down and perjure himself? Is it possible that that is the reason that he was not brought down by the defense? Why didn't the People bring them down? Well, ladies and gentlemen, how many convicts do you think will testify on behalf of the People in a case like this? How many convicts do you think are willing to risk their lives in order to see justice done? You know that they are few and far between, and you know that if any man, any convict came down here and testified against Mr. Wolfe and Johansen he would be setting himself up for a knife in his own back. You know that because you know as common, intelligent people that a stoolie, a man who informs or testifies against his fellow convict is the most hated, the most despised man among convicts.

"Ladies and Gentlemen, I wonder if Marty Farrington was actually one of the four who were seated at that table playing dominos that afternoon. I really wonder about that. Mr. Johansen said that the people who were playing when that argument took place were Mr. Garner, Mr. Stricker himself, and a man called Whitey *Knoles* [sic]. Whitey Knoles—now, Knoles is not anything like 'Farrington'. It is altogether different. He couldn't make a mistake like that. If Farrington were actually the one who were playing, he couldn't have done it, ladies and gentlemen. So I seriously put it to you, was Marty Farrington actually seated at that table. Does he know anything about it at all? And if he was playing, what about the rest of the convicts who came down and testified? Ladies and Gentlemen, there is testimony here that a man by the name of Clark was assaulted by Mr. Stricker the same day. Why was not Mr. Clark brought down to testify as to —[Objection by defense counsel that such a procedure would have been improper to which the Court replied that the jury would decide strictly in accordance with the evidence]. The reputation of Mr. Stricker must have been known to Mr. Clark as a fellow inmate. The reputation of Mr. Stricker, ladies and gentlemen, must have been known also to Tex Goodman. Why wasn't he brought down? * * * [Cited by defense counsel as prejudicial misconduct to which the Court replied that it was instructing the jury to decide the case strictly in accordance with the evidence.] Ladies and Gentlemen, where are the men that Stricker was allegedly talking to on May 8th, the three men that Mr. Johansen says he knows but he doesn't know their names? Why weren't they brought down? Why didn't the people bring any of these men down? Well, I think I have explained that to you pretty clearly already. * * *"

Defendants contend that this argument told the jury that had certain witnesses appeared they would have testified for the People but if they had so done, they would have risked being killed by their fellow convicts. It has been held prejudicial misconduct and prejudicially erroneous for the prosecution to comment on the failure of a witness to appear and that had he done so, he would have testified in a certain manner or to facts not in evidence, People v. Kirkes, 39 Cal.2d 719, 249 P.2d 1; People v. Evans, 39 Cal.2d 242, 246 P.2d 636; People v. Cook, 148 Cal. 334, 83 P. 43; People v. Glass, 158 Cal. 650, 112 P. 281; People v. Smith, 121 Cal. 355, 53 P. 802. Part of the argument here was directed toward the failure of the defense to produce a witness who was allegedly playing dominoes with Stricker and defendant Johansen on the day before the crime. It was said he was too honest to perjure himself by testifying for the defense that Stricker had made a threat against the lives of the two defendants and that he was afraid to testify for the prosecution because of what might thereafter happen to him at the hands of his fellow prisoners. Another part of the argument was to the effect that two prisoners whom the defense claimed Stricker had assaulted (in an endeavor to show the reputation of the deceased for violence was bad) were not produced as witnesses; still another part of the argument questioned whether one Farrington, who was a witness, had really been present at the time as he said he was or whether, as testified to by Johansen, it had been one Whitey Forbes (referred to in the argument as Whitey Knoles). There was testimony by an inmate that "Whitey" and "Marty" Farrington were the same person. Whether or not Marty Farrington and Whitey were the same person was a question of fact for the jury since the testimony on the subject did nothing more than create a conflict in the evidence. It was, however, highly improper for the prosecution to comment on the failure to produce certain witnesses and to state that the witnesses, if produced, would have been too honest to perjure themselves for the defendants and afraid to testify for the People. Such conduct should not be condoned, and is not here approved. Had the People desired to have the men alluded to produced as witnesses, the procedure common in such cases was open. It is only because of the overwhelming evidence of guilt in this case that we do not declare such misconduct sufficiently prejudicial to warrant a reversal. But we cannot say, after an examination of the entire cause, that the remarks of the prosecuting attorney were so prejudicial to defendants as to result in a miscarriage of justice. Calif. Const. art. VI, § 4½; People v. Dail, 22 Cal.2d 642, 659, 140 P.2d 828; People v.

Estorga, 206 Cal. 81, 273 P. 575; People v. Adams, 92 Cal.App. 6, 267 P. 906.

[3, 4] It is next contended that the trial court erred in failing to give certain requested instructions. The first assignment of error is that the court refused to instruct the jury that a confession must be free and voluntary. Immediately after the killing, defendants were taken to a room controlled by prison officials before a member of the district attorney's staff, a detective and a court reporter. Both defendants answered questions concerning the events of May 7th and 8th; both defendants insisted that the killing was done because Stricker was out to "get" them. Merrick, the court reporter present, testified upon questioning by the prosecution that the defendants' statements were not made under any promise and that no threat or force was used on either of them. The questions and answers were then read to the jury without objection by defense counsel. Both defendants testified at the trial and their testimony covered the same subject matter as that which is now objected to as a confession involuntarily given. While it would have been better practice to have instructed the jury as to admissions and confessions, no such instruction was requested by the defense, although it was requested by the People. In view of the fact that defendants testified at the trial in the same vein as the answers they had given just after the commission of the crime and defense counsel testified that he had no objection to the reading of the transcripts of defendants' statements, no prejudice could have resulted from the failure to so instruct. In People v. Barnes, 30 Cal.2d 524, 529, 530, 183 P.2d 654, 657, a police witness was examined for the purpose of showing that the defendants' confession had been voluntarily given. Defense counsel then stipulated that there had been no promises, no coercion and no violence. The trial court there refused to instruct the jury that it was its province to determine whether the confession had been freely and voluntarily given. We held that the stipulation "in the absence of extraordinary circumstances, removes from controversy the question of coercion." It was pointed out that there, as here, the jury was instructed merely that it was the judge of the credibility of the witnesses and of the weight of the evidence. In the case at bar, the jury was also instructed that oral admissions or statements made by a defendant at a time when he was not under oath and not testifying as a witness in the case were to be viewed with caution because he might not have understood the questions and for "other reasons." In the Barnes case we held that "It would have been better practice to instruct them [members of the jury] that they were the exclusive judges as to whether or not the confession was true [as distinguished from its voluntary character]. * * * The failure of the court to give such an instruction, however, did not prejudice defendant." We there concluded that the evidence was sufficient to sustain the verdict independently of the confession. See, also, People v. Hurst, 36 Cal.App.2d 63, 96 P.2d 1003. There is merit in the People's argument that, in the case at bar, the defendant's pre-trial statements constituted admissions rather than confessions in that defendants, at all times, insisted that the killing had been done in self-defense. In People v. Fowler, 178 Cal. 657, 666, 174 P. 892, 895, the court after commenting upon the evidence, said, "Thus the statement itself would show that the killing was done by defendant in his lawful self-defense. Such an admission, as we have shown, is not a confession of the crime, or an acknowledgment of guilt thereof. It is a declaration of innocence; that no crime was committed; that the killing of Duree was a justifiable homicide and not murder or manslaughter." See, also, People v. Arnold, 108 Cal.App.2d 719, 723, 239 P.2d 449; People v. Cryder, 90 Cal.App.2d 194, 203, 202 P.2d 765. Aside from this, however, here, as in the Barnes case, supra, 30 Cal.2d 524, 530, 183 P.2d 654, the evidence was sufficient, independently of the confession (or admission) to sustain the verdict.

[5] The second assignment of error in this respect is the failure to give an instruction on manslaughter. The jury was instructed on first and second degree murder; on self-defense; on justifiable homicide; on premeditation; on malice, both express

and implied. It would appear that there was no evidence in the record to support an instruction on manslaughter. Defendants' testimony showed that there was no sudden quarrel or heat of passion at the time of the crime so as to justify an instruction on voluntary manslaughter; that there was sufficient evidence surrounding the crime itself to show that an instruction on involuntary manslaughter would have been improper.

In People v. Mott, 211 Cal. 744, 748, 297 P. 23, 24, the court, in commenting on the appellant's refused instruction on manslaughter, said, "In the instant case, however, the defendant offered neither plea nor evidence as to any fact which would have justified the jury in finding the defendant guilty only of manslaughter. The only justification which the defendant offered for his otherwise deliberate and premeditated murder was the plea of self-defense. If the jury found that his testimony with regard to that plea was wholly unsupported and unbelievable, it had no other alternative than that of finding him guilty of a willful, unprovoked, and cold-blooded murder. Under such circumstances the authorities fully sustain the trial court in refusing to give to the jury an instruction concerning or defining manslaughter. [Citations.]" People v. Sutic, 41 Cal.2d 483, 261 P.2d 241; People v. Alcalde, 24 Cal.2d 177, 188, 148 P.2d 627.

Defendants argue that the jury should have been instructed that adequate provocation may reduce an intentional killing from murder to manslaughter and that it may also raise a reasonable doubt in the minds of the members of the jury that the defendants formed the intent to kill and carried it out after deliberation and premeditation. Defendants rely upon People v. Valentine, 28 Cal.2d 121, 169 P.2d 1, for the proposition that "* * * the existence of provocation which is not 'adequate' to reduce the class of the offense may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation." People v. Valentine, supra, 28 Cal.2d 121, 132, 169 P.2d 1, 8. It is argued, with merit, that the jury was not instructed as to what constitutes sufficient provocation to reduce the crime from murder of first degree to that of the second degree. The jury was instructed fully, in accordance with the recent decisions of this court, as to both first and second degree murder. In the instruction on the difference between first and second degree murder, the jury was told that "It [murder of the first degree] must be formed upon a pre-existing reflection *and not upon a sudden heat of passion or provocation or other circumstance* sufficient to preclude deliberation and premeditation. * * *" (Emphasis added.)

[6] In the Valentine case, supra, 28 Cal.2d 121, 169 P.2d 1, there was a quarrel immediately preceding the killing. In that case, erroneous instructions were given in several instances as the court pointed out, 28 Cal.2d at page 130, 169 P.2d at page 7: "In three essential and fatal respects the instructions given in this case resemble the instructions condemned in People v. Thomas, 1945, 25 Cal.2d 880, 156 P.2d 7: (1) The jury were told that the existence of a specific intent to kill (which, of course, exists in voluntary manslaughter and in second degree murder as well as in some types of first degree murder) constitutes a homicide murder of the first degree; (2) the effect of provocation and passion as reducing the class of a homicide from murder to manslaughter was emphasized and the effect of provocation and passion as possibly precluding or making doubtful the formation of a deliberate and premeditated intent to kill was ignored; and (3) the jury were told, in effect, that the burden of proving circumstances which would mitigate the offense from murder of the first to murder of the second degree was upon the defendant." In the case at bar, no complaint is made that the instructions given were erroneous, but only that instructions on manslaughter and provocation should have been given. From the facts as testified to by defendants themselves, it would appear that they had discussed killing Stricker the night before the crime was committed and again on the day of the crime just before breakfast. It would appear, from defendants' own story, that the crime was

either murder of the first degree, or a homicide committed in self-defense and justifiable as such. There was here no evidence of a sudden quarrel or any such passion as would make "doubtful the formation of a deliberate and premeditated intent to kill". People v. Valentine, supra, 28 Cal.2d 121, 132, 169 P.2d 1, 7. The jury was fully and fairly instructed on the law of self-defense and the fear necessary to justify a homicide. If the jury, after being fully advised on the law of self-defense, did not believe that "the circumstances [were] such as to excite the fears of a reasonable man placed in a similar position * * *" it could do no less than follow the law as set forth in the instructions relating to murder of the first degree, since defendants' own testimony negatived the theory that they were provoked, or so under the influence of passion as to make it doubtful that they could have formed a deliberate and premeditated intent to kill. It is settled law that instructions must be responsive to the issues which are determined by the evidence. The record here does not bring the case within the factual situation presented by People v. Valentine, supra, where the killing was committed during a sudden quarrel and where the deceased had been guilty of making accusations against the defendant within a few moments of the commission of the crime. In addition, other erroneous instructions in the Valentine case added to the error heretofore discussed. We said in People v. Thomas, 25 Cal.2d 880, 903, 156 P.2d 7, 19, "Provocation of a kind, to a degree, and under circumstances insufficient to fully negative or raise a reasonable doubt as to the idea of *both* premeditation *and* malice (thereby reducing the offense to manslaughter) might nevertheless be adequate to negative or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree; i. e., an unlawful killing perpetrated with malice aforethought *but without premeditation and deliberation.*

"Murder of the second degree may be defined as the unlawful killing of a human being with malice aforethought but which killing is not perpetrated by means of poison, or lying in wait, or torture, is not wilful, deliberate *and* premeditated, and is not committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem. (See Pen.Code, §§ 187, 189.) It is apparent from the facts previously recited that the homicide in this case, if it was murder at all, was murder of the second degree unless the killing was 'wilful, deliberate and premeditated.' *The existence of provocation and its extent and effect, if any, upon the mind of defendant in relation to premeditation and deliberation in forming the specific intent to kill, as well as in regard to the existence of malice* (Pen. Code, § 188), *constitute questions of fact for the jury and they should have been so advised.*" (Emphasis partially added.)

[7] In the Thomas case, as well as in the Valentine case, the murder occurred during a sudden quarrel. In the Thomas case, the question was presented whether the defendant had *previously* formed an intent to kill. In both cases, manslaughter instructions were given; in both cases, murder of the first degree was erroneously defined for the jury; in both cases there were doubtful instructions concerning the burden of proof; in both cases, the evidence was in substantial conflict. In the case at bar, there is no conflict in the evidence; no instruction was given on manslaughter; no sudden quarrel was involved; the instruction on murder of the first (as well as of the second degree) was correct, and is not questioned. The question for determination, as it appears to us, is whether the record shows *any* evidence which would warrant an instruction informing the jury that provocation insufficient to reduce the crime from murder of the first degree to manslaughter might yet be sufficient to reduce the crime from first degree murder to that of the second degree. We are of the opinion that the evidence of a quarrel the day before the killing, together with the evidence showing that the deceased had procured a knife and had threatened to kill the defendants justified the instruction on self-defense which was defendants' theory and which was fully given to the jury. We are unable to see how the evidence of the quarrel and the threat on the day before the killing *together* with the facts surrounding

the crime (the lack of conversation between the deceased and the defendants; the fact that decedent was seated, with his back to the defendants, playing dominoes with other prisoners) could be considered as sufficient to support a verdict of second degree murder. In other words, we feel that the facts of this case would not support a conclusion, or justify an instruction, to the effect that there was sufficient provocation to reduce the degree of the crime to second degree murder. The facts show that the killing was either done in self-defense, or that it was a deliberate and premeditated murder.

In view of the evidence presented, the errors complained of are not of sufficient gravity to have resulted in a miscarriage of justice, Calif. Const. art. VI, 4½, and thus warrant a reversal of the judgments.

For the foregoing reasons, the judgments and orders denying defendants' motions for a new trial are therefore affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

42 Cal.2d 602

TREU v. KIRKWOOD et al.

Sac. No. 6282.

Supreme Court of California.
In Bank.
April 1, 1954.

Mandamus proceeding by former noncivil service secretary of lieutenant governor against state controller and treasurer to compel payment of claim for overtime. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment for former secretary, and state controller and treasurer appealed. The Supreme Court, Edmonds, J., held that, where evidence in favor of one party was not clearly persuasive, and there was not any indication concerning trial judge's appraisal of such evidence, judgment would be reversed for new trial in order to obtain finding upon such issue.

Judgment reversed.

Carter, Schauer, and Shenk, JJ., dissented.

Prior opinion, 255 P.2d 409.

1. Appeal and Error 🔑1170(1)

The Supreme Court must determine from examination of entire record whether there has been a miscarriage of justice before reversing a judgment. Code Civ. Proc. §§ 469, 475; Const. art. 6, § 4½.

2. Pleading 🔑388

It is not every variance between pleading and proof that will necessitate overthrow of a judgment. Code Civ.Proc. §§ 469, 471, 475; Const. art. 6, § 4½.

3. Mandamus 🔑187(9)

In mandamus proceeding by former noncivil service employee of lieutenant governor against controller and the treasurer to compel payment of claim for overtime, variance between petition alleging promise by the lieutenant governor to give time off as compensation for overtime work and proof that promise was in fact one for additional compensation did not mislead defendants to their prejudice and was not so material that it would require a reversal. Code Civ.Proc. § 452.

4. Officers 🔑99

In its original and strict sense, term "salary" signifies a fixed compensation and is frequently used in constitution and statutes as equivalent of compensation.

See publication Words and Phrases, for other judicial constructions and definitions of "Salary".

5. States 🔑59

Under statutory provision that, unless legislature specifically provides that approval of Department of Finance is not required, whenever any state agency fixes salary or compensation which is payable in whole or in part from state funds, salary is subject to approval of Department of Finance before it becomes effective and payable, terms "salary" and "compensation" are synonymous. Government Code, § 18004.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensation".

6. States 🔑121

Purpose of statute providing that Department of Finance has general powers of supervision over all matters concerning financial and business policies of state is to conserve financial interests of state, to prevent improvidence, and to control expenditure of state money by state departments. Government Code, § 13070.

7. States 🔑53

Contract, which fixes rates of pay and working conditions, but which has not been approved by Department of Finance, is invalid. Government Code, § 18004.

8. States 🔑63

Where employment contract provision that lieutenant governor's secretary would be paid additional compensation for overtime work had not been approved by Department of Finance, secretary would not be able to recover thereon in absence of either valid contract or statute. Government Code, §§ 18004, 18005, 18023, 18024.

9. Appeal and Error 🔑1122(2)

A reviewing court is empowered to make findings of fact and to take evidence in support of a judgment. Code Civ.Proc. § 956a.

10. Appeal and Error 🔑1122(2)

Generally, a reviewing court will not make findings of fact and take evidence in support of a judgment if evidence before trial court is conflicting. Code Civ.Proc. § 956a.

11. Appeal and Error 🔑1177(6)

Where evidence in favor of one party was not clearly persuasive, and there was not any indication concerning trial judge's appraisal of such evidence, judgment would be reversed for new trial in order to obtain finding upon such issue. Code Civ. Proc. § 956a.

Edmund G. Brown, Atty. Gen., Wilmer W. Morse and Marcus Vanderlaan, Dep. Atty. Gen., for appellants.

James H. Phillips, Sacramento, for respondent.

EDMONDS, Justice.

From 1947 to 1949, Florenz Treu was a noncivil service employee in the office of the lieutenant governor. By writ of mandate, the state controller and the treasurer have been ordered to approve and pay her claim "for overtime worked * * * for which petitioner was not compensated and was not given compensating time off." The appeal is from that judgment.

In her petition for a writ of mandate, Miss Treu alleged that, prior to the time the work was performed, the lieutenant governor had established normal office hours and promised her compensating time off for work beyond those hours. All overtime work was authorized by the lieutenant governor, she said, and she did not receive time off or any other compensation for such work, nor was any offered to or refused by her. According to the petitioner, a payroll claim for the cash equivalent of the accumulated overtime hours at the time of her separation was filed by the lieutenant governor and approved for payment by the State Personnel Board, but the controller refused to issue a warrant.

By their answer, the controller and treasurer denied that any amount was due for overtime. They alleged that Miss Treu was exempt from, and never held a position in, the state civil service. Her salary, they said, was fixed by the lieutenant governor with the approval of the department of finance at a monthly rate which was paid in full and no salary or compensation on any other basis or in any form other than cash was authorized by the department.

Miss Treu was appointed secretary to the lieutenant governor on March 1, 1947, in which capacity she served for one year. She then became executive secretary. Her employment was terminated by resignation on August 1, 1949. In both positions she was exempt from civil service. During her employment, her salary, fixed on a monthly basis with the approval of the department of finance, progressively increased from $275 to $436 per month.

When Miss Treu commenced her work for the lieutenant governor, he fixed office hours from 9:00 a. m. to 5:30 p. m. on week days and from 9:00 a. m. to noon on Saturdays. At the beginning of her employment, he told her, she testified, "that there was a terrific amount of work in the office and he knew I was going to work a lot of overtime, and that I was going to be paid for the overtime that I worked". She was informed "that she would be paid for the overtime as it would be impossible for her to take any time off because of the increased amount of work."

Thereafter, the lieutenant governor wrote to the department of finance requesting a salary increase for his staff upon the basis that two employees "have taken over and are doing the work that a staff of three people performed previous to my administration. Because of their willingness to assume this additional responsibility, I feel they should be compensated accordingly". He suggested that the appropriation for his office was sufficient to increase their salaries and stated: "I do not intend to further add to my staff as long as Mr. Mydland and Miss Treu continue doing the work that has required three people". In response to this request, the director of finance approved a salary increase for Miss Treu. All of her salary was paid in full.

Prior to the filing of the claim which is the basis of this proceeding, the department of finance had not fixed or approved salary or compensation for Miss Treu on other than a monthly basis, or in amounts different than her agreed monthly salary, nor did it approve compensation in any form other than cash or fix normal working hours for her. An official record was maintained in the lieutenant governor's office showing hours which she worked in addition to normal office hours. All such work was authorized by the lieutenant governor, and she was at no time granted compensating time off for these hours.

Upon her separation from service, a claim for payment for overtime was approved by the State Personnel Board. While the claim was pending in the controller's office, a letter from the attorney general was forwarded to the controller by the director of finance. The attorney general's letter set forth seven facts upon which it said the validity of the claim would depend. Among these were that the lieutenant governor had established normal hours of work for Miss Treu and that he promised her compensating time off for extra hours worked. The covering letter from the director of finance stated that: "The seven items * * * already have been substantiated, and there is available in our files the required letters and affidavits making the required substantiation." Thereafter, the claim was rejected by the controller and this proceeding was commenced.

Upon this evidence, the trial court found the allegations of the petition to be true. Judgment was entered directing that a peremptory writ of mandate issue commanding the respondents to approve and pay her claim. The appeal is from that judgment.

In support of their appeal, the respondents contend that the finding that Miss Treu was promised compensating time off for overtime work is not supported by the evidence. In addition, they say, the judgment may not be sustained upon the theory of a contract to pay cash compensation for overtime work because no such contract was approved by the department of finance as required by statute. They argue that, in the absence of either a valid contract or a statutory provision, Miss Treu's monthly salary was payment in full for all of her services during each month, regardless of the number of hours worked. Other objections made by the respondents are that the trial court failed to find upon certain material issues and that other findings are not supported by the evidence. This court is requested to make findings of fact to conform to the proof. A final contention is that, even if Miss Treu is entitled to a cash payment for overtime work, it should be computed upon the basis of her salary at the time the work was performed, rather than her salary at the time of separation.

Miss Treu relies upon Howard v. Lampton, 87 Cal.App.2d 449, 197 P.2d 69, and Clark v. State Personnel Board, 56 Cal.App.2d 499, 133 P.2d 11, holding that a state employee is entitled, in the absence of statute, to payment upon separation from service for properly authorized overtime work. She also contends that a promise of compensating time off is not a prerequisite to payment for overtime. Even if it is, she says, the promise by the lieutenant governor to pay her for overtime work may be construed as a promise to give her compensating time off. In addition, she disputes each of the other contentions of the respondents.

In Martin v. Henderson, 40 Cal.2d 583, 255 P.2d 416, and Redwine v. Henderson, 40 Cal.2d 583, 255 P.2d 416, the Howard and Clark decisions were disapproved insofar as they determine that a state employee, in the absence of specific statutory authority, is entitled to payment for accrued overtime upon separation from service. Therefore, the question here is whether there was contractual or statutory authority for payment to Miss Treu for overtime services.

The petition specifically alleges a promise by the lieutenant governor to give Miss Treu "compensating time off for overtime hours worked in addition to her normal hours of work". The court found that the promise was made. However, the proof, in the form of a letter from the lieutenant governor to the department of finance and Miss Treu's own testimony, shows conclusively that she was not promised time off. She was told that "it would be impossible for her to take any time off because of the increased amount of work". The promise made to her was "that she would be paid for the overtime".

The respondents contend that this amounted to a failure of proof within the meaning of section 471 of the Code of Civil Procedure, rather than a mere variance. They rely upon Gillin v. Hopkins, 28 Cal.App. 579, 580–582, 153 P. 724, which held that evidence of a contract to accept payment in stock constituted failure of proof of a cause of action upon an agreement to pay a designated sum of money. The situation is analogous to that here. Obviously, a promise to grant compensating time off is far different from a promise to pay cash for overtime work. However, "(n)o variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Code Civ.Proc. § 469.

[1, 2] "The code also provides that the court must, in every stage of an action (and that means on appeal, as well as in the trial of the cause), disregard any error, improper ruling, or defect in the pleadings or proceedings, which, in the opinion of the court, does not affect the substantial rights of the parties. It must appear from the record that the error, improper ruling, or defect was prejudicial and caused substantial injury before the judgment rendered may be reversed or be held to be affected by it; and it must further appear that a different result would have been probable if such error, ruling, or defect had not occurred or existed. Code Civ.Proc. § 475. Not only do these code sections require this court, under such circumstance, to determine from an examination of the entire record, whether or not there has been a miscarriage of justice before reversing a judgment, but the state Constitution is equally mandatory and imperative. Const., § 4½, art. 6. It therefore indubitably follows that it is not every variance that will necessitate the overthrow of a judgment." Murnane v. Le Mesnager, 207 Cal. 485, 495, 279 P. 800, 804.

[3] It is obvious from a review of the record in this case that the respondents were not misled to their prejudice. They anticipated proof of a contract for payment for overtime work and introduced evidence to show that no such contract had been approved. In addition, the pleading adequately apprised the respondents of the claim which they would be called upon to meet. It alleged that "at the time of said separation from said State employment petitioner herein had accumulated and was entitled to be paid in cash by the State of California for overtime worked while an employee of

the said Lieutenant Governor in the total sum of $3,076.53". Construed liberally, as must be done, Code Civ.Proc. § 452, the petition demanded payment for overtime work for which compensation in some form had been promised. Under the circumstances, it cannot be said that the variance is so material as to require a reversal of the judgment. Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 382, 240 P.2d 580.

Although there is no evidence to support the finding that Miss Treu was promised compensating time off for overtime work, the record includes evidence tending to prove that she was promised compensation in cash for work beyond normal office hours. However, the respondents argue that the judgment cannot be sustained upon this theory because no such contract was approved by the department of finance as required by statute.

Miss Treu was appointed under the authority of section 12101 of the Government Code which provides: "The Lieutenant Governor may appoint and, subject to the approval of the Director of Finance, fix the salaries of one secretary and such clerical assistants as the Lieutenant Governor deems necessary for his office." The salary basis fixed by the lieutenant governor for Miss Treu and approved by the director of finance was one for monthly compensation without any authorization of additional payment for overtime.

Miss Treu contends that no approval by the department of finance is necessary to permit the payment of compensation for overtime. Her position, however, is directly contrary to the express provisions of section 18004 of the Government Code. At the time she commenced her employment, that section read: "Unless the Legislature specifically provides that approval of the Department of Finance is not required, whenever any State agency * * * fixes the salary or compensation of an employee * * * which salary is payable in whole or in part out of State funds, the salary is subject to the approval of the Department of Finance before it becomes effective and payable." The office of lieutenant governor is included within the term "State agency". Govt.Code, § 11000.

[4] The words "salary" and "compensation" are, in general usage, interchangeable and are synonymous in most definitions. "Compensation" is "(t)he remuneration or wages given to an employee or, especially, to an officer. Salary, pay, or emolument." Black's Law Dictionary, 4th Ed., p. 354. Likewise, "salary" is defined as "a stated compensation, amounting to so much by the year, month, or other fixed period, to be paid to public officers and persons in some private employments, for the performance of official duties or the rendering of services of a particular kind". Black's Law Dictionary, 4th Ed., p. 1503. "While the term 'salary' in its original and strict sense signifies a fixed compensation, it is frequently used in our constitution and laws as the equivalent of '*compensation*'." Martin v. Santa Barbara County, 105 Cal. 208, 212, 38 P. 687, 689.

[5–7] From the wording of section 18004 read with reference to related statutory provisions, it is obvious that "salary" and "compensation" are there used as being synonymous. Section 13070 of the Government Code provides that the department of finance "has general powers of supervision over all matters concerning the financial and business policies of the State". The purpose of the latter section "is to conserve the financial interests of the state, to prevent improvidence, and to control the expenditure of state money by any of the several departments of the state. (Ireland v. Riley, 11 Cal.App.2d 70, 72, 52 P.2d 1021.)" State of California v. Brotherhood of Railroad Trainmen, 37 Cal.2d 412, 422, 232 P.2d 857, 863. Therefore, a contract fixing rates of pay and working conditions which has not been approved by the department in accordance with section 18004, is invalid. State v. Brotherhood of Railroad Trainmen, supra.

Any doubt concerning the necessity for approval by the department of contracts for "compensation" and "salary" is dispelled by reference to section 13370 of the Government Code which, at the time Miss Treu was hired, provided: "All contracts entered into by any State agency * * * for services, are of no effect unless and until approved by the Department of Finance." Under this section, a contract to pay Miss Treu for her services, beyond normal working hours, regardless of whether payment be considered "compensation" or "salary", or both, would be invalid if lacking the approval specified by the statute.

In her petition in this proceeding, Miss Treu did not allege that the department of finance had authorized the payment to her of any amount for overtime work. The respondents pleaded in defense of her claim that no such authorization had been made.

The evidence concerning the action taken by the department of finance shows that while Miss Treu's claim was pending before the controller, several letters were written to the controller regarding it. Although in some of them, a request was made to the controller to withhold payment pending the determination by the department of certain facts, none of them placed the request upon the ground that the department had not given its approval to the working of extra hours. From this correspondence, it might reasonably be inferred that the department tacitly approved the claim except for the specific irregularities mentioned. One letter to the controller referred to an opinion of the attorney general listing the items necessary to establish the validity of the claim. Included in these prerequisites was proof "that the employee was authorized to and did work the extra hours claimed." The department stated to the controller that the authorizations enumerated by the attorney general "have been substantiated, and there is available in our files the required letters and affidavits making the required substantiation." Although the documents received in evidence tend to show that the authorization to which reference was made was only that of the lieutenant governor, they do not compel that conclusion, and it might reasonably be inferred that the department had also approved the arrangement made by him.

On the other hand, there is evidence from which it reasonably could be concluded that the department gave no such approval. Fred W. Links, assistant director of finance and chief of the division of budgets and accounts, was a witness for Miss Treu. He testified that his division handled her claim. Asked if the department of finance approved it, he answered that the function of his division was not to pass upon its validity; "[w]hat we did was merely to report to the State Controller, as we had requested him to withholding the drawing of the warrant for payment thereof until we had substantiated the facts." Asked if the department fixed or approved salary compensation for Miss Treu other than on her regular monthly basis, or if it fixed or provided for compensating time off for overtime hours, he replied that it did not do so. Although this testimony tends strongly to show a lack of approval, it too is not conclusive upon the issue. It may be that Links was speaking of a formal approval; also, there might have been a departmental approval made without his knowledge.

Although Miss Treu pleaded and tried her case entirely upon a theory of contract, she now contends that no promise of time off was necessary to entitle her to recover. She concedes that section 18005 of the Government Code, authorizing payment upon separation for accumulated overtime, was inapplicable to employees exempt from civil service during the period in question. However, she refers to Government Code sections 18023 and 18024 and Rule 133 of the Personnel Board which provide for the adoption of rules governing hours of work and the granting of time off in lieu of cash compensation for overtime. But she does not claim, nor does the record indicate, that she was within those statutory or regulatory provisions or that any statute entitled her to payment for overtime. Instead, she argues that no statutory authority is essential to permit her recovery. This point has been decided adversely to her position in Martin v. Henderson, supra.

[8] In the absence of either a valid contract or statute, there is no basis for a recovery by Miss Treu. Her monthly salary was payment in full for all of her services, without regard to the number of hours which she worked. Martin v. Henderson, supra; Jarvis v. Henderson, 40 Cal.2d 600,

255 P.2d 426; Robinson v. Dunn, 77 Cal. 473, 19 P. 878.

In summary, from the evidence presented, conflicting inferences could be drawn as to whether or not the department of finance has approved Miss Treu's claim. The issue is essential to a determination of this proceeding. It should have been alleged in the petition for mandate and determined by the findings. Cf. Delany v. Toomey, 111 Cal. App.2d 570, 571–573, 245 P.2d 26. However, no such finding was made. The trial court found that all of the allegations of the petition are true. But Miss Treu did not charge that her claim was for overtime approved by the department. The answer asserted, by way of defense that there was no such approval, and the allegations in each paragraph of the answer were found to be untrue only "so far as they deny the allegations in" the particular paragraph of the petition being answered.

The situation then is that the issue as to approval by the department of finance, fully pleaded in the respondent's answer, was not considered by Miss Treu or the trial judge to be the determinative factor basic to any recovery. Her position, undoubtedly taken in reliance upon the Clark and Howard decisions, which since have been disapproved, was that authorization by the department of finance was not a prerequisite. In her brief before the District Court of Appeal she said: "The court is reminded that there was no legal requirement for the Department of Finance to approve the working hours of petitioner or the approving of compensation for overtime."[1]

The memorandum opinion of the trial judge clearly shows that he did not believe that a promise to pay an employee additional compensation for extra time must be approved by the department of finance to make the state liable for the payment of it. As he construed section 18004 of the Government Code, it requires approval by the department of finance only of salary. "It is true", he said "that the statute states 'salary or compensation' but later each one of the clauses refers only to the word 'salary'. This court does not feel that that statute is subject to the broad interpretation which respondent puts upon it. We are of the opinion that the words 'salary or compensation' are used as interchangeable terms, but that a lump sum to be paid in lieu of compensating time off is not such 'compensation' as is meant there." Undoubtedly, that construction of the statute is the reason why no finding as to the approval by the department was made.

[9–11] Although an appellate court is empowered to make findings of fact and to take evidence in support of a judgment, Code Civ.Proc. § 956a, generally it will not do so when the evidence before the trial court is conflicting. People v. One 1949 Ford V–8 Coupe, 41 Cal.2d 123, 257 P.2d 641. This latter rule is not without exception, cf. Johndrow v. Thomas, 31 Cal.2d 202, 207, 187 P.2d 681; Gudger v. Manton, 21 Cal.2d 537, 547, 134 P.2d 217, but where, as in the present case, the evidence in favor of one party is not clearly persuasive, and there is no indication as to the trial judge's appraisal of the evidence, the judgment should be reversed for a new trial in order that there may be a finding upon the issue.

The judgment is reversed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The judicial history of this case should be of interest to the public as well as to practicing attorneys. Miss Treu filed a petition for a writ of mandate to compel payment to her by the controller and treasurer of the state of California of compensation for overtime promised her by her employer, Lieutenant-Governor Knight, now Governor of the state. Her petition was granted by the trial court and affirmed by the District Court of Appeal. 240 P.2d 32. This court granted the state's petition for hearing and rendered its first decision on April 3, 1953. That decision, which reversed the trial court, held that the contract entered into between Miss Treu and her employer was invalid for lack of approval by the Department of Finance. Mr. Justice Schauer and I filed separate dissenting opinions. On May 1, 1953, this court granted a rehearing with Chief Justice Gibson, Justices Shenk, Schauer and I voting therefor.

The present opinion holds, in accordance with my former dissent, that the evidence presented is sufficient to show a tacit or implied approval by the Department of Finance of the contract entered into between Miss Treu and her employer, the then Lieutenant Governor. In direct conflict with the former opinion, it is now held by a majority of this court that "conflicting inferences could be drawn as to whether or not the department of finance has approved Miss Treu's claim. The issue is essential to a determination of this proceeding." In the former opinion, the majority did not even recognize that there was any evidence tending to show an approval by the department. The record is the same now as it was then. However, the majority now reverse on the ground that the trial court made no finding as to departmental approval or lack thereof. With this I cannot agree.

Florenz Treu, petitioner below, was a former employee of the former Lieutenant Governor. She was appointed secretary on March 1, 1947, and served in that position until March 1st, 1948, when she was appointed to the position of executive secretary. On August 1st, 1949, she terminated her employment with the Lieutenant Governor. She was exempt, during her tenure in both positions, from civil service and its requirements. After the termination of her employment, she brought mandate proceedings in the Superior Court of Sacramento County against the state controller and state treasurer to compel them to allow a claim filed by her against the state in the sum of $3,076.53. This sum represented the cash value of compensating time off which she alleged had been promised her for overtime worked while she was employed by the Lieutenant Governor but which had not been received by her prior to her separation. The state appeals from a judgment directing that the claim be paid.

Section 12101 of the Government Code provides that "The Lieutenant Governor may appoint and, subject to the approval of the Director of Finance, fix the salaries of one secretary and such clerical assistants as the Lieutenant Governor deems necessary for his office." During the time Miss Treu worked for the Lieutenant Governor, her salary was fixed with the approval of the Department of Finance on a monthly basis in amounts which progressively increased from $275 per month to $436 per month. This salary has all been paid. Regular hours of work were established by the Lieutenant Governor as follows: 9 a. m. to 5:30 p. m., Mondays through Fridays, and 9 a. m. to 12 noon on Saturdays. Miss Treu kept a record showing the extra hours she worked and these were recorded on the monthly attendance report forms. The extra hours were authorized to be worked by the Lieutenant Governor and were supported by Authorization for Overtime Form 682. After separation from her employment without having been paid for the overtime work and without having received compensating time off, Miss Treu prepared a claim for payment which was approved by the State Personnel Board and, when later presented to the state controller was by him rejected. Thereafter these proceedings were commenced.

The state first contends that the finding of the trial court that Miss Treu was promised compensating time off for overtime work is not supported by the evidence. It is argued that the promise made to Miss Treu was not for compensating time off but for a cash payment in lieu thereof. This argument has merit. The record shows that Miss Treu was told by the Lieutenant Governor that due to the pressure of work it would be impossible for her to take time off but that she would be paid for her overtime work. This testimony was substantiated by a letter from the Lieutenant Governor to the Department of Finance. The state contends that this constitutes a failure of proof and cites, as authority, Gillin v. Hopkins, 28 Cal.App. 579, 153 P. 724, wherein it was held that evidence of a contract to accept payment in stock constituted failure of proof of a cause of action upon an agreement to pay a designated sum of money. It is provided, however, in section 469 of the Code of Civil Procedure, that no variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense on the merits. Miss Treu's petition alleged that she was entitled to be paid in cash for overtime work and the state could not have been misled inasmuch as it introduced evidence tending to prove that no contract made with Miss Treu for payment for overtime work had been approved by the Department of Finance. We said in Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 382, 240 P.2d 580, 584, that "[a] variance between the allegations of a pleading and the proof will not be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense on the merits, and a variance may be disregarded where the action has been as fully and fairly tried on the merits as though the variance had not existed." And in Chelini v. Nieri, 32 Cal.2d 480, 486, 196 P.2d 915, 918, we said: "that a variance is immaterial and may be disregarded where the case was as fully and fairly tried upon the merits as though the variance had not existed." In view of the pleading heretofore referred to and the proof adduced by both parties, it is at once apparent that the state was not misled to its prejudice. Further, the evidence is more than sufficient to show that Miss Treu was promised compensation for overtime work by the Lieutenant Governor.

The state argues, however, that no such contract is valid unless approved by the Department of Finance as required by the provisions of section 18004 of the Government Code (as the section read at the time she began work). That section provides that "Unless the Legislature specifically provides that approval of the Department of Finance is not required, whenever any State agency [in which the office of Lieutenant Governor is included, Gov.Code, § 11000] * * * fixes the salary or compensation of an employee * * * which salary is payable in whole or in part out of State funds, the salary is subject to the approval of the Department of Finance before it becomes effective and payable."

It may be taken for granted that the words "salary" and "compensation" are synonymous for the purpose of this discussion. Martin v. Santa Barbara County, 105 Cal. 208, 212, 38 P. 687.

In State of California v. Brotherhood of Railroad Trainmen, 37 Cal.2d 412, 421, 422, 232 P.2d 857, it was held that a state agency could not bind the state for wages or salary without the approval of the Department of Finance. The question of approval by the Department of Finance was the subject of conflicting evidence. In support of the determination reached by the trier of fact that Miss Treu was entitled to compensation for overtime, the record contains a letter from the state attorney general to the Department of Finance in which he set forth seven facts upon which he felt the validity of Miss Treu's claim rested. He wrote "[w]hether or not the claim is valid under the rule of that case [Clark v. State Personnel Board, 56 Cal.App.2d 499, 133 P.2d 11] is dependent, in addition to the facts shown above, upon the existence of the following facts: (1) that the Lieutenant Governor did establish normal hours of work for the employee; (2) that he did promise the employee compensating time off for extra hours worked; (3) that this promise was made prior to the time they were worked; (4) that the employee was authorized to and did work the extra hours claimed; (5) that she did not receive compensating time off or other compensation for these extra hours; (6) that she did not waive the overtime by failing to take compensating time off when offered, and finally (7) that the amount claimed is the cash equivalent of the uncompensated overtime." On February 14, 1950, the letter of the attorney general was forwarded to the controller together with an interdepartmental communication signed by James Dean, director of finance, in which he referred to the attorney general's letter stating that the "seven items which he set forth in his letter already have been substantiated, and there is available in our files the required letters and affidavits making the required substantiation." It is argued that these communications constituted a tacit approval by the Department of Miss Treu's claim for payment for overtime. The statute, Gov.Code,

§ 18004, provides that the required approval by the department must only be had before the compensation promised "becomes effective and payable" and does not provide that the approval must be had in advance of the time worked for which compensation is promised. Mr. Links, Assistant Director of Finance, in response to a question as to whether the department had approved the claim testified that "[w]hat we did was merely to report to the State Controller, as we had requested him to withhold the drawing of the warrant for the payment thereof until we had substantiated the facts." Thereafter, on February 14th, as has been hereinbefore set forth, a letter was written by the department to the controller in which it was stated "*there is available in our files the required letters and affidavits making the required substantiation.*" I am satisfied that it can be inferred from this evidence that the conduct of the Department of Finance amounted to an approval of the agreement for overtime pay between Miss Treu and the Lieutenant Governor.

The state relies upon section 13370 of the Government Code in support of its contention that "All contracts entered into by any state agency * * * for services shall not be effective unless and until approved by the Department of Finance." This section adds nothing to the discussion heretofore had. As has been seen, the department impliedly approved Miss Treu's claim for overtime compensation and the trial court so found. In this regard it should be noted that Miss Treu alleged in Paragraph XII all the facts necessary to show that the Department of Finance approved her claim. She alleged "That on the 14th day of February, 1950 the said James S. Dean informed the respondent, Thomas H. Kuchel, that certain facts necessary to be established to make said claim valid had been substantiated and that there was available in the files of said James S. Dean the required letters and affidavits making the required substantiation. The facts so substantiated and established are:

"1. That the said Lieutenant Governor did establish normal hours of work for petitioner;

"2. That said Lieutenant Governor did promise petitioner compensating time off for extra hours worked;

"3. That said promise was made prior to the time said hours were worked;

"4. That petitioner was authorized to and did work the extra hours claimed;

"5. That petitioner did not receive compensating time off or other compensation for said extra hours prior to said date of separation;

"6. That petitioner did not waive the extra hours claimed by failure to take compensating time off for said hours when offered;

"7. The amount claimed is the cash equivalent of the uncompensated overtime."

In addition, all the substantiating facts are alleged. The trial court found the allegations of this paragraph to be true and, in addition, found that the allegations of the answer denying the same were untrue. These findings are sufficient to establish the implied approval of the department. In holding that this is not a sufficient finding on the issue of approval by the Department of Finance, a majority of this court is, by a highly technical and wholly unnecessary construction thereof, depriving a working person of wages earned for work done honestly and conscientiously in reliance upon the promise of one of the highest officers of this state. It is at once apparent from a reading of the reporter's transcript as it relates the testimony of Mr. Links, Assistant Director of Finance, on direct and cross-examination, that the case was tried on the theory that approval by the Department of Finance was at issue.

It is next argued that where a public employee has a fixed monthly salary there can be no such thing as "extra" hours, or days, as a basis for overtime pay, and that Miss Treu's monthly salary was the only compensation to which she was entitled. Robinson v. Dunn, 77 Cal. 473, 19 P. 878, is relied upon in support of this contention. In the Robinson case, the Legislature sought to authorize additional payment for certain employees whose wages were fixed by law at $4 per day because these employees were obliged to work 16 hours per day rather than the hours comprising a normal working day. It was there held that the word "day" "as used in the statute, covers whatever period of the twenty-four hours the legislators choose to remain in session. * * * The services, therefore, were not 'extra', but were such as the employees were bound to render". The situation in the Robinson case is not analogous to the one under consideration. In the instant case, Miss Treu was ordered to work overtime and promised additional compensation therefor. The state's argument that "[t]he length of the work day and of the work week having been in the discretion of the appointing power, the work month for which he was paid covers whatever part of the month that the appointing power required him to work" and "[t]he long hours, therefore, which petitioner here claims she worked were not 'extra,' but were such as she was bound to render for her fixed monthly salary" shows that the present situation differs from that of the Robinson case. The overtime hours worked by Miss Treu were, in effect, such as would be worked by an *extra employee* since the appointing power—the Lieutenant Governor—promised her that she would receive extra compensation for that overtime work in addition to her fixed regular hours of work. The rule announced in Howard v. Lampton, 87 Cal.App.2d 449, 197 P.2d 69, and Clark v. State Personnel Board, 56 Cal.App.2d 499, 133 P.2d 11, now disapproved by the majority opinions in Martin v. Henderson, 40 Cal.2d 583, 255 P.2d 416, and Redwine v. Henderson, 40 Cal.2d 583, 255 P.2d 416, was in full force and effect during the time Miss Treu worked for the Lieutenant Governor and during the time this case has been under judicial review. The disapproval of the rule that a state employee, in the absence of statutory authority, is entitled to payment for accrued overtime upon separation from service, should not be permitted to operate retroactively so as to deprive Miss Treu of a vested right. In Hildebrand v. State Bar of California, 36 Cal.2d 504, 514, 225 P.2d 508, 514, this court said: "* * * it is our conclusion that the ends of justice will be served by dismissing the present proceeding without disciplinary action, thereby permitting this opinion, as the first expression of the views of this court upon the subject, to serve prospectively as a guide to the members of the profession generally, rather than to serve retrospectively to the detriment of petitioners." A note in 85 A.L.R. 262, points out that the general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision was bad law, but that it never was the law. It is also noted, however, that to this the courts have established the exception that, where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contract may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. "The true rule in such cases is held to be to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative repeal or amendment; that is to say, *make it prospective, but not retroactive.*" (Emphasis added.) See, also, People v. Maughs, 149 Cal. 253, 86 P. 187; People v. Ryan, 152 Cal. 364, 92 P. 853. Good faith and fair dealing by state officers should not only be presumed, but enforced. To hold that the disapproval of the cited cases operates retroactively deprives Miss Treu of compensation for services rendered in good faith in reliance upon not only the promise of her employer (which was impliedly approved by the Department of Finance) who held one of the highest offices in this state, but in reliance upon decisions rendered by the highest judicial tribunals of this state. Neither Miss Treu, her attorney, nor the trial court or the District Court of Appeal *could* have known that Howard v. Lampton, supra, and Clark v. State Personnel Board, supra, were to be disapproved in Martin v. Henderson and Redwine v. Henderson, supra. If this case was tried on the theory of the rule laid down in those cases, this court should not now penalize Miss Treu for having done so but should construe the pleadings and the findings liberally to the end that justice would be accomplished.

The final contention made by the state is that Miss Treu was paid in full for all overtime by a special salary adjustment granted her with the approval of the Department of Finance. On July 16, 1947, the Lieutenant Governor wrote to Mr. Links of the Department of Finance that the "salaries" of his employees should be increased to certain specified amounts for the year. The trial court found that Miss Treu did not receive compensation for the overtime hours worked. There is ample evidence in the record in support of that finding and the implication is clear that the fixed salary received by Miss Treu was to cover her fixed hours of work in view of the express promise of her employer, the Lieutenant Governor, to compensate her for overtime worked.

Other points raised by the state do not merit discussion inasmuch as there are really only two primary issues involved—whether or not the Lieutenant Governor and Miss Treu entered into a contract for the payment to her of extra compensation for overtime work and whether or not that contract was approved by the Department of Finance. On both of these issues, the trial court found in her favor and there is ample evidence in support thereof.

For the foregoing reasons, I feel compelled to say that the present majority holding in this case results in a totally unnecessary miscarriage of justice and does nothing to promote respect for the fair dealing of a prominent state official who has been prevented from keeping his word which was given in sincerity and honesty in return for work conscientiously done.

I would affirm the judgment.

SCHAUER and SHENK, Justices (dissenting).

In our view the evidence adequately supports the essential findings and such findings, construed favorable to the judgment (see Richter v. Walker (1951), 36 Cal.2d 634, 640, 226 P.2d 593), are sufficient to sustain it. Accordingly we would affirm the judgment.

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124 Cal.App.2d 321

BOCHTE v. CHESS et al.

Civ. 20040.

District Court of Appeal, Second District, Division 1, California.

March 31, 1954.

As Amended April 14, 1954.

Daughter and residuary devisee of testatrix brought suit to determine heirship and to quiet title to certain realty which had been devised by will. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment adverse to daughter and residuary devisee, and she appealed. The District Court of Appeal, White, P. J., held that where will devised grapefruit farm to trustee in trust to pay $100 a month to mother of testatrix during mother's lifetime and provided that at death of mother the farm should become sole property of trustee, devise to trustee after death of mother of testatrix was not a contingent remainder, which failed when trustee died prior to death of mother of testatrix, but was an indefeasible vested remainder.

Judgment affirmed.

1. Executors and Administrators ⚷315(6)

Suit by daughter and residuary devisee of testatrix to determine heirship and to quiet title to certain realty, which had been devised by will, in so far as the suit purported to be an attack on interpretation of will by superior court sitting in probate, was futile, since decree of distribution of that court constituted a final and conclusive construction of will as against all interested parties. Code Civ.Proc. § 738.

2. Wills ⚷697(2)

Where will devised grapefruit farm to trustee in trust to pay $100 a month to mother of testatrix during mother's lifetime and provided that at death of mother the farm should become sole property of trustee, daughter and residuary devisee of testatrix had no standing to urge ambiguity or uncertainty in language of will dealing with the farm, since the daughter and residuary devisee had no interest in the farm.

3. Wills ⚷634(3)

Where will devised grapefruit farm to trustee in trust to pay $100 a month to mother of testatrix during mother's lifetime and provided that at death of mother the farm should become sole property of trustee, devise to trustee after death of mother of testatrix was not a "contingent remainder", which failed when trustee died prior to death of mother of testatrix, but was an "indefeasible vested remainder".

See publication Words and Phrases, for other judicial constructions and definitions of "Contingent Remainder" and "Indefeasible Vested Remainder".

4. Wills ⚷634(3)

When otherwise effective conveyance of either land or thing other than land creates one of more prior interests, maximum duration of which is measured by lives, or by years, or by combination of lives or years, and then provides that on expiration of such prior limited interests ownership in fee-simple absolute of the land, or corresponding interest in thing other than land, shall belong to person who is presently identifiable, such person has an "indefeasible vested remainder".

5. Wills ⚷702

In suit by daughter and residuary devisee of testatrix to determine heirship and to quiet title to certain realty which was devised by will, court did not abuse its discretion in denying daughter and residuary devisee leave to amend complaint to allege intent of testatrix, since interpretation of will is not governed by what testatrix intended to say, but what she intended by what she did say.

◆

Henry C. Rohr, Los Angeles, for appellant.

Harry A. Pines and Adele Walsh, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff appeals from a judgment for defendants entered after demurrers to plaintiff's complaint were sustained without leave to amend.

Plaintiff is the daughter, and residuary devisee under the will, of Melba Meeker, deceased. As is set forth in the complaint, the decedent by her will, after making certain specific bequests, directed that her eighteen-acre grapefruit grove be disposed of as follows:

"I give and bequeath my eighteen acre grapefruit grove, located on Wilbur Avenue, Northridge, California, to Myer W. Chess, now residing at the Knickerbocker Hotel, Hollywood, California, in trust, to hold, however, for the following purposes:

"That he pay one hundred ($100.00) dollars per month to my mother, Nannie Joslyn, during her lifetime, and that at her death he pay her funeral expenses, and that at the death of my mother the said eighteen acre grove to become the sole property of Myer W. Chess."

Plaintiff's complaint is denominated "Petition for Determination of Heirship and to Quiet Title to Real Property." In the first cause of action it is alleged that Meyer Chess (named as trustee in decedent's will) died intestate in May, 1952, and that defendant Morris Chess was appointed administrator of his estate; that in the probate proceedings had in the estate of Melba Meeker, in June, 1946, a decree of distribution was entered which included the following reference to the real property here in dispute:

"The real estate described as follows: * * * is hereby distributed to Meyer W. Chess in trust for the following purposes: That he pay $100 per month to Nannie Joslyn during her lifetime and at her death he pay her funeral expenses and at the death of said Nannie Joslyn said real estate shall become the sole property of Meyer W. Chess. It is ordered by the court that the said trustee protect the said property during the lifetime of Nannie Joslyn against all liens, including taxes, and that the title to the said property remain in Meyer W. Chess in trust for the purposes above set forth."

It is further alleged that pursuant to the decree of distribution Meyer W. Chess "began operating as trustee and continued to act in said capacity until the date of his death on the 25th day of May, 1952. That on the date of the death of Meyer W. Chess, Nannie Joslyn was living and is now alive." It is then alleged that the defendants (the surviving brothers, nephew and niece of Meyer W. Chess) claim an interest in the real property and that "the rights of such persons so claiming an interest in said real property have not been determined by any court of competent jurisdiction."

By the second cause of action it was alleged that defendant Morris Chess, as administrator of the estate of Meyer W. Chess, has taken possession of the real property and claims the same as part of the estate of Meyer W. Chess; that said claim of the administrator is without right; "that plaintiff herein as the surviving daughter is entitled under the residuary clause of the will of Melba Meeker, deceased, her mother, to the immediate possession of said real property as her sole and separate estate. That whatever title Meyer W. Chess, deceased, held was only as trustee and upon his death with the life tenant Nannie Joslyn surviving him, said real property became part of the residuary estate of Melba Meeker, and pursuant to Paragraph Sixth of the will as referred to hereinbefore was devised to the plaintiff." (The Paragraph Sixth referred to was the residuary clause leaving the residue of the estate to the plaintiff.)

In the prayer of the complaint plaintiff asked for a decree determining her rights in accordance with the theory set forth in the last above-quoted portion of the complaint.

The demurrer of Morris Chess, individually and as administrator of the estate of Meyer W. Chess, was sustained without leave to amend. Subsequently, the demurrer of the remaining defendants was sustained without leave to amend, the minute order noting: "Plaintiff requests leave to amend as against all defendants to set forth the intent of the testatrix. Leave is denied."

Appellant contends, first, that the court abused its discretion in denying leave to amend; second, that the will is ambiguous "as to the estate for the life of the mother" and the ambiguity may be cured by extrinsic evidence in order to ascertain the true intent of the testatrix; that a true trust was not created, but that the interest of Meyer W. Chess was a contingent remainder which never vested because he died before the happening of the contingency, to-wit, the death of Nannie Joslyn.

[1] The contentions of appellant are untenable. So far as her action purports to be an attack upon the interpretation of the will by the superior court sitting in probate, such attack is futile. Section 738 of the Code of Civil Procedure provides in part that in an action to determine adverse claims to real property involving the validity or interpretation of any gift, devise, bequest or trust under a will or purported will, "if the said will shall have been admitted to probate and interpreted by a decree of the superior court sitting in probate which decree has become final such interpretation shall be conclusive as to the proper construction of said will, * * *."

The decree of distribution herein constituted a final and conclusive construction of the will as against all interested parties. Estate of Van Deusen, 30 Cal.2d 285, 290, 182 P.2d 565, and authorities therein cited.

The argument that a true trust was not created because of the uncertainty, or lack of provision, in the will as to the disposition of the income of the property should it exceed the amounts required to be paid by the terms of the trust, is of no avail to appellant. The validity of the trust was determined finally by the decree of distribution. Hamilton v. Ferrall, 92 Cal.App.2d 277, 281, 206 P.2d 663.

[2-4] Moreover, appellant has no standing to urge ambiguity or uncertainty in the testatrix' language, for the reason that appellant has no interest in the trust property, whether the devise be viewed as a trust or as a devise subject to a lien or charge in favor of the testatrix' mother during her lifetime. We are in accord with the statement in respondents' brief that "it is unequivocally clear that she (testatrix) intended to convey the property to Meyer W. Chess, subject to an equitable lien or

charge in favor of Nannie Joslyn. It is the type of estate which is thoroughly reviewed in the case of Woodley v. Woodley, 47 Cal. App.2d 188, 117 P.2d 722." The language of the will is clear, that upon the death of Nannie Joslyn the land was to become the sole property of Meyer W. Chess. The estate devised to Meyer W. Chess was not, as appellant contends, a contingent remainder which failed when he died prior to the event which would terminate the prior limited estate, but was an indefeasible vested remainder. "When an otherwise effective conveyance of either land or a thing other than land creates one or more prior interests, the maximum duration of which is measured by lives, or by years, or by a combination of lives or years, and then provides, in substance, that upon the expiration of such prior limited interests, the ownership in fee simple absolute of the land, or the corresponding interest in the thing other than land, shall belong to a person who is presently identifiable, such person has an indefeasibly vested remainder." Rest., Property, sec. 157, comment h, page 548. In many cases involving testamentary dispositions similar to the one here involved and in which the residuary devisee was able to present a much stronger argument for the view that the estate in remainder was not a vested one, the courts have held that a vested estate was created. See Estate of Welch, 83 Cal.App.2d 391, 188 P.2d 797, where trust property was to be conveyed to a grandson upon reaching the age of twenty-five, but the grandson died before attaining that age; also Estate of Riemer, 69 Cal.App.2d 634, 159 P.2d 677; Miller v. Oliver, 54 Cal.App. 495, 202 P. 168; Estate of Rider, 199 Cal. 724, 251 P. 799; Estate of Norris, 78 Cal.App.2d 152, 177 P.2d 299; Estate of Wallace, 11 Cal.2d 338, 79 P.2d 1094, where the court relied upon the above-quoted passage from the Restatement. As pointed out by respondents, consistent with the presumption in favor of the immediate vesting of estates, the courts have construed words of seeming futurity as relating to deferring possession rather than postponement of the vesting of title. Thus the words "shall be transferred and distributed" in Estate of Dunphy, 147 Cal. 95, 81 P. 315, 317; "be divided" in Estate of Heywood, 148 Cal. 184, 82 P. 755; "shall pass to and vest" in DeVries' Estate, 17 Cal. App. 184, 119 P. 109, 115; and "shall vest" in Randall v. Bank of America, 48 Cal.App. 2d 249, 119 P.2d 754, were all treated as not being inconsistent with the immediate vesting of title.

[5] There was no abuse of discretion in denying leave to amend to allege the intent of the testatrix. The interpretation of the will is not governed by what the testatrix intended to say, but what she intended by what she did say. Title Insurance & Trust Co. v. Duffill, 191 Cal. 629, 218 P. 14. Any uncertainty as to the details of the management of the trust or the disposition of its income or the duties of the trustee or remainderman are of no moment here, for the language of the testatrix is clear and unequivocal, affording no ground for admission of evidence as to her intent, so far as concerns the absolute vesting of title in Meyer W. Chess. Moreover, as heretofore stated, the matter was conclusively determined by the decree of distribution. Hamilton v. Ferrall, supra; Federal Farm Mtg. Corp. v. Sandberg, 35 Cal.2d 1, 215 P.2d 721.

For the reasons stated, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

124 Cal.App.2d 326

McNEIL
v.
CITY OF MONTAGUE.
Civ. 8301.

District Court of Appeal, Third District, California.
March 31, 1954.

Individual brought action against city to recover for damage or destruction of his property by fire when city, while acting in its governmental capacity, burned dry grass and weeds near city hall, and fire spread and destroyed or damaged property of individual. The Superior Court of Siskiyou County, James M. Allen, J., entered judgment adverse to individual, and individual appealed. The District Court of Appeal, Paulsen, J. pro tem, held that individual was not entitled to recover on ground that there was a taking and damaging of his property for public use within meaning of constitutional provision that private property shall not be taken or damaged for public use without just compensation.

Judgment affirmed.

Eminent Domain ⟹2(1)

Where city, while acting in its governmental capacity, burned dry grass and weeds near city hall, and fire spread and destroyed or damaged property of individual, individual could not recover from city for damage or destruction of his property on ground that there was a taking and damaging of his property for "public use" within meaning of constitutional provision that private property shall not be taken or damaged for public use without just compensation. Const. art. 1, § 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Use".

◆

Barr & Hammond, Yreka, for appellant.

Tebbe & Correia, Yreka, for respondent.

PAULSEN, Justice pro tem.

The appellant seeks to recover damages for property alleged to have been destroyed or damaged by fire which spread from one set by the agents of the city while they were burning dry grass near the city hall for the purposes of fire suppression and weed control.

The complaint attempts to state two causes of action. The first was based upon negligence in permitting the fire to escape. The second was based upon the same acts and recites:

> "That upon the 2nd day of August, 1951 while acting in its governmental capacity and doing an act in its governmental capacity, to-wit, the burning of weeds for the purpose of limiting fire hazard and suppressing weeds, and in the course of said action in the governmental capacity, the said City of Montague took certain personal property of the plaintiff, to-wit, one building at the value of $8,000.00 or thereabouts, certain soda fountain equipment at the value of $3,000.00 or thereabouts and certain tar paper at the value of $1,000.00 or thereabouts."

A demurrer to the complaint was sustained without leave to amend and the appeal is from the judgment entered thereon.

It is the appellant's contention that the facts alleged show a violation of Section 14, Article I of the Constitution of California, which provides in part as follows:

> "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *."

Appellant does not question the correctness of the court's ruling so far as it relates to the first cause of action and concedes that he could not state a cause of action against the city based on negligence.

In Hanson v. City of Los Angeles, 63 Cal. App.2d 426, 147 P.2d 109, it was established that defendant city through its authorized agents had burned weeds for the purpose of abating a nuisance on a lot adjacent to a piece of real property owned by the plaintiff and had negligently permitted the fire to spread and had thereby destroyed plaintiff's property. The sole question considered in that case was whether the city in so doing was acting in a governmental or proprietary capacity. It was held that the city was acting in a governmental capacity and that plaintiff could not recover because of the negligence of its employees. On that ground the judgment for plaintiff was reversed with direction to the trial court to enter judgment for defendant. The question of damages for a public use was not raised or discussed in that case.

Appellant does contend, however, that he has stated or can state a cause of action based on the theory that if the employees of the city while lawfully burning weeds on the lot occupied by the city hall negligently permitted the fire to escape and damage his property, it has been so damaged for a public use. In support of his contention he cites Tormey v. Anderson-Cottonwood Irr. District, 53 Cal.App. 559, 200 P. 814, and Ketcham v. Modesto Irr. Dist., 135 Cal.App. 180, 26 P.2d 876.

In those cases the plaintiffs sought damages because the defendant irrigation districts were operating canals in such a manner that seepage water was escaping and depriving the plaintiffs of the full use of their lands adjoining the canals. The lands used for the canals had admittedly been acquired and were being used for public purposes and the extension of the use through the seepage of water to the lands adjoining was also clearly for a public use and it was so held. It may be noted here also that upon a proper showing the lands covered by seepage water could have been condemned for the use of the districts.

The exact point presented for consideration here was decided by the Supreme Court after the decision in Tormey v. Anderson etc. District, supra. In Miller v. City of Palo Alto, 208 Cal. 74, 280 P. 108, the employees of the defendant city had used a vacant lot near the property of plaintiff for the burning of garbage and had carelessly permitted the fire to escape and damage the plaintiff's property. It was contended there, as here, that this constituted a taking or damaging of private property for public use. The court, after stating there was no merit to the contention, said, 208 Cal. at page 77, 280 P. at page 109:

> "* * * A public use is 'a use which concerns the whole community, as distinguished from a particular individual or a particular number of individuals; public usefulness, utility, or advantage, or what is productive of general benefit; a use by or for the government, the general public, or some portion of it.'"

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

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124 Cal.App.2d 874

Lewis BERG and Leonard Bickle, doing business as the Yreka Seed and Grain Co., plaintiffs and appellants, v. CITY OF MONTAGUE, a Municipal Corporation, and Larry Lynch, defendants and respondents.

Civ. 8302.

District Court of Appeal, Third District, California.

March 31, 1954.

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Barr & Hammond, Yreka, for appellants.

Tebbe & Correia, Yreka, for respondents.

PAULSEN, Justice pro tem.

This is a companion to the case of McNeil v. City of Montague, Cal.App., 268 P.2d 497.

Except as to parties plaintiff and the allegations of property damage the facts are identical and the allegations of the complaint are substantially the same.

On the authority of McNeil v. City of Montague the judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

124 Cal.App.2d 414

PEOPLE v. STEIN.

Cr. 5080.

District Court of Appeal, Second District,
Division 1, California.
April 5, 1954.

Defendant was convicted of having violated Penal Code provision relating to bookmaking. The Superior Court of Los Angeles County, Arthur Crum, J., entered judgment, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law 🔑563

The corpus delicti may be established by circumstantial evidence.

2. Criminal Law 🔑260(11)

In a criminal proceeding before judge without jury weight and value of evidence was for trial judge.

3. Gaming 🔑98(3)

Evidence was sufficient to sustain conviction for violation of Penal Code provision relating to bookmaking. Pen.Code, § 337a, subd. 2.

◆

Arthur F. Larrabee, Los Angeles, Arthur O. Aragon, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Martin M. Ostrow, Dep. Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment.

Defendant was charged with the violation of Section 337a, Subdivision 2, of the Penal Code which relates to "bookmaking". A jury was waived and the issue presented on the transcript of the preliminary examination. Defendant was adjudged guilty and appeals from the judgment.

As recited in appellant's brief, "On January 11, 1941 at about 11:30 in the morning, three police officers from the Wilshire Vice Squad arrived at a four-story apartment house located at 665 South Cochran in the City of Los Angeles. They went to Apartment No. 205 and one of the officers (W. R. Morgan) listened at the door and could hear a man's voice using a telephone inside the apartment but he could not distinguish what was being said. He could hear numbers but could not quite distinguish what they were. He did not see who was in the apartment and did not see anybody in there. This officer then left the other two officers sitting in the lobby where they could see the door to apartment 205, a very short distance away, and went outside looking for the manager. He went down through the building, through the basement and out the side and up the south side of the building outside. This was about three or three and one-half minutes after he had listened at the door, and after that he came back so that he was only gone about three and one-half minutes. During these three or three and one-half minutes he was gone, he walked along the south side of the apartment building, and as he was directly opposite or beneath where this apartment 205 is located, he heard a noise up above him and the screen window of the bathroom opened and some papers came fluttering down. He waited for them to fall to the ground and he gathered them up and he found them to be what he called "Betting Markers and a Scratch Sheet". The defendant did not testify. The foregoing is not all of the evidence. Following the arrest appellant's conversation with the officers included, in effect, an admission of guilt.

It is contended on appeal:

"I

"That the final judgment of conviction is contrary to law.

"II

"That the final judgment of conviction is contrary to the evidence.

"III

"That the court erred in the decision of questions of law arising during the course of the trial.

"IV

"Errors of law occurring at the trial and excepted to by defendant."

[1–3] The record does not support appellant's contentions. It is well settled that the corpus delicti may be established by circumstantial evidence. The weight and value of evidence is for the trial judge. As a matter of law the evidence was sufficient to support the trial judge's conclusions. There are no prejudicial errors in the record.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

124 Cal.App.2d 202

ROBERTS et al. v. CRAIG et al.

Civ. 15737.

District Court of Appeal, First District, Division 1, California.

March 29, 1954.

Action against holder of limited instruction permit and her husband for injuries allegedly sustained by occupant of automobile as a result of negligent operation thereof by permittee. The Superior Court, Contra Costa County, Harold Jacoby, J., entered judgment on a verdict in favor of plaintiffs, and defendants appealed. The District Court of Appeal, Peters, P. J., held that, though injured occupant was a licensed automobile operator and driver held only a limited instruction permit, negligence of driver was not imputable as a matter of law to licensed occupant and that whether occupant was a guest or passenger was a question of fact for jury under the evidence.

Judgment affirmed.

1. Appeal and Error 🔑930(1)

The evidence most favorable to plaintiffs must be accepted on appeal from judgment entered on a verdict in favor of plaintiffs.

2. Negligence 🔑14

Vicarious liability is the exception and a person, himself free from fault, is not generally required to bear the consequences of the actions of another nor is negligence of one person imputed to another non-participant except in the clearest of cases and where the interests of justice demand it.

3. Action 🔑14

Vicarious liability should be imposed only where one person actually acts through another to accomplish his own ends, and while right of control over the person is a test of the required relationship, it is not in itself justification for imposing liability.

4. Joint Adventures 🔑1.15

To establish a "joint adventure" there must be clear evidence of a community of interest in a common undertaking in which each participant has or exercises the right of equal or joint control and direction.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Adventure".

5. Joint Adventures 🔑1.1

A joint adventure is a sort of mutual agency, akin to a limited partnership.

6. Automobiles 🔑198(4)

That driver of automobile and companion have certain plans in common is not sufficient in itself to establish a joint adventure, unless there is such a community of interest that companion is entitled to be heard in the control of the vehicle.

7. Automobiles 🔑198(1)

Where licensed automobile driver actively and negligently assumes to interfere with operation of automobile by holder of limited instruction permit or fails to object to patent mismanagement of automobile or otherwise fails to use reasonable care as an instructor, licensee may be held liable to third persons for such negligence, regardless of whether the parties were engaged in a joint enterprise. Vehicle Code, § 253.

8. Negligence 🔑135(8)

Evidence failed to establish that holder of instruction permit and licensed automobile driver who accompanied her merely as an accommodation to permittee were engaged in such a joint enterprise as would justify imputing negligence of permittee to licensee. Vehicle Code, § 253.

9. Negligence 🔑93(12)

Where holder of limited instruction permit and licensed automobile driver who accompanies permittee merely as an accommodation to permittee are not engaged in a joint enterprise, the mere right, not exercised by licensee, to control operation of automobile by permittee is insufficient to justify imputing negligence of permittee to licensee in action against permittee for injuries sustained by licensee as a result of negligent operation of automobile by permittee. Vehicle Code, § 253.

10. Negligence 🔑89(1)

Negligence of one member will not be imputed to another member of joint enterprise so as to bar her cause of action against negligent member of joint enterprise for injuries sustained as a result of such negligence.

11. Negligence 🔑89(1)

Negligence of one member of a joint enterprise is imputed to other members and liability imposed on all when action for damages resulting from such negligence is brought by a third person in order to protect third persons from loss caused by the joint enterprise.

12. Negligence 🔑136(30)

In action by licensed automobile driver and her husband against holder of limited instruction permit and her husband for injuries sustained by licensee as a result of negligent operation of automobile by permittee, negligence of permittee was not imputable as a matter of law to licensee who accompanied permittee as an accommodation to permittee, regardless of whether licensee and permittee were engaged in a joint enterprise. Vehicle Code, § 253.

13. Automobiles 🔑245(24)

In action against driver of automobile and her husband for injuries sustained by occupant, whether occupant, who was a licensed automobile driver, was a guest and not a passenger and hence not entitled to recover for negligence of driver was a question of fact for jury under evidence that driver wished to make trip in order to secure husband's salary checks and that licensee had no reason to make trip except to accommodate driver who had only a limited instruction permit and could not lawfully operate automobile unless accompanied by and under immediate supervision of licensed operator. Vehicle Code, § 253.

14. Automobiles 🔑245(87)

A licensed automobile driver riding with holder of limited instruction permit does not as a matter of law assume the risk of permittee's negligence. Vehicle Code, § 253.

15. Automobiles 🔑245(87)

Whether licensed automobile operator riding in automobile driven by holder of limited instruction permit assumed the risk of driver's negligence so as to bar recovery for injuries sustained by licensee as a result of such negligence was a question of fact for jury under the evidence. Vehicle Code, § 253.

◆

Tinning & DeLap, J. Vance Porlier, Richmond, for appellants.

Louis J. McKannay, Concord, Carlson, Collins, Gordon & Bold, Richmond, George R. Gordon, Martinez, for respondents.

PETERS, Presiding Justice.

Plaintiff, Mrs. Roberts, was a licensed automobile driver. Defendant, Mrs. Craig, possessed a limited instruction permit under section 253 of the Vehicle Code which entitled her to drive only when accompanied by and under the supervision of a licensed driver. Mrs. Roberts accompanied Mrs. Craig on a trip. Mrs. Craig drove the automobile. She so negligently operated the car that an accident resulted and Mrs. Roberts was injured. In this action by Mrs. Roberts and her husband against Mrs. Craig and her husband the jury brought in a verdict in favor of the plaintiffs. Defendants appeal from the judgment entered on the verdict, their main contention being that Mrs. Roberts was guilty of contributory negligence because the negligence of Mrs. Craig, as a matter of law, was imputable to Mrs. Roberts.

[1] The facts are not substantially in dispute. Both parties live near Concord, in Contra Costa County. They were on their way to Martinez when the accident happened. They had been friends for several years. Although there is some conflict in the testimony as to why they were going to Martinez, the evidence most favorable to respondents, which we must accept on this appeal, is to the effect that during a visit of respondent at the home of appellant on May 3, 1951, appellant stated that she wanted to make the trip to try and collect some salary checks of her sailor husband, and, because she had only a limited instruction permit, she did not want to go alone, but wanted a licensed operator to accompany her. She asked respondent if she would do so. Respondent had no personal reason to go to Martinez, but agreed to accompany appellant as an accommodation to her friend. Appellant admitted that before asking respondent she had asked two other friends to accompany her, but they had been unable to make the trip.

It was agreed that appellant would call for respondent the next morning. On the morning of May 4, 1951, respondent discovered, rather unexpectedly, that she could have the use of her own car that day because her husband did not need it. She decided to drive over to appellant's home and offer to take her to Martinez in respondent's car. On the way she met appellant who was driving over to pick up respondent pursuant to their prior agreement. Respondent offered the use of her car, but appellant stated that she felt fine, was not nervous, and wanted to drive her own car. Respondent's car was returned to its garage, and the two friends, in appellant's car and with appellant driving, proceeded on their trip.

The accident occurred at the intersection of Willow Pass Road, on which appellant and respondent were traveling, and the Arnold Industrial Highway. About three-quarters of a mile before reaching this intersection appellant said something about the car not acting right, and asked respondent if she noticed anything "funny" about its performance. Respondent replied that she was not familiar with that car's operation, but that she did not notice anything wrong with its performance.

After this conversation, the two friends proceeded without incident to the intersection. Here appellant stopped for a stop sign. Appellant and respondent looked for approaching traffic in both directions on the Arnold Industrial Highway. Respondent told appellant, which was the fact, that the traffic was clear, and appellant started into the intersection. The car started jerking, whereupon appellant fed it more gas, and the car jerked forward. Thereupon, appellant apparently froze at the wheel and completely lost control of the car. Three times respondent told her to apply her brakes, but appellant failed to do so. The car turned sharply, jumped over two six-to-eight-inch curbs located along the edges of the dividing strip of the highway, traversed the other side of the highway, and went over an embankment and down a deep gully bordering the highway. Respondent received serious injuries, forming the basis of this action.

It is conceded that the evidence supports the finding that appellant was guilty of ordinary negligence proximately causing the accident. But, says appellant, under the provisions of section 253 of the Vehicle Code requiring a permittee to whom an instruction permit has been issued to be accompanied by and under the supervision of a licensed operator, all acts of negligence of the permittee in driving the car are imputable, as a matter of law, to the licensed driver riding with the permittee. If this were the proper interpretation of the section it would prevent recovery in the present action.

The section reads as follows: "Any person over the age of fourteen years may apply to the department for an instruction permit. The department for good cause may issue to the applicant an instruction permit which shall entitle the applicant while having such permit in his immediate possession to drive a motor vehicle upon the highways for a period not exceeding six months *when accompanied by, and under the immediate supervision of, a licensed operator or chauffeur, * * *.*" (Italics added.)

But little aid as to the meaning of the section is to be found in its legislative history. The original section relating to permits was section 59 of the California Vehicle Act. Stats. of 1923, Chap. 266, at p. 531. A temporary permit of the general type of an instruction permit was first mentioned in the section as a result of a 1925 amendment to section 59. Stats. of 1925, Chapter 239, at p. 394. As then amended the section provided for the issuance of a temporary permit allowing the holder to drive a motor vehicle for a limited period "when accompanied by a licensed operator". In 1935 this section became codified as section 253 of the Vehicle Code, Stats. of 1935, Chapter 27, at p. 129, and, as first adopted in that year, contained the language last quoted. But later in the 1935 session, Stats. of 1935, Chapter 570, at p. 1665, the section was amended by changing the phrase "when accompanied by a licensed operator" to "when accompanied by, and under the immediate supervision of, a licensed operator". Although the section has been amended several times since 1935, the language here involved was not changed and appears in the section as presently effective.

No California cases have been found interpreting the portion of the section here involved. Appellant urges that since the "supervision" of the permittee has been placed in the licensee, each act of the permittee necessarily becomes the act of the licensee. Such interpretation would mean that the licensee is not only barred from any action against the permittee growing out of the operation of the car, including an action based on the willful misconduct of the permittee, but also that the licensee would become liable to third persons injured as a result of the negligence of the permittee, and perhaps would become criminally liable for penal violations of the permittee. The language used does not permit such an interpretation. It is worthy of note that when the Legislature intended to make a person jointly liable with the driver of a vehicle to third persons it had no difficulty in finding language to express that intent. Thus, section 402 of the Vehicle Code expressly makes the owner liable for the negligence of a person operating the car with his consent. Section 352 makes an adult signing a minor's application similarly liable. No such provisions are found in section 253. The significance of the absence of such language was commented on by the New York court in interpreting a similar statute in Sardo v. Herlihy, 143 Misc. 397, 256 N.Y.S. 690, 691. In that case, as in the instant one, the plaintiff was a licensed driver riding with an operator who had what, under New York law, was called a "learner's" permit. The car in which plaintiff was riding collided with that of defendant under circumstances where the jury found that the holder of the learner's permit and the defendant were both guilty of negligence. It was urged, as it is in the instant case, that the negligence of the learner was imputable to the licensee rider, so as to make him guilty, as a matter of law, of contributory negligence. The applicable New York statute provided that: "'The holder of a learner's permit shall not operate or drive a motor vehicle unless at all times under the immediate supervision and control of a driver duly licensed'". Vehicle and Traffic Law, § 20, subd. 4, par. b, McK. Consol.Laws, c. 71. Note that this language is almost identical with section 253 of our Vehicle Code. But the New York statute went beyond the language of the California section. After providing that it was unlawful for an unlicensed person to give instructions in driving to anyone, the statute provided that any licensee "'when instructing another, shall be liable with him for any breach of this article or of the general highway traffic law, or of any local ordinance, rule or regulation.'"

In spite of the fact that the New York statute, unlike its California counterpart, makes the licensee criminally liable for the acts of the permittee the New York Supreme Court held that its statute did not result in the imputation of the negligence of the permittee to the licensee in a civil action. The Court pointed out that the supervision and control granted the licensee is over the person of the permittee and is not over the vehicle being driven. That is equally true of the California statute, which certainly does not grant the licensee physical control over the permittee's vehicle. The New York court also pointed out that at common-law there was no doctrine of imputation as a matter of law of the negligence of a student driver to his instructor, and held that when the New York Legislature intended to impute the negligence of a driver to another it did so by express statutory provisions similar to sections 402 and 352 of the California Vehicle Act. From this reasoning the court concluded that the New York statute while it "attempted to make the licensed driver liable penally for violations of the statute" it "had no effect upon his civil liability or rights, and should not be so construed." 256 N.Y.S. at page 693. This reasoning is most persuasive, and is in accord with the cases from other states that we have found interpreting such statutes. Van Sciver v. Abbott's Alderney Dairies, 143 A. 153, 6 N.J.Misc. 949; Wolpert v. Garrett, 278 App.Div. 893, 105 N.Y.S.2d 21; see, also, Vidal v. Town of Errol, 86 N.H. 1, 162 A. 232. We have found no case holding to the contrary.

[2–6] Appellant argues, however, that the statute declares that the parties share control over the operation of the car, that this makes them joint adventurers, and, therefore, that the negligence of the permittee is imputable to the licensee. Similar arguments were found to be unsound in the cases above cited, and rightfully so. The negligence of one person is not imputed to another non-participant except in the clearest of cases and where the interests of justice demand it. The fundamental rule is that one person, himself free from fault, shall not be required to bear the consequences of the actions of another. Vicarious liability is the exception. It is only where a person actually acts through another to accomplish his own ends that the law will or should impose such vicarious liability. Right of control over the other person is a test of the required relationship, but it is not itself the justification for imposing liability. Aside from such legal relationships as master and servant, principal and agent, etc., before the courts will find that the parties were joint adventurers there must be clear evidence of a community of interest in a common undertaking in which each participant has or exercises the right of equal or joint control and direction. Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385; Pope v. Halpern, 193 Cal. 168, 223 P. 470. A joint venture is a sort of mutual agency, akin to a limited partnership. Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601; Westcott v. Gilman, 170 Cal. 562, 150 P. 777; Arnold v. Humphreys, 138 Cal.App. 637, 33 P.2d 67. It is not sufficient that the parties have certain plans in common, but the community of interest must be such that the passenger is entitled to be heard in the control of the vehicle. Pope v. Halpern, 193 Cal. 168, 223 P. 470; Campagna v. Market St. Ry. Co., 24 Cal.2d 304, 149 P.2d 281; Miller v. Peters, 37 Cal.2d 89, 230 P.2d 803; Flores v. Brown, 39 Cal.2d 622, 248 P.2d 922. Most of the cases indicate that the common interest must be of some business nature. 20 Minn.Law Rev. 401, 404; 16 Cornell Law Quarterly, 320.

[7, 8] Of course, if the licensee actively and negligently assumed to interfere with the operation of the car, or failed to object to patent mismanagement of it, or failed otherwise to use reasonable care as an instructor, regardless of whether the parties were engaged in a joint enterprise, the jury could find the licensee negligent. But here it did not. Here the contention is that, as a matter of law, the parties were engaged in a joint enterprise and that the negligence of one is imputed to the other. There is no basis for such conclusion.

[9] Appellant claims to have found language contrary to these conclusions in Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914. In that case the parties were engaged in a joint enterprise in the legal sense in that they were on a trip to Lake Tahoe on business of joint interest when the accident occurred. The plaintiff, a rider in the car, was injured as a result of the negligence of the defendant driver. In spite of the fact that the parties were joint adventurers

on the trip, a verdict for the plaintiff, who was held to be a passenger and not a guest, was upheld. The reason given for holding that the negligence of the driver was not imputable to the passenger was because there was no evidence "that the passenger had joint control of the operation of the vehicle." 9 Cal.2d at page 290, 70 P.2d at page 915. Appellant here seizes upon this phrase and contends that here such control existed by virtue of the statute. There the parties were joint adventurers in fact, here they were not. If the parties are joint adventurers, the right to control becomes of legal significance. If they are not so engaged the mere right to control which is not exercised is not sufficient to create the vicarious liability.

[10, 11] There is another complete answer to this contention. Not only were the parties not in fact joint venturers, but even if they were, the negligence of appellant would not be imputed to respondent so as to bar her cause of action against appellant. The doctrine of imputed negligence is indulged in to protect third persons from loss caused by the joint enterprise. Liability is imposed on all members engaged in a joint enterprise when the action is brought by a third person because the courts have felt that in such a case fairness requires that the joint enterprise should bear the damages caused by the negligence of any member of the enterprise. But this basic cause for the imputation of the negligence of one to another does not exist when one member of the joint enterprise sues another. The better reasoned cases hold that the doctrine of imputed negligence will not be indulged in where the action is between members of the joint enterprise. Dean Prosser, in his well-reasoned text on Torts, states (p. 496): "A few courts, entirely mistaking the nature of the vicarious liability in the joint enterprise cases, have held that the negligence of the driver is to be imputed to the passenger to bar recovery even when he brings his action against the negligent driver himself. There seems to be no possible justification for such a result. It is well settled that the vicarious liability which is designed for the protection of third persons against the risks of the enterprise does not extend to any action between the parties themselves, and that a negligent servant will be liable to his master, or one member of a partnership to another. Most of the courts which have considered the question have recognized this, and have held that the driver's negligence, which is itself the cause of action, will not bar the passenger's recovery."

This rule has been recognized in this state. In Ledgerwood v. Ledgerwood, 114 Cal.App. 538, 300 P. 144, a mother was riding in a car driven by her adult son. The car was the community property of the mother and her husband. The son negligently operated the car, resulting in injuries to the mother. A judgment in favor of the mother was affirmed. The court made the following two comments:

"Appellant seeks to charge respondent with imputed negligence upon the theory of joint enterprise and also upon the theory that respondent was the owner of the car and therefore theoretically had the right of control. We need not stop to consider the sufficiency of the evidence to show joint enterprise nor whether the respondent might properly be deemed the owner because of her community property interest in her husband's car. We may assume that respondent was the owner of the car and that the parties were engaged in a joint enterprise, but in our opinion the negligence of appellant may not be imputed to respondent, and her right of recovery is not defeated in the absence of actual negligence on her part." 114 Cal.App. at page 541, 300 P. at page 145.

After discussing the reasons for this rule, and citing many cases, the court stated 114 Cal.App. at page 543, 300 P. at page 146: "In our opinion, where the injured party brings an action against the driver based upon the negligence of such driver, neither the fact that such injured party is the owner of the car, nor the fact that he is the employer or principal for whom the driver is acting, nor the fact that he is engaged in a joint enterprise with the driver, should defeat the action. It goes without saying that an owner, employer, principal or any other person who is personally present may be chargeable with contributory negligence in an action brought by such person against the driver, but in such cases it is actual negligence and not imputed negligence which bars the recovery."

[12] For these several reasons it is our opinion that the negligence of the permittee is not imputable as a matter of law to the licensee, where the licensee sues the permittee either under the statute or under the facts, or both.

[13] Appellant next contends that respondent, as a matter of law, was a guest and not a passenger and therefore cannot recover for the negligence of the driver. The trial court left this issue to the jury, and it has impliedly found that respondent was a passenger and not a guest. Under the evidence, this was a fact issue.

It is appellant's theory that this was a social and not a business trip, and that, under the rule announced in Brandis v. Goldanski, 117 Cal.App.2d 42, 255 P. 36, respondent is barred from recovery. There it was held that where the automobile trip is for pleasure of both parties, the mere exchange of social courtesies is not a benefit so as to amount to compensation that would make the rider a passenger and not a guest. Here, however, the jury, based on respondent's evidence, was justified in finding that the primary purpose of the trip was the business of the driver and that compensation was given by the rider. Appellant wanted to make the trip to Martinez to secure her husband's salary checks. Respondent had no business to transact in Martinez and had no reason, business or social, to go there. She was asked by appellant to go as an accommodation because the law prohibited appellant from driving without a licensed driver in the car. Thus, the implied finding that the primary purpose of the trip was the business of appellant is supported. The required "compensation" can be found in the furnishing of herself and her driver's license to appellant in order that appellant could comply with the law.

The problem here involved is very similar to the one involved in Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704. In that case the driver asked her friend to drive to town with her in order to help the driver select certain Christmas presents. The friend had some knowledge not possessed by the driver of the desires of the proposed recipients and of the sizes of various articles of wearing apparel required to fit their needs. The rider thus invited had already done her shopping and had no other reason for making the trip. The trial court granted a nonsuit, which was reversed, the court holding that whether the rider was a passenger or a guest was a jury question. "In the present case the evidence that plaintiff took the trip at defendant's request in order to aid defendant with her Christmas shopping clearly shows a substantial benefit to defendant", 23 Cal.2d at page 241, 143 P.2d at page 706, so as to make the question one of fact for the jury. That is equally true in the instant case.

[14, 15] The last contention of appellant is that, as a matter of law, respondent assumed the risk of appellant's negligence. It is claimed that respondent knew that appellant was an inexperienced driver, knew that appellant had only an instruction permit, and knew generally the provisions of such permit. Appellant also points out that before starting on the trip respondent asked appellant how she felt and suggested that they should make the trip in her car. Some reliance is also placed on the evidence that shortly before the accident appellant asked respondent if she noticed that the car was not acting properly, it being contended that this should have indicated to respondent that the car was defective and that appellant was an inexperienced driver. The appellant does not mention the evidence to the effect that respondent knew that appellant had completed a full course in a driver's school and had taken some extra lessons to prepare herself for her driver's test, or that respondent knew that appellant was accustomed to driving about Concord, apparently without anyone else

in the car, or that respondent had ridden with appellant on at least one previous occasion. It is not the law that a licensed operator riding with a person who possesses only an instruction permit, as a matter of law, assumes the risk of the driver's negligence. Whether there has been such assumption is a fact question. Here, under the evidence, the issue was properly left to the jury.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

124 Cal.App.2d 368

HAYWARD v. HAYWARD.

Civ. 20031.

District Court of Appeal, Second District, Division 2, California.

April 2, 1954.

Proceedings on application, following divorce, for modification of custody order with reference to minor child. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered order granting the father custody, and the child's mother appealed. The District Court of Appeal, Fox J., held that evidence warranted conclusion that best interests of child warranted a modification of custody order.

Order affirmed.

1. Parent and Child 🔑2(3.1, 4)

A trial court has a broad discretion when passing on an application for change of custody of children, and it is the welfare of the child that is determinative.

2. Parent and Child 🔑2(4)

The exercise by the trial court of its discretion on an application for change of custody of a child will not be disturbed on appeal in absence of clear showing of an abuse of such discretion.

3. Divorce 🔑303(3)

In proceedings on application by father, from whom mother of child was granted a decree of divorce, for change of custody of infant son given into custody of mother, under agreement whereby son was to be cared for by another person because of mother's illness, order giving custody to father, with right of possession in mother every other week-end, and at other reasonable times, was not an abuse of discretion under the evidence.

◆

Boyle, Bissell & Atwill, Robert C. Mardian, Pasadena, for appellant.

James D. Caribaldi, Los Angeles, for respondent.

FOX, Justice.

When plaintiff was granted an interlocutory decree of divorce in September, 1951, the parties were given joint custody of their infant son, who was then 17 months old. They agreed, however, that a Mrs. Stevenson, who had been caring for the child since January because of the mother's ill health due to a cerebral hemorrhage resulting from an aneurysm of the brain, should continue to have his physical custody and care. This arrangement has since continued. In the meantime a final decree has been entered; defendant has remarried and established a home. He now desires the sole custody of his son. After a hearing on an order to show cause the court modified the previous decrees by awarding the physical custody of the child to defendant, with the provision that "Plaintiff shall have possession of the minor child every other week-end from Friday at 6 p. m. to the following Sunday at 6 p. m." and "at other reasonable times." Plaintiff appeals from this order.

The sole question is: Did the trial court abuse its discretion in so modifying the custody order? The answer is in the negative.

[1, 2] The trial court has a broad discretion when passing on an application for the change of custody of children. Davis v. Davis, 41 Cal.2d 563, 261 P.2d 729. It is the

welfare of the child that is determinative. Young v. Young, 117 Cal.App.2d 735, 738, 256 P.2d 1009; Disney v. Disney, 121 Cal. App.2d 602, 263 P.2d 865. Since an application for a modification of an award of custody is addressed to the sound legal discretion of the trial court its decision will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion. Munson v. Munson, 27 Cal.2d 659, 666, 166 P.2d 268; Disney v. Disney, supra.

[3] Defendant has provided a separate room for his son in his new home. Both he and his wife are anxious to have the boy. There are no other children in the home. Defendant is paying Mrs. Stevenson $155 a month to care for the child. With an adequate home and a wife who is anxious to take care of the child there is no reason why the boy should be cared for by a third party at the father's expense. After the defendant procured the issuance of the order to show cause, the mother filed an affidavit saying that she had recovered from her illness and was in a position to take care of her child and desired his custody. The evidence does not, however, show that she had an established home. True, she was living at the home of her mother and step-father at the time of the hearing, but she moved there only after defendant initiated these proceedings. She had gone there "within the last two weeks." She explained that she had not gone sooner because her step-father "was ill and under the circumstances it was not too good for me to be there * * *" Plaintiff had lived with her mother "in the latter part of 1951" for "possibly two or three" months. Then she left. In the meantime she does not appear to have had any settled abode. She moved frequently. She testified that she lived in "numerous places" during this period of less than two years. Defendant said she had lived in "approximately ten" different places during this time.

Considering the foregoing, and the further fact that the judge had the parties before him and thus had an opportunity to evaluate their testimony and determine the weight to which it was entitled, it cannot be said, as a matter of law, that he abused his discretion in modifying the custody order.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Ex parte FLOYD.*

Cr. 1001.

District Court of Appeal, Fourth District, California.

April 1, 1954.

Rehearing Denied April 13, 1954.

Hearing Granted April 29, 1954.

Habeas corpus proceeding to secure release from extradition. The District Court of Appeal, Mussell, J., held that where husband, who was in prison pursuant to governor's warrant issued at request of Governor of Ohio upon charge of nonsupport of a minor child, had submitted to jurisdiction of California court and complied with order of that court for support of wife and child in Ohio, he was not subject to extradition for nonsupport and was unlawfully detained.

Decree accordingly.

1. Husband and Wife 🔑303
Parent and Child 🔑3(1), 17(1)

Under Uniform Support of Dependents Act, an "obligor" means any person owing a duty of support. Code Civ.Proc. § 1661.

2. Extradition 🔑29

Sections of Uniform Support of Dependents Act, providing for surrender upon demand of any person found in the state who is charged in demanding state with crime of failing to provide support of a person in that state and relieving person charged for nonsupport from extradition if he submits to jurisdiction of court in asylum state and complies with court's order of support, relate to criminal enforcement of the act and are not dependent upon instigation of proceedings for civil enforcement of the act. Code Civ.Proc. §§ 1660, 1661.

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* Subsequent opinion 273 P.2d 820.

3. Extradition ⚷29

Where husband, who was in prison pursuant to Governor's warrant issued at request of Governor of Ohio upon charge of nonsupport of a minor child, had submitted to jurisdiction of California court and complied with order of that court for support of wife and child in Ohio, he was not subject to extradition for nonsupport and was unlawfully detained. Code Civ. Proc. § 1661.

◆

Joseph K. Robbins, San Diego, for petitioner.

Edmund G. Brown, Atty. Gen., James Don Keller, Dist. Atty., and Olney R. Thorn, Deputy Dist. Atty., San Diego, for respondent.

MUSSELL, Justice.

Petitioner Denzel Lee Floyd alleges that he is unlawfully imprisoned, detained and confined by the Sheriff of San Diego County pursuant to a Governor's warrant issued at the request of the Governor of Ohio upon a charge of the crime of nonsupport of minor child; that the State of Ohio has adopted the Uniform Support of Dependents Act; that said act is in substance identical with the Uniform Support of Dependents Act adopted by the State of California; that pursuant to section 3115.04 Revised Ohio Code, your petitioner, on February 18, 1954, submitted to the jurisdiction of the Superior Court in and for the County of San Diego, State of California; that said court made its order requiring petitioner to pay as and for the support of his wife and child in the State of Ohio the sum of $125 per month commencing March 20, 1954; that by the express terms of said section of the Ohio Revised Code your petitioner is relieved of extradition during the period of his compliance with the California court order of support; that petitioner has complied with said order and is not in default thereof.

It was stipulated by the respective parties at the hearing in this court that the uniform reciprocal support acts of both the States of California and Ohio are identical in substance; that on March 1, 1954, the Superior Court of San Diego county made its order requiring Mr. Floyd to pay $125 per month as and for the support of his minor child in Ohio; that there is full compliance with that order; that petitioner was in actual custody when the petition herein was filed and that return has been made on the writ.

In 1953 Title 10a of the Uniform Reciprocal Enforcement of Support Act was enacted by the legislature of this state and added to Part 3 of the Code of Civil Procedure, Stats.1953, Chap. 1290. Chapter 2 of that act provides as follows:

> " 1660. The Governor of this State (1) may demand from the Governor of any other state the surrender of any person found in such other state who is charged in this State with the crime of failing to provide for the support of any person in this State and (2) may surrender on demand by the Governor of any other state any person found in this State who is charged in such other state with the crime of failing to provide for the support of a person in such other state. The provisions for extradition of criminals not inconsistent herewith shall apply to any such demand although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom. Neither the demand, the oath nor any proceedings for extradition pursuant to this section need state or show that the person whose surrender is demanded has fled from justice, or at the time of the commission of the crime was in the demanding or other state.
>
> "1661. Any obligor contemplated by Section 1660, who submits to the jurisdiction of the court of such other state and complies with the court's order of support, shall be relieved of extradition for desertion or nonsupport entered in the courts of this State during the period of such compliance."

Chapter 3 of said act provides for the civil enforcement of the duty of support and since no proceedings of that nature were taken in the instant matter, such proceedings are not involved herein.

Section 6 of the Ohio Reciprocal Act for Support of Dependents, Uniform Dependents Act, Ohio General Code 8007–6, contains the same provisions as in section 1661, supra.

The question here presented is whether the petitioner must be relieved of extradition for nonsupport during the period of his compliance with the order made by the Superior Court of San Diego County pursuant to said act. We conclude that the question must be answered in the affirmative.

[1, 2] An obligor, as defined in the act, means any person owing a duty of support and petitioner is such an obligor. Sections 1660 and 1661 of the statute involved relate to criminal enforcement of the act and are not made dependent upon the instigation of proceedings for civil enforcement thereof contained in chapter 3. The purposes of the act, as stated in Section 1652, are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto. There is no ambiguity in the language used in Section 1661 and it plainly provides for relief of extradition upon compliance with the conditions therein specified. Such compliance would result in the accomplishment of the stated purposes of the act and make unnecessary the civil proceedings under Chapter 3.

It is argued that a person whose extradition is demanded upon a criminal charge of failing to provide for dependents cannot defeat extradition by voluntarily submitting himself to the courts of this state and by attempting to invoke the civil remedies provided in the Uniform Reciprocal Enforcement of Support Act. This argument is without merit. Petitioner is not seeking to invoke the civil remedies provided for in the act. Such proceedings are instituted by the obligee (the person to whom a duty of support is owed) in the demanding state. In this case the State of Ohio. No such proceedings were commenced.

In In re Susman, 116 Cal.App.2d 698, 254 P.2d 161, 162, petitioner sought release by habeas corpus proceedings from extradition under the terms of section 1661 of the Code of Civil Procedure. In that case the return was denied for the reason that the New York statute involved made no provision in its uniform support of dependents law in respect to criminal enforcement or the relieving of extradition as provided in Section 1661 of our Code of Civil Procedure. It was there said:

> "The only question is whether New York adopted a similar reciprocal provision to section 1661, C.C.P. in reference to being relieved of extradition. If so, the writ should be granted since it has been stipulated that petitioner has fully complied with the order for payment of support issued in this state. Otherwise, the writ must be denied."

[3] It appears from the record before us that the petitioner should be discharged from custody. It is therefore so ordered.

BARNARD, P. J., and GRIFFIN, J., concur.

124 Cal.App.2d 276

SILVA et al.

v.

COASTAL PLYWOOD & TIMBER CO. et al.

Civ. No. 8319.

District Court of Appeal, Third District,
California.
March 30, 1954.

Minority stockholders in Nevada corporation brought suit to enjoin board of directors from calling a meeting of stockholders to approve amendment to corporation's articles so that shares of stock in corporation could be sold and transferred by operation of law or otherwise without any restriction and to permit any person to own any number of shares. The Superior Court of Sonoma County, McGoldrick, J., entered judgment adverse to minority stockholders, and they appealed. The District Court of Appeal, Peek, J., held that such amendment was authorized by Nevada Constitution and statute.

Affirmed.

1. Corporations ⚷40

In suit in California by minority stockholders of Nevada corporation to enjoin proposed act of board of directors in calling meeting of stockholders to approve amendment to articles of corporation, question whether articles could be amended was to be determined in light of the constitution and laws of Nevada. N.C.L.1931–1941 Supp. § 1606(3); Const.Nev. art. 8, § 1.

2. Corporations ⚷40

In view of provision of Nevada constitution that corporations may be formed under general laws, and in view of provision of Nevada statute that a corporation may amend its articles by increasing, decreasing, or reclassifying its authorized capital stock, Nevada corporations articles, which provided that only one share of stock could be owned by any stockholder, and which required that stockholders be active employees or future active employees, could be amended to permit stock to be sold and transferred without any restrictions so that any person may own any number of shares. N.C.L.1931–1941 Supp. § 1606(3); Const.Nev. art. 8, § 1.

3. Constitutional Law ⚷70(3)

The wisdom of a statute is the concern of the Legislature and not the court.

◆

Clarendon W. Anderson, Santa Rosa, for appellants.

Webster V. Clark & George Brunn of Rogers & Clark, San Francisco, for respondents.

PEEK, Justice.

Plaintiffs have appealed from a judgment entered following the order of the trial court sustaining defendants' demurrer without leave to amend.

Defendant corporation was organized under the constitution and laws of the State of Nevada. That state by its constitution provides that "corporations may be formed under general laws, and all such laws may, from time to time, be altered or repealed." Art. 8, § 1. This provision was implemented by a statute which provides that a corporation in that state may amend its articles by "* * * increasing, decreasing or reclassifying its authorized capital stock, by changing the number, par value designations, preferences, or relative, participating, optional, or other rights, or the qualifications, limitations or restrictions of such rights, of its shares * * *." Nev.Comp. Laws, Supp.1931–1941, Sec. 1606(3). Like statutory provisions are found in the Corporations Code of this state, sections 3600 and 3601. The articles of the corporation provided that only one share of stock could be issued to or owned by any stockholder who "* * * must be an active employee, or a person acceptable to the Board of Directors as a future active employee of the corporation." It is stated in the articles that the reason for such restrictions is "* * * the particular nature of this corporation and the contribution to the success thereof expected to ensue from the plan of identifying the management personnel and employees with stock ownership * * *." Apparently for the purpose of implementing the so-called plan, there were extensive provisions in the bylaws having to do with minimum and maximum wages to be paid stockholder employees, and also job tenure. The corporation became involved financially and following notice of default under the provisions of certain mortgages, a petition was filed under chapter 10 of the National Bankruptcy Act, 11 U.S.C.A. § 501 et seq., for the reorganization of said corporation. Shortly thereafter the board of directors called a meeting of the stockholders for the purpose of approving an amendment to the articles so that "Shares of stock of this corporation may be sold and transferred by operation of law or otherwise without any restriction, and any person may own any number of said shares." Previously the articles had been amended twice—the first amendment reduced the classes of stock, and the second eliminated the provisions relative to wages and job tenure. Presently only a portion of the stockholders are employed by defendants.

Defendant Hampton, who is not a stockholder, obtained proxies and options from a majority of the stockholders for the purchase of their shares subject to the approval of the proposed amendment to the articles. Plaintiffs and appellants are minority shareholders who sought by their complaint to enjoin the proposed act of the board.

Plaintiffs, while conceding that articles of incorporation may be amended under the reserved power to amend, nevertheless contend that there is a limitation on such power and that an amendment to the articles "may not be so drastic as to change the fundamental nature of the corporation." This phrase, they say, means that the "* * * corporation must remain the same kind of a corporation that it was prior to the amendment."

This argument, like that of plaintiffs in DeMello v. Dairyman's Co-op Creamery, etc., 73 Cal.App.2d 746, 167 P.2d 226, 228 "* * * overlooks the power reserved to the State in section one of Article XII of the State Constitution to alter from time to time or repeal laws for 'the formation, organization and regulation of corporations and to prescribe their powers, rights, duties and liabilities and the powers, rights, duties and liabilities of their officers and stockholders and members.' See secs. 362 and 362a, Civil Code. It is thoroughly established in California that these provisions of law form part of the contract between the corporation and its stockholders. Schroeter v. Bartlett Synd. Bldg. Corp., 8 Cal.2d 12, 63 P.2d 824. The right of the Legislature under the constitutional reservation of power to amend the corporate laws and thus change the rights and liabilities of stockholders is well established. [Citing cases.]" See also Loney v. Consolidated Water Co., 122 Cal.App. 350, 9 P.2d 888.

Plaintiffs' contract with the corporation was not unconditional. That it was not so considered by the stockholders is illustrated by the prior amendments to the articles which, for all practical purposes, defeated the so-called "plan" of the corporation; in fact to a degree that it might well be said that the restrictions upon stock ownership now relied upon by plaintiffs no longer exists, and the question raised by their pleading is moot.

[1] Necessarily, since corporations are solely creatures of statute, the problem herein presented must be determined in light of the constitution and laws of Nevada. As previously noted, the constitution of that state specifically permits alteration or repeal of all laws respecting corporations. And as also noted, the implementing statutes of that state specifically permit the amendment proposed by the board of directors of defendant corporation.

[2, 3] Plaintiffs do not contend, nor could they, that their rights are property rights existing separate and apart from their contract rights as shareholders. Without that element it cannot be said that there has been such impairment of their contract as would come within constitutional prohibitions. Mere interference with their contract rights as shareholders cannot overcome the reserved right of the state to exercise what it determines to be in the public welfare under the power reserved to it in the constitution. Thus the problem is not as to whether "vested" rights or the "fundamental nature" of the corporation will be affected, but whether or not the amendment falls within the scope of the applicable statute. Inherent in the statute is the possibility of change. There can be no other reason for the reservation. The wisdom of enactment is the concern of the legislature, not the courts.

Since the proposed amendment to the articles is expressly authorized by law, it becomes unnecessary to discuss plaintiffs' contention relative to what they term a "drastic change in the fundamental nature of the corporation." However, if a determination of that question were necessary, suffice it to say that the proposed change in no way affects the basic business of the corporation. It remains the same as before. The amendment appears to be merely an attempt to alleviate what was an apparent failure of the plan to combine management with an employee-shareholder arrangement. It necessarily follows that said proposed amendment is not such a change as is prohibited either in law or in equity.

The order and judgment are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

124 Cal.App.2d 378

BLACK et al. v. ARNOLD BEST CO.

Civ. 4642.

District Court of Appeal. Fourth District. California.

April 2, 1954.

Rehearing Denied April 27, 1954.

Hearing Denied May 27, 1954.

Action to quiet lessors' title to possession and ownership of leased premises, to obtain judgment for rent past due and attorneys' fees, and to recover money advanced in removing lessee's property. The Superior Court, Fresno County, Leonard Meyers, Judge Assigned, entered judgment for lessors and lessee appealed. The District Court of Appeal, Griffin, J., held that whether lessors had waived right to have rent payments made on first day of each month as provided in lease was question of fact for trial court.

Affirmed.

1. Quieting Title ⚷44(3)

In action to quiet lessor's title, to obtain judgment for rent past due and attorneys' fees, and to recover money advanced in removing lessee's property, wherein lessee denied being in default under leases, finding that lessee was not entitled to be relieved of default and forfeiture under leases was sustained by the evidence. Civ.Code, § 3275.

2. Contracts ⚷346(2)

A party seeking to be relieved from a forfeiture by application of statute providing a party may be relieved from a forfeiture incurred under terms of an obligation upon making full compensation to the other party, must plead and prove facts that will justify application of the statute. Civ.Code, § 3275.

3. Quieting Title ⚷44(3)

In action to quiet lessors' title to possession and ownership of leased premises, finding that lessors had not waived right to have rent payments made on first day of each month as provided in lease was sustained by the evidence. Civ.Code, §§ 1500, 3275.

4. Quieting Title ⚷44(3)

In action to quiet lessors' title to possession and ownership of leased premises, finding, that lessee was duly served with rent notices pursuant to lease, was sustained by the evidence.

5. Compromise and Settlement ⚷23(3)

In action to quiet lessors' title to possession and ownership of leased premises, wherein lessee counterclaimed for use of leased premises by lessors, finding, that parties had made settlement on counterclaim was justified by the evidence.

Ralph Robinson, Fresno, for appellant.

Milo Rowell, Richard Z. Lamberson, Breckinridge Thomas, Rowell, Lamberson & Thomas, Fresno, for respondents.

GRIFFIN, Justice.

By separate leases dated July 17, 1947, plaintiffs, doing business as "Black's" food stores, leased to defendant, for a fur business, the third floor of their building for a 20-year period at $200 per month, payments to begin September 1, 1947, and a space 17 ft. by 9 ft. by 6 ft. on the mezzanine floor of that same building, together with window display space for the same period at $50 per month.

Defendant took possession of the leased premises, with the possible exception of the mezzanine floor, and moved in considerable stock in trade. Thereafter, defendant paid the monthly rentals intermittently. On several occasions the checks given in payment of rent did not clear the bank for a period of several weeks. The rental for one four-month period (February, March, April and May, 1950) amounting to $1,000, was not paid until December 4, 1950, by a personal note of a Mr. Weinblatt, one of the parties interested. It was at this time that plaintiffs informed defendant that its tenancy was unsatisfactory because of lack of proper payment of rent on time and because defendant was planning to "crack up the floor" and put in a staircase, which was objectionable to plaintiffs. The manager of plaintiff company told Mr. Weinblatt that they had not operated their store in good faith; that they had not conducted any amount of business in the place for two years and that he was not going to allow any further breach of the terms of the lease; and that if there was such a breach in the future they would terminate the lease. He testified that he asked Weinblatt what he wanted the lease for anyhow, since he apparently had little use for the property, and Weinblatt then asked him "how much is it worth for us to get out", and he told him it was worth nothing to him. The next month's rent of $250 was due on January 1, 1951, and was not paid until January 9, 1951. This was the last payment of rent entered in plaintiffs' books. These payments were not entered in the books until the checks were actually paid by the bank on which they were drawn. On February 1, 1951, the monthly rental was due and was unpaid. On March 1, a like sum became due and remained unpaid. Soon thereafter plaintiffs consulted their attorney about dispossessing defendant, and on March 14, "Notice to Correct Breach and Notice to Pay Rent or Quit" was posted in two places on the leased premises. The notice, dated March 14, 1951, reads in part:

> "A breach of said lease has occurred in that you have failed to pay the rent due * * *. You are accordingly notified to correct such breach within a period of 5 days from the date hereof or to quit and deliver up possession of the premises."

Copies of this notice were, by registered mail, sent to defendant company at the address of the leasehold premises. A further written notice was mailed on March 19, 1951, in a similar fashion, notifying defendant of the amount due and unpaid, and that "in the event payment thereof is not made within the period of 3 days after the service of this notice upon you that said lessors elect to terminate said lease and said lease will stand terminated."

Thereafter, a Mrs. Gammage, secretary-treasurer of the defendant company, came to plaintiffs' office on Friday, March 23, and said she came to pay the rent that was in arrears. The manager of plaintiffs' store testified he asked her if she had the cash and she said "no" but that she had a check; that he told her he was sorry, they had too much trouble with her checks "bouncing" on previous occasions, and he did not wish to accept it; that she said she did not blame him and he then told her to see plaintiffs' attorney if there was to be any further conversation about the matter; and that she left. He further testified that about March 26, 1951, after the time set out in the notice of termination had expired, he entered the premises on the third floor by means of a key given to him by defendant's agent on March 23, and had the stock in trade removed to a bonded warehouse and plaintiffs paid the bill, including storage expenses, amounting to $993.16.

It appears that after Mrs. Gammage left plaintiffs' office on March 23, she went to plaintiffs' attorney's office and told him she had been sent there to talk about the settlement of the $500 rent owed by the Arnold Best Company; that she offered her check and it was refused; that they told her they would take $500 in cash but not take a check from her, due to past performances in this regard; that the attorney told her the leases were terminated but if defendant would pay $500 for past rent plaintiffs would lease the third floor to them for the balance of the month so they could make arrangements to remove the goods; that by telephone plaintiffs' attorney talked to Weinblatt in Los Angeles and told him the same thing; that Weinblatt stated he refused to accept the termination and the attorney informed him that Weinblatt was not the one to determine that question since he was in default in payment of the rent. Mrs. Gammage made an appointment to see plaintiffs' attorney the following day for further discussion, after she had talked with a Mr. Benioff, chairman of the Board of Directors of the defendant company in New York, by telephone. The next morning she telephoned to the attorney and stated she had been unable to reach Mr. Benioff. The attorney told her his client was not going to go beyond that week-end to settle the matter, and that if it was not settled they were going to start moving the property out of the premises on Monday. The attorney testified he heard nothing further from her.

It appears from Mrs. Gammage's testimony, which is at variance with the testimony of the other witnesses, that without the knowledge of plaintiffs or their attorneys, she did, on Saturday morning, go to a bank and deposit $500 in cash in a special account entitled "Black's Grocery" for their benefit. She testified she received this cash by telegram from New York that day and then contacted defendant's lawyers and related what she had done and that she left Fresno on Sunday to return to San Francisco where defendant company had one of its offices. On Monday, March 26, these attorneys wrote plaintiffs' attorneys that they had been informed by Mrs. Gammage that she had tendered $500 to them as part of the rent and that it had been refused. Therein he notified plaintiffs that on March 24th $500 had been deposited to their account in a certain bank. Attorneys for plaintiffs replied to this letter on March 27 and informed defendant's attorneys that the information obtained from Mrs. Gammage was in error; that she offered to write a check in payment of the rent and they refused the suggestion; that when she was dealing with them that morning she said nothing about making a deposit in the bank for the account of Black's but on the contrary asked for time; that he had conferred with Benioff and informed him that the leases had been legally terminated, and since Mrs. Gammage failed to notify them of any other arrangements they were proceeding to remove the defendant's property from the premises; and that they considered defendant liable to plaintiffs under the lease for such expenses as well as attorneys' fees incurred.

This action followed. The plaintiffs, in the first cause of action, seek to quiet plaintiffs' title to its possession and ownership of the property free and clear of any leasehold rights of the defendant. In a second cause of action they seek judgment for rent past due and attorneys' fees; and in a third count they seek recovery for money advanced in removing defendant's property and for storage expenses totaling $902.54, and for attorneys' fees involved in the action.

The answer of defendant denies generally the allegations of the complaint and alleges that the two leases are still in force and effect. It denies that defendant was in default under the leases; admits the leases provide for attorneys' fees upon the happening of certain events, but claims such events have not legally occurred. It then alleges, somewhat in detail, the fact that defendant spent considerable sums in installing fixtures and semi-permanent improvements in the place; that the attempted termination of defendant's rights under the leases by reason of default in payment was a result of a misunderstanding, and that defendant's offer to comply with the terms of the leases was in good faith. It claims certain sums were due defendant by reason of plaintiffs assuming possession of certain portions of such premises for their own use, and offered to pay any damage suffered by plaintiffs by any claimed breach of the lease. By way of counterclaim it alleged that plaintiffs were guilty of forcible entry and detainer in removing defendant's furniture and in detaining possession of the premises from it, and seeks judgment for $3,000 for each month they were denied such possession. Damages are also sought for loss that occurred through improvements made to the property and for storage charges, etc.

The court found generally in favor of plaintiffs in each cause of action; that defendant was in arrears in rental payments; that plaintiffs served a notice to correct the breach within five days after March 14, 1951; that defendant failed and refused to do so within the required period or at all and, pursuant to the terms of the leases, plaintiffs did terminate both leases involved on March 21, 1951; that accordingly, since the leases so provided, attorneys' fees were allowed to enforce the conditions thereof, totaling $700; that since the leases, in case of breach thereof, provided that lessors might enter the premises and remove the personal property of lessee, plaintiffs were authorized by its terms so to do, and accordingly allowed moving and storage expense fixed at $902.54. It allowed $500 for nonpayment of rental, as alleged in the complaint.

It specifically found as untrue the general allegations of defendant's answer and cross-complaint. Judgment was entered accordingly and defendant appealed.

The principal contentions are whether, under the pleadings, the evidence was sufficient to support the finding that defendant was in default in the payment of rent and whether the plaintiffs legally terminated the leases.

[1, 2] The first contention is predicated upon the argument that since this was an action in equity to quiet title and not one in unlawful detainer, defendant had a right, in an equitable proceeding, to be relieved of default and forfeiture, and accordingly equity was not done, citing Milton E. Giles & Co. v. Bank of America, 47 Cal.App.2d 315, 117 P.2d 943; Section 3275, Civil Code; Gonzalez v. Hirose, 33 Cal.2d 213, 200 P.2d 793; and Pehau v. Stewart, 112 Cal.App.2d 90, 245 P.2d 692. We see no merit to this argument since the court heard volumes of unlimited evidence on both the legal and equitable issues involved and signed findings indicating that the defendant was not entitled to equitable relief nor to relief from their apparent default in payment of rent under the terms of the leases. Section 3275 of the Civil Code is as follows:

> "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

The right to relief from default there authorized is not a matter of right under all circumstances, and that section presupposes that the party seeking relief from a forfeiture is in default, and in order to secure relief under its terms it is necessary for him to plead and prove facts that will justify its application. Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367; Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199; Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 143, 69 P.2d 849. See, also, Crowell v. City of Riverside, 26 Cal.App.2d 566, at page 582, 80 P.2d 120, 128, where it was said:

> "While, however, as already observed, the complaint in the instant case seeks, in one of its counts, to quiet the respondents' title and is, therefore, as to that count, in some sort a bill in equity, yet it is such only in a limited sense, since actions to quiet title are authorized by section 738 of the Code of Civil Procedure and governed by its provisions. In an action to quiet title, therefore, where the case involves a purported forfeiture, what the court is in reality asked to do is not to alter the existing status but to declare it. If the forfeiture has occurred, it has already taken place without any action on the court's part. The court's duty is merely to determine the fact. * * * The general rule that equity will not enforce a forfeiture does not apply."

Next, it is argued that since defendant was delinquent in payment of rent on numerous occasions and since plaintiffs accepted these delinquent payments by checks in the past, without objection, even though strict performance as to time of payments was made a condition of the lease, plaintiffs waived such provision and defendant was entitled to notice reinstating the requirement for strict performance and allowing a reasonable time for compliance before being considered in default, citing Eddleman v. Deavel, 107 Cal.App.2d 351, 237 P.2d 38; Retsloff v. Smith, 79 Cal.App. 443, 249 P. 886; and Gonzalez v. Hirose, supra.

An examination of the terms of the leases, in this respect, shows that defendant agreed to pay the installments of rent on the first day of each month, and in the event of failure of lessee to pay "rent as herein provided * * * Lessor may, at his option, five (5) days after written notice to Lessee to cure said breach (if the same be a breach of a condition other than the payment of rent, and in that event, without notice);" (1) terminate the lease, reenter the premises and take possession; (2) without terminating it, reenter and take possession; (3) terminate the lease and take possession without liability for any resultant damage; (4) declare the balance of the rent reserved to be due and payable; and (5) reenter and take possession by process of law, with or without notice to lessee. It is then provided that in case plaintiffs bring an action against lessee to enforce any of the terms of the leases lessee agrees to pay reasonable attorneys' fees. Time is agreed to be the essence of the agreements and "any waiver by Lessor of the prompt and punctual performance of any term, condition or covenant hereof shall not be construed to be a waiver of the prompt and punctual performance of the same or any other term, condition or covenant subsequently when due."

It is apparent that defendant was in default in payment of rent due under the leases. Waiver of the time provision of the leases was a factual question for the trial court under the facts presented. Myers v. Williams, 173 Cal. 301, 159 P. 982.

It appears from the evidence that defendant was previously informed that plaintiffs would not accept any further checks of defendant as payment for rents, for reasons which were obvious. The evidence also discloses that plaintiffs informed defendant when it paid rentals that were overdue that thereafter they intended to enforce a strict performance of the terms of the leases in this respect, and notice was sent to them, whether required or not under the terms of the leases, to quit or pay rent within five days from that date. Similar notices were posted at the entrance to defendant's office in the Black's store building. A similar written notice was mailed on March 19th, notifying them that if the rent was not paid within three days from date, after service, the lessors elected to terminate the lease.

It is clear that when plaintiffs finally received notice of a cash tender on March 26th (under section 1500, Civil Code) defendant was in default and had failed to appropriately comply with the notices sent to it within the period required.

[3] The evidence further shows that at the time defendant made the deposit in the bank to a special account, defendant's agent had already been informed that under the terms of the leases the lessors had elected to and did terminate the leases. Although defendant did not specifically plead a waiver or estoppel in its answer, as generally required, Myers v. Williams, 173 Cal. 301, 159 P. 982; Leak v. Colburn, 55 Cal. App. 784, 204 P. 249; Clifford v. Fleshman, 65 Cal.App. 762, 225 P. 45; Taylor v. United States Fidelity & Guaranty Co., 86 Cal.App. 382, 260 P. 898, the court found that they were in default, and at least impliedly found that there had been no waiver of the time element in respect to the payment of rent involved. This finding is supported by the evidence.

The next argument is that the notices upon which plaintiffs based their election to terminate the leases were ineffective because they were not sent to the place most likely to provide the defendant with notice, and accordingly the time within which to comply with the notices was unreasonable.

As heretofore noted, the notices were posted at and addressed to the defendant at the third floor of Black's building in Fresno. Defendant claims that they only spasmotically occupied these quarters during the past two years; that they had offices in San Francisco and Stockton and were paying an agent of theirs a small amount each week to obtain, every few days, their mail which came to them at Black's store, and to forward it to them; that this agent also rendered some service in sending certain merchandise from the store to them, as it might be ordered.

This agent testified she received a registered letter on March 15, 1951, addressed to Arnold Best Company, at its place of business in Fresno, and signed a return receipt therefor in the name of the company and forwarded it to San Francisco, which was supposed to be the headquarters of Crown Mark or the Arnold Best Company; that she received another registered letter between March 14 and 19, and forwarded it to the company's address in Stockton because she was told to forward further mail there instead of the San Francisco address; and that she saw the notice posted on the door at the place of business in Fresno.

[4] It appears that plaintiffs' usual custom was to bill defendant for the rental. Such bills were sent to the San Francisco office. The last one was so sent on March 1, 1951, and was forwarded to defendant's agent in Stockton. It appears that defendant company was having some bankruptcy proceedings in San Francisco, and that its definite location of business was somewhat uncertain or unknown, or at least it was unknown to plaintiffs' attorneys. The court found the defendant was duly served with notices pursuant to the terms of the leases, which provided:

> "Any notice required to be given by law shall be in writing and may be given by personal delivery or by registered mail, addressed to lessee at the demised premises, whether or not lessee has departed from, vacated or abandoned the premises, or at his place of business * * * or to either of them in any other manner prescribed by law."

Plaintiffs strictly followed the provisions of the leases as to where to send notices and as to what notice, if any, was required under the circumstances. The evidence sustains the finding of the trial court and the time element cannot be said to be unreasonable under the circumstances, particularly where plaintiffs informed defendant in December that thereafter all rental payments must be made on the dates due. Andrews v. Russell, 85 Cal.App. 149, 259 P. 113; Universal Milk Co. v. Wood, 205 Cal. 751, 272 P. 745.

Under the terms of the leases, in case of default in payment of rent, plaintiffs were entitled to take possession of the premises and remove defendant's property therefrom. Defendant's agent was notified by plaintiffs' attorney that if arrangements were not otherwise made such merchandise would be removed the following Monday. Apparently, proper arrangements were not made and plaintiffs rightfully removed it, and the cost thereof was a proper charge under the lease agreements. Likewise, under the leases, attorneys' fees were properly allowed.

[5] It appears that there was some use of the premises leased to this defendant by plaintiffs in temporarily storing certain goods on the mezzanine floor as well as on the third floor. There was also some reference to an existing sign for which plaintiffs were receiving rental, and which plaintiffs agreed to remove when defendant arranged to completely take over the mezzanine floor for the purposes desired. It appears that defendant did not completely take over the mezzanine floor and did not make any other arrangements in reference to this space and apparently made no particular complaint about such sign. However, in its cross-complaint it asked to be given credit for the reasonable value of this sign to the plaintiffs during this leasehold period, and for the reasonable value of storage space occupied by plaintiffs, which defendant contended was unauthorized. It appears from the evidence that some discussion was had in reference to this at the time, and that some settlement was made. The record shows that defendant was allowed one month's rent, i. e., $250 for this benefit. It does not appear that, until the trial of this action, any further claim was made, and for all intents and purposes, the court was justified in believing that the parties had agreed upon their differences in this respect.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

In re McLAUGHLIN'S ESTATE. *

SEYMOUR v. McLAUGHLIN et al.

Civ. 15649.

District Court of Appeal, First District, Division 1, California.

March 29, 1954.

Rehearing Denied April 28, 1954.

Hearing Granted May 27, 1954.

Proceeding for settlement of trustees' account. The Superior Court, City & County of San Francisco, Herbert C. Kaufman, J., entered an order settling the account and fixing trustees' compensation, and objector appealed. The District Court of Appeal, Bray, J., held that award of $22,500 to three trustees for operating, at expense of $28,228.29, trust having annual income of $106,687.02, under the circumstances, including the circumstance that trustees received compensation from other entities in which trust was interested, was an abuse of discretion.

Reversed with directions.

1. Trusts 🔑312, 315(1), 329

The allowance of fees and expenses of trustee is matter within the discretion of trial court and cannot be interfered with by District Court of Appeal unless abuse of discretion is manifest.

2. Trusts 🔑329

The duty of District Court of Appeal is to determine whether there is any substantial evidence to support allowance made by trial court to trustee for fees and expenses.

3. Trusts 🔑318

Statute, providing that where there are several trustees, compensation shall be apportioned according to the respective services rendered by each trustee was enacted for benefit of trustees. Probate Code, § 1122.

4. Trusts 🔑318

Where total compensation paid to several trustees is proper, beneficiary of trust cannot object if a trustee performing more services than his fellow trustee is willing to permit that fellow trustee to obtain a greater portion of the over-all fee than services rendered would strictly justify. Probate Code, § 1122.

5. Trusts 225, 227

Trustees, in administration of multi-million dollar trust, properly sought aid of attorneys, accountants, stock brokers, and other experts.

6. Trusts 🔑317

Practice of trustees in asking each year for extraordinary compensation for negotiation of leases and sales during year, and, if negotiations resulted in leases or sales during a particular year, in seeking additional extraordinary compensation in that year, was permissible. Probate Code, § 1122.

7. Trusts 🔑325

Burden was upon trustees to establish services rendered by them. Probate Code, § 1122.

8. Trusts 🔑315(2)

Award of $22,500 to three trustees for operating, at expense of $28,228.39, a trust having annual income of $106,687.02, under the circumstances, including the circumstance that trustees received compensation from other entities in which trust was interested, was an abuse of discretion.

9. Trusts 🔑315(2)

One of the matters to be considered in fixing fees of trustees is the responsibility which the trustees assumed. Probate Code, § 1122.

10. Trusts 🔑315(2), 317

Trustees are entitled to reasonable fees for ordinary services rendered and liberal fees for extraordinary services and for their responsibility. Probate Code, § 1122.

Martin Minney, Jr., Michael J. Cullen, Heller, Ehrman, White & McAuliffe, San Francisco, J. Arthur Leve, Leve, Hecht, Hadfield & McAlpin, New York City, for appellants.

Cooley, Crowley & Gaither, San Francisco, for respondents.

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* Subsequent opinion 274 P.2d 868.

BRAY, Justice.

Appellant, who was referred to below as objector, appeals from the "Order Settling Sixth Account and Report of Trustees; Approving Activities of Trustees During Period Covered, and Fixing Trustees' Compensation for Trustees and Trustees' Attorneys, and Overruling Certain Objections Thereto," excepting certain portions.

Questions Presented.

1. Alleged abuse of discretion in allowance of trustees' fees.

2. Effect of trustees' receiving salaries from allied entities.

Appellant appeals primarily from the allowances to the trustees for fees, and does not now complain of the approval by the court of the trustees' actions save insofar as such actions affect the allowance for fees. The court allowed $7,500 as compensation to each of the three trustees for the one year period covered by the account, $22,500 in total.

1. Alleged Abuse of Discretion.

[1, 2] The allowance of fees and expenses is a matter within the discretion of the trial court and cannot be interfered with by this court unless an abuse of discretion is manifest. Estate of Mills, 119 Cal.App.2d 8, 258 P.2d 1028. Our task is to determine whether there is any substantial evidence to support the allowance made by the court. Estate of Griffith, 97 Cal. App.2d 651, 655, 218 P.2d 149.

Dorsey E. McLaughlin by his will created a trust for the benefit of his widow, his son and appellant daughter. At his death in 1945 the estate was valued at $4,804,550.65 (according to the account, the trust assets are presently carried at a valuation of $2,282,675.72, apparently a net reduction in principal for the year of $26,273.98) before taxes. Until the death of the widow the beneficiaries share equally in the trust income. Of the three trustees named in the will, the widow alone remains in office. The original trustees nominated the two other incumbent trustees, Honn and Mrs. Wales. They were former business associates of the trustor. This is the sixth account of the trustees and covers the period January 1 to December 31, 1951. The son has approved the account, and obviously, the widow is satisfied with it.

The record fails to show how the court arrived at the sum it allowed for fees. While there was considerable evidence concerning the operation of the trust, it is difficult to determine how much of the services applies to the year in question, how much of the services was rendered by Honn and Mrs. Wales as trustees, as distinguished from their duties as directors and trustees of certain corporations and another trust in which the trust held interests. There can be no question that the allowance was very generous. Whether it amounted to an abuse of discretion is the difficult question.

A consideration of the activities of the trustees during the year follows:

1. At the end of the year the estate had stocks and bonds valued at $1,729,211.57, which yielded $75,880. As to this portfolio the stocks were constantly watched and a watching account maintained, information and advice was informally obtained from brokers, trustees took several publications and services for review and studied sources of information. Stocks were priced daily during the first part of the year and then once a week, with entire portfolio being priced every 90 days. Stock purchases were $234,809.42 while stock sold was $77,618.39.

2. Two unimproved lots on McAllister Street, San Francisco, valued at $57,918.45 yielded a rental of $9,000 under lease previously made. Inquiries from brokers and agents were received and negotiations for sale carried on, although no sale was made during the period. (Sale made later.)

3. Collected $3,600 in interest on note of son.

4. The estate owns a controlling interest (51%) in The Pacific Dock and Terminal Company, valued at $78,555, and a demand note of that company valued at $161,046.73 after trustees collected $7,159.50 principal and $14,985 interest. The Dock company also owed as of January 1, 1951, to the estate back accrued interest of $403,779.67. The operation of this company is one of the controversial matters here. There are

five directors including Honn and Mrs. Wales. Honn and Mrs. Wales receive directors' fees of $50 plus travel expenses per meeting (usually four meetings per year). Mrs. Wales as secretary-treasurer receives $200 per month. The principal property of the company consists of 95 acres of upland and approximately 5 acres of submerged land in the Long Beach Inner Harbor area. Richfield Oil Company operates 49 wells on the property as holdover lessee under an expired lease. The net oil and gas royalty to the Dock company for 1951 was over $127,000. Surface leases bring the company about $13,000. The gross income of the company was $141,000 with operating expenses of $76,000, of which $41,000 was taxes. The company is heavily indebted, owing over $1,800,000. According to the trustees the company's principal problem is to keep Richfield interested in oil production and development. However, the evidence shows that any activity in this respect is that of the president and not of the trustees. Apparently, the only activities of the trustees distinguishable from their activities as directors of the corporation were efforts to find a buyer for the estate's interest in the company and the indebtedness due the estate. There were perhaps five or six tentative proposals, some made in person, others by phone, and there was correspondence. Possibly the trustees met with brokers or possible buyers on five different days. There was considerable testimony about the income tax situation and the bookkeeping of this company. However, the company employed a firm of certified public accountants and a full time bookkeeper.

5. The estate owns a 40 per cent interest in the Wilson Estate valued at $63,871.25. The sole asset of the Wilson Estate is a note of The Pacific Dock and Terminal Company, which with interest amounted on January 1, 1951, to $566,513.77. The trust received $4,800 payment on principal and $2,400 on interest—total, $7,200. A most peculiar situation exists with reference to this Wilson Estate. Although the only asset of the Wilson Estate is the indebtedness to it of the Dock company, and the only duties of the Wilson trustees are to accept payment made to it once a year by the Dock company and then prorate that payment to the McLaughlin estate and the other 32 persons interested in the Wilson Estate, a very expensive setup is maintained by the Wilson Estate trustees. Honn is one of these trustees and at least up to May, 1951, received $50 per month compensation from that estate. Mrs. Wales receives $40 per month therefrom for secretarial services. The Wilson Estate pays 10 per cent of the expense of operating the office jointly maintained by it with the McLaughlin estate and certain corporations. Apparently it costs the Wilson Estate $2,727.58 per year to make the one collection from the Dock company. In view of the interlocking situation in which Honn and Mrs. Wales are directors of the Dock company and trustees of both the Wilson and McLaughlin estates and receive pay from all of them, it is difficult to understand the necessity for the cost of operating the Wilson Estate. Certainly no extraordinary services are rendered by the McLaughlin trustees in this matter. None were claimed.

6. The Spring Hill Corporation, entirely owned by the estate, is carried on the books at no value, except $111,110.09 which is advances made to it by decedent and the trustees, although the actual indebtedness to the estate is $299,000. The main property of the corporation is approximately 230 acres of surface property and 340 acres of mineral rights in Nevada County. A gold mine was once operated by decedent on the property but it ceased to operate in 1949. The trustees have been disposing of the machinery and equipment from time to time, paying agents 10 per cent commission on the sales. $16,000 worth of equipment was sold in 1951. Pursuant to a plan devised by the deceased and later approved by the beneficiaries 35 acres were cleared for a residential subdivision. One house was built and sold. Now, however, the trustees are doing no building but are endeavoring to sell lots through local brokers. No money was spent in 1951 for roads or buildings. Only two lots were sold that year, although an oral agreement to sell four more to a contractor was made. The

corporation shares offices with the McLaughlin estate and pays 20 per cent of the cost. Mrs. Wales receives $90 per month as secretary-treasurer, having charge of the books and correspondence. Tax matters are handled by the certified public accountant firm and the actual bookkeeping by the office bookkeeper. The major part of the salvage of equipment has been completed. Correspondence was had with the assessor of Nevada County and Honn visited him there once. As a result, there is to be a substantial reduction in taxes in 1952. Honn testified that it would be hard to differentiate between the services of the directors of the company and the trustees in this matter. Both Honn and Mrs. Wales are directors. Foreclosure proceedings were started by the corporation against one Valerga and he made full payment. What the trustees did as trustees in this respect does not appear. The operation of the corporation for the year showed a net profit of $900 before depreciation and a loss of $6,700 after. The expense of operating the company for the year was $2,794. No money was paid the McLaughlin trust, although next year $25,000 was paid. The record does not show over what period this sum was accumulated.

7. Beck Iron Ore Property valued at $12,500 and yielding $185 on a lease entered into in 1951. This about pays the taxes on the property. Inquiries from brokers for option-leases were received and negotiations were had culminating in 1952 in what is apparently a very advantageous option to lease. It is difficult to determine how much time was devoted by the trustees in 1951 to the negotiations.

8. Other services. Distribution to the beneficiaries of decedent's household furniture, valued at $20,000 and the payment to the beneficiaries of $69,335.85 in trust income by monthly payments. The total trust income was $106,687.02, the total expenses were $28,228.39, leaving a net income of $78,458.63.

[3, 4] Although we have referred throughout this opinion to the work of the trustees, it is conceded that the widow participated very little in the trust activities. She was consulted by the trustees on all major decisions and sat in meetings to determine action on major problems. Direct administration was left to the other two trustees. The "working trustees" were the other two. Section 1122 of the Probate Code provides that where there are several trustees the court shall apportion compensation according to the respective services rendered. This section undoubtedly is for the benefit of the trustees. If the total compensation is proper, the beneficiary cannot object if a trustee performing more services than his fellow trustee is willing to permit that fellow trustee to obtain a greater portion of the over-all fee than the services rendered by him would strictly justify. The request by the trustees was for $7,500 *each*. The trial court did not attempt to determine a gross fee and then divide it in accordance with the wishes of the trustees. It allowed each $7,500 and as to the amount to be paid to the widow stated: "I think when these testamentary trusts are created and when widows are named executors in the will, they rarely do any of the work, but they receive the same compensation. * * * I think it is pretty well accepted that a widow should receive equal compensation with either working executors or working trustees, so I am going to allow her the same compensation. * * *" Thus, it appears that the over-all allowance was not based upon the value of the total services rendered by the trustees.

[5] The record shows that the trustees in the operation of this trust, of the companies and the Wilson Estate in which they are directors and trustees, have had the help of attorneys, accountants, stock brokers, real estate brokers, bookkeepers, etc. This, of course, is proper. With a trust of this size, it cannot be expected that the trustees can do this type of detail work themselves. An expense of $28,228.39 (of which only $2,817.01 is taxes) is a considerable percentage of the income of $106,687.02. It is doubtful if the trustees needed all the help and the office expense incurred by all the various entities. Apparently, not much effort has been made to reduce expenses that either directly or indirectly affect the net income received by the bene-

ficiaries. Perhaps the dual relationship of the trustees as such and as representatives of the other entities has something to do with this fact. Moreover, the fact that they had all this assistance lifted the burden somewhat from the trustees.

This brings us to the effect of that relationship. It was not disclosed to the court in any of the prior accountings. Mrs. Wales receives $200 per month from the Dock company, $90 per month from Spring Hill Corporation, $40 per month from the Wilson Estate. Honn received $50 per month as trustee of the Wilson Estate. The record is not clear as to whether this is continuing or ended in May, 1951. Both Mrs. Wales and Honn receive director's fees from the Dock company. The record does not disclose whether they received director's fees from the Spring Hill Corporation. While the acceptance of such fees may not be improper, these facts should have been called to the court's attention right from the first. See Overell v. Overell, 78 Cal.App. 251, 248 P. 310. We are unable to find in the record any indication that the court segregated in any manner the services rendered by the trustees as distinguished from those rendered in their other capacities, nor can we find any indication that in arriving at compensation the court gave any consideration to their compensation in those capacities.

It is true that trustees Honn and Mrs. Wales were acting in the other capacities during the lifetime of the decedent and being paid therefor. That fact, however, does not exonerate them from their duty to disclose the situation to the court. An individual may do many things with his money which the trustees may not do.

Let us examine the six categories of services which the trustees characterize as extraordinary services.

1. The operation of Spring Hill Corporation. As pointed out before, even trustee Honn could not differentiate between the services rendered as trustees and as directors. Most of the operations were routine. Certainly very little could be allowed for extraordinary services here.

[6] 2. Review and scrutiny of affairs and operations of The Pacific Dock and Terminal Company. Again, with the exception of negotiations for sale of the trust's interests in the corporation, practically nothing was done that was not done by the corporation itself. As to the negotiations for sale, there was some activity, but not of any great amount. The testimony concerning this activity, and, in fact, all attempted sales or leases during the year, was very indefinite. It is impossible to determine how much time was devoted to it. Apparently it is the custom of the trustees each year to ask for and receive extraordinary compensation for the negotiation of leases and sales during the year, and then if they result in leases or sales during a particular year to obtain additional extraordinary compensation in that year. This practice is permissible. See Conant v. Lansden, 1950, 341 Ill.App. 488, 94 N.E.2d 594; Probate Code, § 1122. But the difficulty is that as far as the record shows, no consideration in any one year is given to the fact that compensation has been given in a previous year nor to the question of whether, although the action culminates in a particular year, the bulk of the negotiations took place, and a large compensation was received, in the prior year.

3. Negotiations with reference to notes and advances receivable by trustees. This applies to those due from the Dock company and the Wilson Estate. But as pointed out before, these matters are handled by the officers of those entities. While the trustees as such obviously must advise with the debtor entities, the bulk of their duties as trustees is merely to accept the moneys due the estate when paid to them.

4. Management of the trust real property and negotiations for sale. While there are some extraordinary services here, they are not very great. What was said under paragraph 1 above as to the inability to determine how much negotiations occurred in this particular year applies to these properties.

5. Lease on Beck Iron Ore Properties and negotiations with regard to the lease

and option later entered into. According to the trustees the latter is a very valuable project. However, it was not entered into during the year. The trustees are entitled to extraordinary compensation for the negotiations during the year. But it is practically impossible to determine how much time was devoted to this matter.

6. Federal and state income tax returns and adjustments on previous years, including negotiations of claims for refund previously filed. Here again the work done by the trustees is delightfully indefinite. While, of course, there was some supervision by the trustees, obviously the main work was done by the accountants. There is no basis upon which to figure what compensation should be allowed for the trustees' services.

[7] Mrs. Wales testified that she was at the office over 40 hours per week. No attempt was made to inform the court how much of this time was devoted to the various entities from which she received about $330 per month. Honn spent only about one-half of his time at the office but as to what portion of that time was devoted to the trust as distinguished from his services in other capacities and to his other activities does not appear. The burden was on the trustees to establish the services rendered by them. See Purdy v. Johnson, 174 Cal. 521, 163 P. 893.

[8] Considering the income for the year, the part of the services performed by the trustees which can be distinguished from that performed in their other capacities, the fact that the compensation to the widow was not based upon services rendered by her or by the other trustees, the fact that the record shows that many of the services claimed to have been performed by the trustees were actually performed by employees and other officers of the entities involved, the compensation received by the trustees from allied sources, show that the compensation allowed was so far out of line as to constitute an abuse of discretion by the court. There is no evidence to support such extraordinary allowances.

[9, 10] We have in mind that one of the matters to be considered in fixing fees is the responsibility which the trustees assume. Here, there is a large estate and a large responsibility. Here, the trustees are entitled to a reasonable fee for the ordinary services rendered and a liberal fee for their extraordinary services and their responsibility. But in view of the state of the record there is no evidence to support the allowance made.

Much of the transcript and the trustees' brief is devoted to showing that the trustees did excellent service in the past. Apparently they were well compensated therefor, too. We are concerned only with their activities in 1951.

The trial court will have to make a complete review of the services rendered in the year 1951 in accordance with the views herein expressed. The only portions of the order challenged are those approving compensation for trustees and allowing trustees' fees. Those portions are reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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124 Cal.App.2d 371

BROCKWAY LAND & WATER CO.

v.

PLACER COUNTY et al.

District Court of Appeal.
Third District.
California.
April 2, 1954.

Action against county to quiet title or to enjoin improvement of property by county under claim of dedication. The Superior Court of Placer County, W. T. Belieu, J., rendered a judgment quieting defendant's title and plaintiff appealed. The District Court of Appeal, Third District, Paulsen, J. pro tem., held that plaintiff had waived objection to alleged collateral attack on decree in plaintiff's chain of title, as having been rendered in action brought against corporate receiver after his discharge.

Appeal from order denying motion for new trial dismissed, and judgment affirmed.

1. Appeal and Error ⚿110

An order denying motion for new trial is not appealable.

2. Corporations ⚿560(5)

Where receiver of corporation was sole defendant in action for reformation of receiver's deed, he had no power to perform and court had no power to appoint a commissioner to perform for him unless he was qualified and acting receiver at the time, and if he had been discharged, his reformed deed or that of the commissioner acting in his place conveyed no interest.

3. Judgment ⚿486(1)

Trial ⚿105(1)

Failure to object, at separate trial of cause of action to enjoin improvement of realty, to evidence that receiver of corporation had been discharged before bringing of action for reformation of his deed to plaintiff, operated to waive plaintiff's objection that such evidence was a collateral attack upon decree for reformation, and such waiver was operative in subsequent trial of cause of action to quiet title; and court was upon notice of probable invalidity of the reformation decree and properly recognized invalidity of plaintiff's title thereunder.

4. Judgment ⚿506

Although judgment or order is valid on its face, if party in favor of whom it runs admits facts showing its invalidity, or without objection on his part, evidence is admitted which clearly shows existence of such facts, court should declare a judgment or order void.

5. Judgment ⚿470

The rule limiting collateral attack is a mere rule of convenience, designed to bring an end to litigation when parties had opportunity to have their day in court, and rule requiring court to protect itself against fraud is equally important and should not be unduly circumscribed or limited.

R. E. Shields, San Mateo, for appellant.

Alexander B. Broyer, Roseville, F. L. Sinclair and Leland J. Propp, Auburn, for respondent.

PAULSEN, Justice pro tem.

[1] This appeal is taken from a judgment quieting defendants' title. There is also a purported appeal from the order denying appellant's motion for a new trial. This is not an appealable order and it is ordered dismissed.

In 1911 F. B. Alverson and Ferguson Breuner Company owned a large tract of land lying immediately north of Lake Tahoe. At that time it was subdivided and a map was filed dedicating certain streets and highways to public use. This was accepted by the Board of Supervisors of Placer County and there is no question concerning the fact of dedication. After some years had elapsed, however, a dispute arose as to location and the ownership of the property involved in this action. In view of the conclusion we have reached, it is not necessary to discuss the facts of the dedication further.

Early in the year 1950 defendant county, claiming that the land in dispute was dedicated to a public use, undertook to improve it for highway purposes. On June 9, 1950, appellant filed its complaint herein setting forth two causes of action: the first was in the usual form of a cause of action to quiet title; the second incorporated by reference those parts of the first alleging plaintiff's ownership, alleged the facts of the threatened improvement of the property by the defendants, and demanded relief in the form of a temporary injunction.

After a lengthy hearing growing out of the second cause of action, the court denied injunctive relief. More than a year elapsed thereafter before the case came on for trial on the first cause of action before the same judge. At the time of trial of the quiet title action, appellant's present counsel was substituted in the place and stead of the original counsel, and in fairness to him it should be noted that this was his first appearance in any of the proceedings herein mentioned.

At this trial, appellant introduced or otherwise relied upon the following records to establish its title: (a) Deed from Ferguson Breuner Company and F. B. Alverson to Tahoe Vista Investment Company; (b) Deed from Tahoe Vista Investment Company, a dissolved corporation by its trustees, to George H. Clark; (c) Deed from George H. Clark and his wife to The Sherman Company, Nevada, a corporation; (d) Records of the United States District Court in San Francisco, dated July 27, 1930, showing that H. G. Feraud was appointed receiver of The Sherman Company, Nevada; (e) Decree of the Superior Court of Placer County, entered October 3, 1949, in Action No. 15574, entitled Brockway Land and Water Company v. H. G. Feraud as receiver of The Sherman Company, Nevada, a corporation; and (f) Deed executed October 13, 1949, by a commissioner appointed by the Superior Court of Placer County in said Action No. 15574, after H. G. Feraud, as receiver, although personally served, had defaulted.

Appellant contends that these records are sufficient, prima facie, to establish its claim of ownership and that no competent or admissible evidence was offered by respondents to refute them. Respondents concede that this is true if the decree of the Superior Court of Placer County in said Action No. 15574 and the commissioner's deed executed pursuant thereto were valid.

It is admitted that when The Sherman Company, Nevada, was sued in the United States District Court, and that court appointed a receiver who took possession of its property, it had title to the land involved in the present action, subject to whatever rights the County of Placer had gained by virtue of the dedication heretofore mentioned. Appellant asserts that it had entered into an agreement with the receiver for the purchase of the land in question; that he had been authorized by the District Court to convey the property; that he had executed a deed to appellant but had failed to include all the property and that in order to correct this error, appellant had instituted the suit in the Superior Court of Placer County to have the receiver's deed reformed. It is conceded that appellant has no title unless the action in the state court against the receiver appointed by the District Court is valid and the commissioner's deed passed title. Up to this point there was a complete break in the chain.

Respondent's answer in the present action denied appellant's allegations of ownership but presented no issue of fraud in its procurement and in no manner directly challenged the validity of the decree in the suit for reformation of the receiver's deed. However, over the strenuous objection of appellant that its reception into evidence constituted a collateral attack on the decree, the court admitted the order of the United States District Court in the receivership action, dated December 4, 1939, terminating the receivership, discharging H. G. Feraud, as receiver, and stating—

> "It Is Further Ordered, Adjudged and Decreed, that said H. G. Feraud shall transfer by proper endorsements, assignments and/or deeds to The Sherman Company, Nevada, its successors or assigns, any and all assets or property of said receivership remaining in his name as receiver; and shall deliver possession of any assets or property remaining in his possession as said receiver; and
>
> "It Is Further Ordered, Adjudged and Decreed that title to and the right to possession of any and all assets or property of said receivership estate now known or which may hereafter be discovered shall revest and/or remain in said Sherman Company, Nevada, its successors or assigns * * *."

The court also admitted, over the objection of appellant, a transcript of the testimony of the president of appellant company given in the action for reformation, the purpose being to show that when appellant brought that action its president knew H. G. Feraud was no longer the receiver of The Sherman Company, Nevada, and that he would not appear in the suit. It is true that the witness did not specifically admit knowledge of the receiver's discharge, but as appears from the following testimony, considered in the light of all the surrounding circumstances, it is difficult to escape that conclusion. We quote:

> "Q. * * * You have discussed the matter wih Mr. Feraud, have you not? A. I have. They were overlooked.
>
> "Q. And you suggested to him that he give you a deed to these, but he suggested that it would be better for you to bring a suit to get it, is that right? A. No.
>
> "Q. I say, he suggested it would be better to bring a suit? A. Yes, he thought that was the best way to do it.
>
> "Q. Since the suit has been filed you have been in communication with him, particularly by telephone? A. I have talked with him several times by telephone.
>
> "Q. You know that he has no intention of appearing in this matter? A. That is correct. He assured me that."

Appellant now argues that the reception of such evidence constituted a collateral attack on the decree in the suit for reformation and was clearly inadmissible.

[2] The purpose of introducing such evidence was to show lack of jurisdiction in the Superior Court of Placer County, and fraud in procuring an appearance of jurisdiction. Feraud, as receiver, was the sole defendant in the action for reformation and unless he was the qualified and acting receiver at the time, he had no power to perform, and the state court had no power to appoint a commissioner to perform for him. If he had been discharged, his reformed deed, or that of the commissioner acting in place, conveyed no interest in the property. In 45 Am.Jur. 379, it is stated:

> "A receiver who has been discharged is relieved from all his official duties as such, and he is neither a necessary nor a proper party to an action on any such liability. Clearly, after his discharge, a receiver is not a proper party to an action on a contract made by him in his official capacity. Indeed, an action cannot be maintained against a receiver, even for the purpose of establishing the validity of a claim, after he has been discharged and has ceased to hold any relation to the fund out of which alone payment can be secured."

And again in 45 Am.Jur. page 283, the following statement is found:

> "The effect of a discharge of a receiver is to relieve him from all official duties as such. He is not thereafter a proper party to an action, and no judgment can be rendered against him thereon."

[3] Assuming that the state court had the power to reform a deed executed by a receiver under appointment by a Federal Court and that the decree was valid on its face, the record discloses that appellant had waived its right to object on the ground of collateral attack. During the trial of the second cause of action wherein appellant sought a preliminary injunction, Mr. Robinson, then attorney for appellant, made no objection to the introduction of evidence which unequivocally showed that Mr. Feraud, the receiver of The Sherman Company, Nevada, was discharged many years prior to the bringing of the action for reformation of his deed.

The testimony of Mr. Wells concerning the action for reformation was:

> "The Witness. The Complaint in that action, I believe, shows his default. Whether there was personal service or by advertising, I don't recall. He actually filed a deed, but he was discharged.
>
> "The Court. I am wondering if he was personally served.
>
> "The Witness. He was no longer, I believe he was no longer receiver at the time he was served at the time of that action, and believe he was discharged in * * * I have off-record information he was discharged in '38 as receiver.
>
> "The Court. What records have you that he was discharged at the time he was served?

> "Mr. Propp. I am in a position to introduce that as soon as I finish with Mr. Wells."

Mr. Propp, attorney for defendants, then called particular attention to the order of discharge, read it in full, and introduced it into evidence. Mr. Robinson, appellant's attorney, stated that there was no objection.

The court was thus put upon notice that in all probability the plaintiff in the case for reformation had knowingly brought suit against a defendant who no longer had the power or right to perform, although the record might appear otherwise if not fully explored. The trial court had before it a record showing that appellant had for some reason invoked the aid of a state court to reform a deed executed by a receiver under appointment of a Federal Court, instead of asking relief from the United States District Court which had appointed him. It had before it the record in the suit for reformation which disclosed that the complaint was filed originally on June 30, 1949; that while it was alleged therein and in the amended complaint filed later that H. G. Feraud was appointed receiver on June 27, 1930, there was no allegation that he was still the duly qualified and acting receiver at the time the complaint was filed in 1949.

In 15 Cal.Jur. pp. 61, 62, it is said:

> "The public policy underlying the doctrine of collateral attack is not such as to prevent the interested parties from waiving the protection of the rule limiting collateral inquiries to the face of the record. The rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. And if the parties admit or stipulate, or fail to object to the evidence of, the facts showing a lack of jurisdiction, it is then established that the judgment is void as effectively as shown by the record; *and whenever such fact is brought to the attention of the court, it is the duty of the court to so declare as a matter of law.*" (Italics supplied.)

[4] In Thompson v. Cook, 20 Cal.2d 564, 569, 127 P.2d 909, 912, the Supreme Court states the rule as follows:

> "* * * although the judgment or order is valid on its face, if the party in favor of whom the judgment or order runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, then it is the duty of the court to declare the judgment or order void."

Appellant's present counsel does not claim that he is not bound by the actions of his predecessor, but argues that the two hearings "were almost separate trials" and that on a second trial a party should be permitted to object even though there was no objection when the evidence was offered at the first trial or hearing. The circumstances of this case are not the same as those existing on a retrial after reversal or the granting of a motion for new trial, and whatever merit appellant's argument may have under such circumstances we think it is not applicable here. Both the hearing on the application for injunction and the trial to quiet title, involved the matter of appellant's ownership of the property and the only difference was in the relief sought. On the first hearing, the court necessarily had to consider the question of title and its order denying the injunction was undoubtedly based, in part, on evidence that appellant had no title. It would be strange, indeed, if in the same action, tried piecemeal on the same complaint, the court when advised of circumstances such as existed here, could not consider evidence indicating that the court had been the victim of fraud.

[5] There is nothing sacred about the rule limiting collateral attack; it is a rule of convenience designed to bring an end to litigation when parties have had an opportunity to have their day in court. The rule that permits and makes it the duty of a court to protect itself against fraud is equally important and should not be unduly circumscribed or limited. To do so might well lead to an attempt to create a third branch of our jurisprudence designed to correct that wherein equity itself is defective by reason of its universality.

The trial court was correct under the circumstances in holding that appellant had no right or title to the property in dispute. It is therefore in no position to question other provisions of the judgment relating to the rights of respondents.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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124 Cal.App.2d 123

PEOPLE v. PLATT.

Cr. 5122.

District Court of Appeal, Second District, Division 3, California.
March 24, 1954.

Criminal prosecution. From an order of the Superior Court of Los Angeles County, Clement D. Nye, J., setting aside information charging defendant with grand theft sounding in false pretences and forgery, the People appealed. The District Court of Appeal, Vallée, J., held that the evidence though weak and unsatisfactory, established reasonable and probable cause to believe that defendant had committed the offenses justifying the denial of his motion to set aside the information.

Order reversed.

1. Criminal Law 🔑240

To justify an order holding a defendant to answer to the superior court, reasonable or probable cause may be found, although the evidence does not establish defendant's guilt beyond a reasonable doubt, and all that is required is a reasonable probability of defendant's guilt. Pen. Code, § 995.

2. Criminal Law 🔑240

"Reasonable or probable cause" required to hold commitment of a defendant exists if there is sufficient proof to make it reasonable to believe that defendant is guilty of the offense charged. Pen.Code, § 995.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable or Probable Cause".

3. Indictment and Information 🔑137(4)

On motion to set aside an information, question of guilt or innocence of defendant is not before court, nor does issue concern quantum of evidence necessary to sustain conviction, but court only determines whether magistrate acting as a man of ordinary caution, could conscientiously entertain a reasonable suspicion, that a public offense has been committed in which defendant participated.

4. Indictment and Information 🔑137(4)

On motion to set aside an information, the court may not substitute its judgment as to the weight of evidence for that of the magistrate and if there is some evidence to support information court shall not inquire into its sufficiency. Pen.Code, § 995.

5. Indictment and Information 🔑137(4)

Under the statute, an information will be set aside only where there is no evidence that a crime has been committed or there is no evidence to connect defendant with a crime shown to have been committed. Pen.Code, § 995.

6. False Pretenses 🔑26

An information charging grand theft includes the offense of obtaining money for false pretences. Pen.Code, §§ 484, 487.

7. False Pretenses 🔑4

To establish a crime of grand theft sounding in false pretences there must be proof of making of false representations of past events or existing facts as distinguished from mere expressions of opinion, that representations were known to be false and were made with an intent to defraud the owner of his property and that owner was actually defrauded. Pen.Code, §§ 484, 487.

8. False Pretenses 🔑7(1)

A representation as to the quantity of a thing offered for sale may constitute a false pretence where it involves a statement of fact known to be false. Pen.Code, §§ 484, 487.

9. False Pretenses ⚿7(5)

Representations as to the volume of a business are statements of present or past facts, in determining the crime of grand theft sounding in false pretences.

10. False Pretenses ⚿9

If statements relative to the volume of business are made by a person knowing them to be untrue with intent to defraud one to whom they are made and such person relies on the statements and is induced thereby to part with something of value, offense of theft in obtaining property by false pretences is committed. Pen.Code, §§ 484, 487.

11. Criminal Law ⚿27

The forging or uttering of an order for the delivery of goods is a felony. Pen. Code, § 470.

12. Forgery ⚿1, 16

Crime of forgery is complete when one either makes or passes a false instrument with intent to defraud. Pen.Code, § 470.

13. Forgery ⚿35

Fact of forgery may imply an intention to defraud. Pen.Code, § 470.

14. Indictment and Information ⚿140(2)

Evidence established that a reasonable or probable cause or a strong suspicion that defendant had committed the offenses of grand theft sounding in false pretences and forgery so as to justify a denial of his motions to set aside the informations charging such offenses though there was a strong doubt that there would ever be a conviction. Pen.Code, §§ 470, 995.

◆

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., Los Angeles, for appellant.

Jerry Giesler and Rexford D. Eagan, Beverly Hills, for respondent.

VALLÉE, Justice.

Appeal by the People from an order granting a motion of defendant to set aside the information charging him with two counts of grand theft and four counts of forgery, on the ground he had been committed without reasonable or probable cause. Pen.Code, § 995.

In the information, defendant was accused of feloniously taking $2,500 and $5,000 in money from Michael Epstein and Robert Saltzman; and of forging four merchandise purchase orders, each in the sum of $69.22, publishing and passing them knowing they were false, with intent to defraud each of the four purported purchasers, Michael Epstein, and Robert Saltzman.

Defendant owned a franchise from a manufacturer, covering several California counties, for the sale and distribution of Stroll-O-Chairs, a baby item combination. He also operated the Baby Research Institute through which the combinations were sold. Through an advertisement in a Los Angeles newspaper in which defendant offered to sell exclusive distributorships, he was contacted by Michael Epstein. Epstein was a merchant and manufacturer of infant goods and had a baby items store. About September 11, he went to the Institute; defendant demonstrated the product and explained the modus operandi of the business: how many salesmen would be needed, the number of potential buyers based on population and number of births a day and prenatal cases, and possible profits. Afterwards, Epstein discussed the matter with his neighbor, Robert Saltzman, who in turn contacted defendant a few days later.

After several conversations between defendant and Epstein and Saltzman, it was agreed that the latter two would buy the entire franchise for $7,500. Epstein and Saltzman testified that defendant had at different times told them he had between 150 and 175 orders for combinations which he would turn over to them, and that they were walking into an established business. By oral agreement, Epstein and Saltzman were to receive 150 or more bona fide orders; defendant was to stay with them for thirty days, train them, show them how to organize salesmen, and help them obtain a franchise direct from the manufacturer. Saltzman gave defendant a check for $200 as a deposit.

On October 1, 1952, the agreement was reduced to writing by attorneys for Epstein and Saltzman and signed by the parties. Defendant warranted, in the agreement, that prior to its execution "he has taken orders for not less than *100* Combinations, delivery of which have not as yet been made." The figure "100" was written in ink in the typewritten agreement. Defendant agreed to assign such orders to Epstein and Saltzman and to deliver to a trustee all moneys in excess of $5 per order which he had received from purchasers on account of the orders, such moneys to be held and distributed in accordance with certain instructions. Epstein and Saltzman agreed to pay defendant $7,500: payable $2,500 on the execution of the agreement, receipt of which was acknowledged; $5,000 not later than November 1, 1952, on condition that the franchise had been delivered by that date. They also agreed to pay the dollar value of the inventory on hand as of October 1, 1952. Saltzman testified to what transpired at the time the figure "100" was inserted in the blank space: that on October 1st, he had counted 147 purchase orders which had been lying in a desk drawer at the Institute; however, defendant was supposed to "turn in" 150 orders to them; defendant said, "What must I do now while I'm in here? Should I go out and sell three or four to make the 150? Then I suggested * * * 'I have counted 147 orders. * * * I am perfectly satisfied to have a figure put in no less than 100. On the rest, I'm sure that there is 147.' "

Defendant remained with the business for nearly one month. On October 1, Saltzman began to take an active part in the business, and during October he was in the store every day and worked closely with defendant. During the first part of that month Epstein did not give much time to the business.

Prior to October 1, defendant employed approximately 23 salesmen. In October, defendant interviewed from 150 to 200 prospective salesmen, during which interviews defendant wrote out sample or demonstration orders in their entirety, including the names of purchasers and salesmen. These orders were not destroyed. "A lot" of additional salesmen were employed. Defendant did not go out into the field and solicit purchasers. Epstein and Saltzman continued to subscribe to a service that gave them a weekly report of the names of new and of expectant mothers.

During October, about 75 purchase orders were received and were placed in the desk drawer. Epstein testified, "Some [of the orders] that were sold I may have thrown away." Defendant entered some of the orders on a yellow work sheet, but it was not an accurate tab of the orders. Saltzman testified that he did not keep any records of any kind of the business during October nor at any time thereafter. All of the orders, both prior to and after October 1, were kept in a desk drawer and were neither filed nor segregated. The moneys received during October were deposited in the account of the trustee in accordance with the terms of the agreement. During the month, about 5 deliveries of chairs were made to customers.

Epstein and Saltzman obtained the franchise and inventory, and defendant received the money: $200 deposit on October 1, $2,300 on October 3, and $7,500.68 on October 28. The latter sum included $2,500.68 for the inventory.

On October 28 or 29, defendant returned to New York because of the illness of his wife, a fact known to Epstein and Saltzman. He gave them his New York telephone number. The sample or demonstration orders, together with all other records of the business, both prior and subsequent to October 1st, were left with Epstein and Saltzman. At that time, Epstein for the first time counted the purchase orders and found either 150 or 158 orders.

In the middle of December, 1952, after calling "four or five" of the purported purchasers in order to deliver the combinations, Epstein, with Saltzman listening on an extension, telephoned defendant in New York and told him that the orders that were left were forgeries. Epstein testified that defendant threatened he would see they did not receive any merchandise from the factory if they tried to get him back to California. As a result of the conversation, Saltzman went to the Stroll-O-Chair factory in New York and took with him "quite a few" of the 147 orders that he had counted on October 1st. He testified that "by mistake" he left "between 30 and 40 orders" on the desk in the office of the company. No deliveries had been made to any of the purported purchasers whose names appeared on the orders, but Epstein had called four or five of them. Saltzman then went to Buffalo, New York, where he saw defendant and told him what had occurred: the people whom they called knew nothing about the orders—never placed any orders; and if defendant did not give the money back, he would go to the district attorney. Defendant replied that the orders were given to him by the salesmen. Saltzman did not show defendant any of the orders that he had taken with him to the factory.

Originally defendant was charged in eight counts with forging merchandise purchase orders. At the preliminary hearing, the People introduced in evidence 97 purchase orders.[1] Saltzman identified them and stated that of these 74 were a part of the 147 he had counted on October 1. Three salesmen testified. Their testimony related to 71 of the orders in evidence that were purportedly solicited and signed by them. Each testified he had not procured nor signed the orders. Only one of them actually had ever sold any combinations.

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[1] Due to the fact that there seems to be a variance as to the number of purchase orders introduced in evidence and the testimony relative thereto, the following table is set forth:

Exhibits	Number of Orders	Salesman*	Orders Dated Prior to Oct. 2 1952	Orders Dated After Oct. 2 1952	Orders Not Signed By Defendant	Orders Signed By Defendant
A	1	Miller		1	1	
B	1	Fisher	1		1	
C	1	Miller		1	1	
D	1	Fisher		1	1	
E[1]	1	*Eden*	1			1
F[2]	1	*Eden*	1			1
U[3]	19	*Eden*	19			19
V	25	*Ragel*	16[5]	9	25	
W	24	*Bennet*	24		24	
X	22	Fisher	11	11	22	
Y[4]	1	*Eden*	1			1
	97		74	23	75	22

* Italicized—Salesmen that testified.

1. Count VI
2. Count V
3. Count III—Order No. 1771
4. Count IV
5. State claims that 19 were included within the 147 counted on October 1st; however 11 of them were dated either on October 1st, or later.

Order Nos.:
1817—October 1, 1952
1818—October 1, 1952
1819—October 2, 1952
1820—October 3, 1952
1821—October 6, 1952
1822—October 7, 1952
1823—October 7, 1952
1876—October 15, 1952
1877—October 17, 1952
1878—October 18, 1952
1879—October 20, 1952

The two orders dated October 1, 1952, have been included in the subtotal (16) as orders dated prior to October 2nd, and as part of the 147 orders.

One of the salesmen, Mr. Eden, testified he never prints his name when he signs it; however, on the orders that were purportedly secured by him, his name is printed.[2] The testimony of the three salesmen was also to the effect that of the 74 orders that Saltzman testified were included within the 147 he had counted on October 1st, they had not solicited 62 of them. Nine of these purported orders were dated on or after October 2, 1952.

Eight of the purported purchasers (women) testified they had neither authorized the purported purchases nor had signed the orders. On the date the apparent orders were taken, each of them lived at the address as shown on her respective purported order. Six of the women stated that they each had a child who was born within a period thirty days prior to the date shown on their respective purported orders as the date on which the orders

[2] One of the orders purporting to be Eden's reads:

"Baby Research Institute
Exclusive Introductory Agents For
Ever-Ready
Stroll-O-Chair
The Five Purpose Baby Unit
"It Grows With The Baby"
Southern California Office
5287 W. Pico Bvd. WE. 3–8429 Los Angeles 19, Calif.
No. 1762

Shipping Date 1–30–53
Name Glen Owens
(Avoid Errors—Please Print Plainly)
Address 1409 N. Benton Wy. Apt. ......
City L. A., 26 State Cal.

1 Stroll-O-Chair Complete
At Introductory Price Grey 64.95

S. Tax 2.27

Delivery And Service Charge 2.00

Stroll-O-Chair Items Are
Not Sold in Stores Total Sale 69.22
A Hi-Chair A Table & Chair Set
A Car Seat A Youth Chair Deposit Pd 20.—
A Stroller
All For The Price Of One Bal C.O.D. 49.22

Ask for and keep a copy of this order. No one has authority to change this printed order in any way. This order is not subject to cancellation by you, nor will deposit be refunded, credited, or transferred. We will not be responsible for delays due to strikes, accidents, fires, war, Government priorities or causes beyond our control.

Date Of Order 9–15–52
Customer's Signature Mrs. Glen Owens
Customer's Phone

"We always try for advancement:

All advance engineering changes incorporated from date of order to delivery date will be included at no additional cost to customer.

Independent Distributor
Glenn Eden".

were taken.[3] The testimony brought out the fact that seven children of the purported customers were born within the first four days of September, 1952.

An expert witness identified the printing and writing on Exhibits E, F, U, and Y, a total of 22 orders, as that of defendant; the handwriting on the other exhibits was not that of defendant. Subsequently, the four counts evidenced by Exhibits A, B, C, and D were dismissed. The other four counts for forgery were retained and were incorporated in the information as counts III, IV, V, and VI.

The basis for the charges of grand theft lies in the alleged failure of defendant to turn over to Epstein and Saltzman on October 1, 1952, one hundred bona fide orders. It is contended that defendant warranted that he had 100 bona fide orders; that since 62 of the orders were not solicited nor written by the salesmen whose names appear on them, and inasmuch as Saltzman had counted 147 orders on October 1st, there could not have been more than 85 bona fide orders on that date.

[1, 2] The evidence necessary to justify an order holding a defendant to answer to the superior court is not subject to the same test as that before a trial jury in a criminal action, and reasonable or probable cause may be found for holding to answer although the evidence does not establish the defendant's guilt beyond a reasonable doubt. All that is required is a reasonable probability of the defendant's guilt. Davis v. Superior Court, 78 Cal.App.2d 25, 27, 177 P.2d 314. "Reasonable or probable cause", required to uphold the commitment of a defendant, Pen.Code, § 995, exists if there is sufficient proof to make it reasonable to believe that the defendant is guilty of the offense charged. People v. George, 95 Cal.App.2d 425, 429, 213 P.2d 33; People v. Thomas, 90 Cal.App.2d 491, 494, 203 P.2d 567.

[3–5] On a motion to set aside an information, the question of the guilt or innocence of the defendant is not before the court, nor does the issue concern the quantum of evidence necessary to sustain a judgment of conviction. The court is only to determine whether the magistrate, acting as a man of ordinary caution or prudence could conscientiously entertain a reasonable suspicion that a public offense had been committed in which the defendant had participated. Weber v. Superior Court, 35 Cal.2d 68, 69, 216 P.2d 871. A court may not substitute its judgment as to the weight of the evidence for that of the magistrate. If there is some evidence to support the information, the courts will not inquire into its sufficiency. Under section 995 of the Penal Code, the information will be set aside only where there is no evidence that a crime has been committed or there is no evidence to connect the defendant with a crime shown to have been committed. Lorenson v. Superior Court, 35 Cal.2d 49, 55–57, 216 P.2d 859.

[6] The crime of grand theft is committed when a person knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of property of a value exceeding $200. Pen.Code, §§ 484, 487. An information charging grand theft includes the offense of obtaining property by false pretenses. People v. Myers, 206 Cal. 480, 483–484, 275 P. 219; People v. Payton, 36 Cal.App.2d 41, 49, 96 P.2d 991.

[7] Although the crime of obtaining property by false pretenses has been includ-

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[3]

Exh.	Order No.	Purported Purchaser	Purported Order Date (1952)	Date of Birth of Youngest Child (1952)
A	1829	Mrs. Frank Merino	Oct. 6	Sept. 2
B	1861	Mrs. P. Gazzetta	Sept. 23	Sept. 3
C	1833	Mrs. William Aull	Oct. 17	No child
D	1901	Mrs. Lewis	Oct. 20	Sept. 3
E	1770	Mrs. Ann [Louise] Levyn	Sept. 23	Sept. 4
F	1772	Mrs. Jane [Diane] Cooper	Sept. 22	Sept. 1
U	1771	Mrs. Mary [Helen] Grieve	Sept. 22	Sept. 1
Y	1762	Mrs. Glen Owens	Sept. 15	Sept. 4

ed under the designation of theft, the elements of that crime have not been changed. People v. Selk, 46 Cal.App.2d 140, 147, 115 P.2d 607. To establish the commission of the crime of grand theft "sounding in false pretenses," as the charge is made here, these factors must be proved: 1) the making of false representations of past events or existing facts as distinguished from a mere expression of opinion; 2) that the representations were known to be false and were made with intent to defraud the owner of his property; and 3) that the owner was actually defrauded in that he parted with his property in reliance on the false representations. People v. Jones, 36 Cal.2d 373, 377, 224 P.2d 353.

[8–10] A representation as to the quantity of a thing offered for sale may constitute a false pretense where it involves a statement of fact known to be false. 35 C.J.S., False Pretenses, § 14, p. 651. Representations as to the volume of a business are statements of present or past facts. People v. Foster, 117 Cal.App. 252, 253, 3 P.2d 586; People v. Walker, 76 Cal.App. 192, 203, 244 P. 94; People v. Raines, 66 Cal.App.2d 960, 153 P.2d 424; People v. Wilson, 130 Cal.App. 760, 20 P.2d 748. If statements relative to the volume of business are made by a person knowing them to be untrue, with intent to defraud the one to whom they are made, and such person relies on such statements and is induced thereby to part with something of value, the offense of theft, obtaining property by false pretenses, is committed. People v. Foster, supra. The signing of a person's name without authority, at least where the instrument has been uttered, is sufficient to imply an intent to defraud. People v. Horowitz, 70 Cal.App.2d 675, 687, 161 P. 2d 833; People v. Baender, 68 Cal.App. 49, 59, 228 P. 536.

As a result of a newspaper advertisement, Epstein and Saltzman became interested in buying from defendant his franchise to sell stroll-o-chairs at an agreed price of $7,500. At different times, defendant orally represented to Epstein and Saltzman that he had and would assign to them between 150 and 175 orders for the purchase of the combinations for future delivery. In the written agreement, he warranted that there were 100 such orders. On October 1, defendant turned over to Saltzman all the purchase orders he had; Saltzman counted 147 orders. Ninety-seven purported orders were introduced in evidence, of which 74 were among the 147 which Saltzman counted on October 1. Three of the salesmen testified that of the 74 orders, they did not solicit nor sign 62 which were purportedly procured by them. Only one of them had sold a chair. Five of the purported customers, of orders that were dated prior to October 1, testified that they had neither authorized the purported purchases nor signed their names to the orders. The effect of the testimony of the expert was that the printing and writing on 22 of the orders which were turned over to Saltzman on October 1 were that of defendant. Epstein testified that in paying the money to defendant he relied on the statements defendant orally made to him during the period the sale was being negotiated, and on the warranty included in the written agreement concerning the number of orders defendant had for future delivery of the combinations.

Although there are many missing links—orders—in the chain from the time that Saltzman counted 147 orders on October 1 to October 29, when Epstein counted 158, during which interval approximately 75 sales were made, and to the date of the preliminary hearing when only 97 orders were introduced in evidence, we may not weigh the evidence. There was "reasonable and probable cause"—"a strong suspicion"—to believe that defendant's representations were of existing facts; that they were false; that he knew they were false; that they were made with intent to defraud; and that Epstein and Saltzman parted with money in reliance on the false representations.

Defendant is also charged with four counts of forgery. The information alleges that defendant with intent to cheat and defraud the four named purchasers, Epstein, and Saltzman, forged four merchandise orders for the payment of money, each in the sum of $69.22, and uttered, published, and passed them, knowing they were forged.

Forgery is defined in section 470 of the Penal Code. The pertinent part of the section reads: "Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to * * * receipt for money * * * or the delivery of goods or chattels of any kind, * * * or other contract for money or other property; or counterfeits or forges the seal or handwriting of another; or * * * passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged, or counterfeited matters, * * * knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; * * * is guilty of forgery." See People v. McKenna, 11 Cal.2d 327, 332, 79 P.2d 1065; People v. Horowitz, 70 Cal.App.2d 675, 687, 161 P.2d 833; People v. Wilson, 139 Cal.App. 139, 142, 33 P.2d 476.

[11–13] The forging or uttering of an order for the delivery of goods is a felony. People v. Way, 10 Cal. 336; 12 Cal.Jur. 650, § 4. The crime of forgery is complete when one "either makes or passes a false instrument with intent to defraud." People v. Davidian, 20 Cal.App.2d 720, 724, 67 P.2d 1085, 1087. The fact of forgery may imply an intention to defraud. People v. Baender, 68 Cal.App. 49, 59, 228 P. 536; People v. Horowitz, 70 Cal.App.2d 675, 687, 161 P.2d 833.

The same salesman's name appears on the four forgery count orders. The salesman, Mr. Eden, testified he neither solicited nor signed the purported orders; he never prints his name when he signs it—the name on the orders was printed; and he did not turn in the orders to defendant or to the Institute. The four purported customers testified they had not been contacted about the combinations, they did not authorize the purchases, they did not sign the orders, nor had they given anyone permission to sign their names to the respective purported orders. On three of the order blanks, the first names of the purported purchasers were incorrect. The expert testified that the printing and writing, including the salesman's and purchasers' names, on the four forgery count orders, were defendant's. The four forgery count orders were part of the 147 which were turned over to and counted by Saltzman on October 1st.

[14] From the summarized evidence, there was "reasonable or probable cause" —"a strong suspicion"—to believe that defendant forged the four purchase orders, and presented them as bona fide orders to Epstein and Saltzman with the intent to defraud them.

The evidence is weak, unsatisfactory, and permeated with conclusions of Epstein and Saltzman. It fully merits the comment of the committing magistrate that he had a "strong doubt" that there would ever be a conviction, and the statement of the trial judge that "there is but remote possibility of getting a conviction in this case. It looks to me like it is an effort to use the District Attorney's Office to effect a settlement of a bad business deal that did not pan out the way they wanted it to, but I don't think there is any criminal action." But these are not the tests. Since there is some evidence to support the information, the order setting it aside must be reversed.

Order reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

124 Cal.App.2d 248

WAGNER v. TROUT.

Civ. 8325.

District Court of Appeal, Third District, California.

March 29, 1954.

Rehearing Denied April 19, 1954.

Hearing Denied May 27, 1954.

Action by used car dealer to quiet title to and recover possession of automobile, wherein defendant filed cross complaint seeking to quiet her title to automobile. The Superior Court, San Joaquin County, Woodward, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that findings as to fact and contents of Nevada registration of automobile in name of plaintiff's transferor, in absence of evidentiary support for finding as to plaintiff's knowledge of transferor's fraud in procuring such registration, were in such direct conflict with general finding that defendant and not plaintiff was owner of automobile under prior California registration in names of defendant or plaintiff's transferor as to require reversal of judgment.

Judgment reversed.

1. Automobiles 🔑52, 54

Where automobile was registered in California in the names of owner or another, such other person, having possession of pink slip, though he had no real interest in automobile, could register it in his name in Nevada and thereafter he could transfer automobile to a third person, presenting Nevada green slip as evidence of his right to do so, and transferee, ignorant of any conflicting claim, would be protected in his title so acquired.

2. Replevin 🔑72

In action to quiet title to and recover possession of automobile, plaintiff had the burden of proving his ownership of automobile by the best evidence of such ownership, if such evidence was required. Code Civ.Proc. §§ 1855, 1981.

3. Automobiles 🔑20

In action by used car dealer to quiet title to and recover possession of automobile originally registered in California in names of defendant or plaintiff's transferor but allegedly transferred to plaintiff in Nevada under Nevada registration in transferor's name alone, failure of plaintiff to produce and file with court Nevada green slip or explain failure to do so justified trial court in denying credence to plaintiff's testimony as to acquisition of title and finding in accordance with defendant's testimony that under unchanged California registration defendant and not plaintiff was owner of automobile. Code Civ.Proc. §§ 1855, 1981.

4. Appeal and Error 🔑994(3), 1012(1)

It is within the province of trial court to determine what credit and weight should be given to testimony of any witness and reviewing court cannot control trial court's finding or conclusion denying credence to testimony unless it appears that there are no matters or circumstances which at all impair its accuracy, and where such matters do appear, a finding of trial court denying credence to testimony must be upheld.

5. Fraudulent Conveyances 🔑301(1)

In action by used car dealer to quiet title to and recover possession of automobile, findings that plaintiff had knowledge of fraud by which his transferor had procured registration of automobile in California in names of defendant or plaintiff's transferor and subsequent registration of automobile in Nevada in name of transferor alone were unsupported by the evidence.

6. Fraudulent Conveyances 🔑137(1), 226

Transfer of automobile in Nevada, unless accompanied by immediate delivery, followed by actual and continued change of possession, would be fraudulent and therefore void as to transferor's creditors, but such transfer would not vest in creditor any title to or right to possession of automobile.

7. Fraudulent Conveyances 🔑228, 230, 237(2)

Transferor's creditor may attach property transferred in fraud of creditors, may bring an equitable action to have transfer declared void as to creditor and property subjected to his claims as a creditor, or if claim as creditor has been reduced to judgment, he may have the property sold under execution.

8. Fraudulent Conveyances ⚿226

A creditor cannot without legal process appropriate to payment of his debt property fraudulently conveyed by debtor.

9. Fraudulent Conveyances ⚿172(2)

Transfer of automobile in Nevada, though fraudulent as to transferor's creditors, was binding as between parties to transfer, if transferee had no knowledge of fraud, regardless of whether there was immediate delivery followed by continued change of possession of automobile.

10. Appeal and Error ⚿1071(1)
Quieting Title ⚿47(2)

In action by used car dealer to quiet title to and recover possession of automobile, findings that plaintiff knew of fraud by which his transferor had procured registration of automobile in Nevada in his name indicated acceptance of plaintiff's testimony as to fact and contents of Nevada registration upon which plaintiff relied, and in absence of evidentiary support for finding as to plaintiff's knowledge of fraud, findings as to Nevada registration were in such direct conflict with general finding that defendant and not plaintiff was owner of automobile under prior California registration in names of defendant or plaintiff's transferor as to require reversal of judgment for defendant.

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Richard J. Lawrence, Sacramento, for appellant.

Gordon J. Aulik, Stockton, for respondent.

VAN DYKE, Presiding Justice.

By this action appellant Wagner sought to recover the possession of an automobile from respondent Trout. The pleadings were in the usual form and both appellant Wagner, as plaintiff below, and respondent Trout, as defendant below, asked that title to the vehicle in question be quieted. The trial court gave judgment in favor of respondent Trout and Wagner appeals.

The following facts appear in the testimony of respondent. Prior to the time that Wagner's claim of title originated respondent was living with one Raymond Trout. The couple were not husband and wife. She purchased the automobile with her own funds and directed the dealer who sold her the car to register the title in her name alone. For some unexplained reason, the car was registered in the name of respondent or Raymond Trout, thus making it possible under California law for either respondent or Raymond to transfer the car. When respondent discovered this situation, and that the pink slip was in the possession of Raymond, she compelled him to give her a document which stated that Raymond was thereby relinquishing all interest in the car to her. However, he retained the pink slip. Later on Raymond wanted to borrow on the car and she permitted him to do this. The two signed a promissory note for $200, which money was then borrowed from the Bank of America and the car was so registered as to show legal title in the bank and registered ownership in respondent or Raymond. This loan was paid off and Raymond again got possession of the pink slip. The couple went to Reno, Nevada, and while there Raymond left the respondent, taking the car with him. It took her some time to ascertain his whereabouts. She located him in Las Vegas.

Appellant, who is a used car dealer in Las Vegas, testified that Raymond transferred the car to him as part payment for another used car which he had for sale and that this transfer was agreed upon on the evening of the 14th of September, 1950. He testified that the car then had Nevada license plates and that Raymond presented to him a Nevada green slip, a document tantamount to the California pink slip, which green slip showed the car to be registered to Raymond alone as owner. Raymond, said appellant, "signed off" on the green slip. The car which Raymond was buying from appellant was not ready for delivery and appellant testified that for this reason he allowed Raymond to continue his use of the automobile here in issue; that Raymond returned it next morning and delivered it to him and he placed it on his used car lot; that early in the morning of the 15th of September the car was stolen from his lot and he did not discover its whereabouts until sometime later, after instigating a search for it; that he found it in the possession of respondent who claimed to own it. Appellant introduced in evidence an application for purchase of appellant's used car, which application showed that the proposed deal was one whereby the car in issue here would be turned in at a fixed figure as a part of the down payment to be made by Raymond for the substitute car. This application to purchase was dated September 15th. Appellant testified also that notwithstanding the theft of the car and after he and Raymond had notified the Nevada authorities of the theft and after Raymond had taken steps to collect the insurance on the car deemed stolen, he, Wagner, had proceeded to complete the deal with Raymond, turning over to him the substitute car and issuing a conditional sale contract which showed a down payment for the value of the car in issue here, the payment of $100 in money, and a balance still unpaid. No objection was made that appellant's testimony as to the Nevada registration was not the best evidence, but during the giving of that testimony appellant volunteered that he could produce in court the green slip issued by the State of Nevada. He testified that he did not know of any claim that respondent had as to the car and it is apparent that he, in dealing with Raymond, relied upon the registration of the car in the State of Nevada in the name of Raymond. Appellant rested his case as to ownership upon his testimony as above stated.

Concerning these happenings in Las Vegas respondent testified that she knew nothing of any Nevada registration or of any dealings which Raymond might have had with appellant. She said there were no Nevada plates on the car to her knowledge. She located Raymond at his place of employment in Las Vegas early on the morning of the 15th of September, 1950. She demanded of him that he turn the car over to her. She testified that the car at that time was parked at Raymond's place of employment in an area marked for customer parking, and that it was not upon the used car lot of appellant. She said that Raymond told her to take the car, get out of town with it and not bother him further and this she proceeded to do. Later on, and after the filing of this action, the car was taken from her possession through court process. Appellant and respondent were the sole witnesses at the trial.

At the conclusion of the testimony the court asked counsel if there was any question as to the Nevada registration or as to the fact of the issuance of the Nevada green slip, commenting that appellant had testified that he could present the green slip if it was wanted. Counsel for the respondent refused to stipulate that the registration was as appellant had testified and requested that he be permitted to see the green slip and that it be filed with the court. Appellant's counsel responded that, while they did not have the green slip in court at that time, yet it was available and would be exhibited to counsel for the respondent and filed with the clerk of the court. The court ordered that this be done and that the case be submitted upon briefs, counsel for the appellant to file first. Considerable time passed and the brief was not filed and the green slip was not produced. Both matters became the subject of correspondence between counsel and the response of counsel for the appellant was that the green slip was not immediately available, but that a certified photostatic copy thereof would be obtained and this or the original would be furnished. Further time passed and this was not done. Finally, counsel for respondent filed in court a motion that the cause be decided and that judgment be rendered in respondent's favor upon her cross-complaint seeking to quiet her title to the automobile. Counsel for the appellant did not appear at the hearing of this motion, although the moving papers had been duly served. At that time the court, having stated for the record the failure of the appellant's counsel to file any brief and failure of appellant or his counsel to furnish the Nevada green slip or other proof of its having been issued, stated that the motion to give judgment in favor of respondent would be granted. Thereafter the court made findings of fact favorable to respondent and entered judgment in accordance therewith.

[1] It is apparent that Raymond Trout, by virtue of the way in which the car was registered in California, could have registered the car in his name in Nevada, and if, having done that, he had thereafter transferred the car to appellant, presenting the Nevada green slip as evidence of his right to do so, the appellant, ignorant of any conflicting claim, would be protected in his title so acquired. But appellant's proof that the car was so registered depended entirely upon appellant's oral testimony. The court found that respondent was at all times the owner of the car and that appellant had no title to and no interest therein. The first question presented on this appeal is whether or not that finding can be supported.

[2–4] The finding of ownership can be supported upon the testimony of respondent if the effect of appellant's testimony concerning the Nevada registration is not binding upon the trial court. There is no essential conflict in the testimony of the two witnesses. When, however, while orally testifying as to the existence of the Nevada registration evidenced by the Nevada green slip appellant stated that he could produce the green slip and when thereafter, when ordered by the court to do so, he neither produced it nor explained his failure, his conduct cast such doubt upon the veracity of his testimony concerning the registration as to justify the court in disbelieving him and finding in accordance with the testimony of respondent that the California registration, which had never been changed, showed title to be still in himself or Raymond. The burden was upon appellant to prove the ownership of the vehicle, Sec. 1981, Code Civ.Proc., by the best evidence thereof if that was required, Sec. 1855, C.C.P., and his failure to produce and file with the court the Nevada green slip upon which he relied justified the trial court in denying credence to his testimony as to his title. As was held in Blanc v. Connor, 167 Cal. 719, 722, 141 P. 217, 218, it is within the province of a trial court to determine what credit and weight should be given to the testimony of any witness and an appellate court cannot control the trial court's finding or conclusion denying credence to testimony unless it appears that there are no matters or circumstances which at all impair its accuracy. Where such matters do appear a finding of the trial court denying credence to the testimony must be upheld. Said the court, quoting from Davis v. Judson, 159 Cal. 121, 128, 113 P. 147:

> "* * * '* * * The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact; and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy.'"

We conclude that the general findings of the trial court that respondent, and not appellant, was the owner of the car in question are supported on the theory, however, that the court did not accept the testimony of appellant as to the fact and contents of the Nevada registration.

[5–9] The foregoing would be sufficient to dispose of the appeal if it were not for the further and more specific findings made by the trial court responsive to affirmative allegations in respondent's pleadings. Having found generally that the plaintiff was not the owner of the car, and, conversely, that respondent was such owner, the court proceeded to make findings more specific in nature. The court found that the automobile was registered in this State in the names of respondent and Raymond "through the fraudulent conduct of the said Raymond"; that the car was still registered to the two in this State and "that all of these facts were at all times mentioned in the Complaint herein within the personal knowledge of the plaintiff." We fail to find in the record any support for this finding that these matters were within the personal knowledge of the plaintiff. He testified that he knew nothing about the California registration and there is nothing from which such knowledge can be inferred. The court further found "that the registration of said vehicle was procured in Nevada through fraud and plaintiff had knowledge thereof." A fair interpretation of this finding is: 1. That the car had been registered in Nevada, but that the registration was ineffective in support of appellant's title because the Nevada registration had been accomplished through someone's fraud, presumably the fraud of Raymond; and, 2. That the plaintiff had knowledge of that fraud. Again, there is no support in the evidence for the finding that whatever was the fraud of Raymond appellant had knowledge thereof. But by its form the finding indicates that the court believed appellant testified correctly and truthfully in respect of the Nevada registration. As we have said, if that registration was in fact as testified to by appellant, then, there being no support in the record for a finding that appellant knew of any taint of fraud concerning that registration, appellant's title would be made out. The court proceeded further to find that if there was any transfer of the automobile to plaintiff by Raymond said transfer was fraudulent as to respondent in that the transfer was not accompanied by an immediate delivery, followed by an actual and continued change of possession and was therefore void as to respondent who the court found to have been a creditor of Raymond at that time. These findings of fraudulent transfer show no title in respondent. Such a transfer is void as to creditors, but the invalidity vests no title in the creditor. The creditor by reason of such invalidity obtains no right to the possession of the property transferred. As such defrauded creditor the respondent had various remedies which she could have enforced in order to collect her debt. For instance, she could have attached the property; if her claim as a creditor had been reduced to judgment she could have had the property sold under execution; she could have had an equitable action to have the transfer declared void as to her and the property so transferred subjected to her claims as a creditor. But the fact of fraudulent transfer, invalid as to her as a creditor, invests her with no title. It is declared in 37 C.J.S., Fraudulent Conveyances, § 316: "A creditor cannot without legal process appropriate property fraudulently conveyed by the debtor to the payment of his debt." Of course the transfer was good as between the parties to it whether or not there was immediate delivery followed by actual and continued change of possession. Byrnes v. Hatch, 77 Cal. 241, 19 P. 482; Ramirez v. Hartford Acc. & Indem. Co., 29 Cal.App.2d 193, 84 P.2d 172. The legal effect, therefore, of the court's findings that the property had been transferred by Raymond to appellant in violation of the provisions of Nevada law is that the title passed to appellant as between Raymond and himself. The fact that it was void as to respondent in respect of her claims as a creditor does not vest in her any title to the property.

[10] Returning now to the general finding of ultimate fact that respondent was the owner and appellant was not, it inferentially rests upon a finding that no such registration and transfer as testified to by appellant existed. But this necessary inference is in conflict directly with the finding of the court later that the car had been registered in Nevada. Under these circumstances we deem the findings in such conflict that it cannot be said therefrom, after a consideration of the testimony, what theory the trial court adopted in the rendition of its judgment. If that court accepted the testimony of appellant as to

the fact and the form of the Nevada registration then the judgment rests entirely upon the findings concerning the fraud of Raymond in respect of the rights of respondent or upon the findings of fraudulent transfer, which, as we have seen, are not supported by the record or are legally insufficient to support the judgment. If the trial court did not accept that testimony for the reasons we have hereinbefore discussed then proof of appellant's title disappears and the judgment could be affirmed upon the theory that plaintiff had failed to prove his title. The situation is one which we think necessitates reversal for conflict in the findings.

The judgment is reversed.

PEEK and SCHOTTKY, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

124 Cal.App.2d 298

ALBERT et al.

v.

JAMIESON, City Clerk.

Civ. No. 16212.

District Court of Appeal, First District, Division 2, California.

March 31, 1954.

Proceeding for writ of mandate to compel city clerk to accept nomination papers of petitioners. The Superior Court, Alameda County, Ralph E. Hoyt, J., entered judgment denying writ. Petitioners appealed. The District Court of Appeal, Kaufman, J., held that provision of statute permitting nomination by signing nomination paper not earlier than 60th day before municipal election was mandatory.

Judgment affirmed.

Elections 🔑144

Under statute providing for nomination of candidates for elective office by signing nomination paper not earlier than 60th day before election and requiring affixing of date of signing, nominations, signatures on which were affixed on dates prior to 60 days before election, were insufficient. Elections Code, §§ 9708, 9756, 9757.

Haley, Schenone & Tucker, Raymond N. Baker, Hayward, for appellants.

George P. Oakes, City Atty. of City of Hayward, Hayward, for respondent.

KAUFMAN, Justice.

This is an appeal by the petitioners, Antone Albert, Louis A. Bozzi, Jr., and Henry R. Gall, from the judgment of the Superior Court whereby a petition for a writ of mandate was denied and wherein the sole question presented to the court involved the determination of the propriety of the action of the City Clerk, defendant, (respondent) in rejecting the three nomination papers proposing the three petitioners, (appellants) as candidates for councilmen at the forthcoming City of Hayward Municipal Election to be held the 13th day of April, 1954. The City Clerk of the City of Hayward rejected each of the said nomination papers and refused to certify each of the said three petitioners as nominees for such office for the reason that each of said nomination papers shows on its face that all the signatures of the voters appearing thereon were signed and affixed thereto prior to the first date allowed by law for the signing of said nomination papers, to-wit: that all of the signatures of said voters were signed and affixed thereto earlier than the 12th day of February 1954, the sixtieth day before the date for holding the 1954 Municipal Election in the City of Hayward.

Section 9756 of the Elections Code of the State of California specifies the method of nominating candidates for any elective office in the City of Hayward and reads as follows:

Method of nomination. "Candidates may be nominated for any of the elective offices of the city in the manner following:

"Not earlier than the sixtieth day nor later than 12 o'clock noon on the fortieth day

before a municipal election, the voters may nominate candidates for election by signing a nomination paper except that not later than 12 o'clock noon on the fifteenth day before an election, the voters may nominate, by signing a nomination paper, candidates for election to fill a vacancy in office caused by a recall. Each candidate shall be proposed by not less than five nor more than ten voters, but only one candidate may be named in any one nomination paper. No voter may sign more than one nomination paper for the same office and in the event he does so his signature shall count only on the first nomination paper filed which contains his signature. Nomination papers subsequently filed and containing his signature shall be considered as though his signature does not appear thereon. Each seat on the governing body is a separate office. Any person registered to vote at the election may circulate a nomination paper. Where there are full terms and short terms to be filled, the term shall be specified." (Emphasis ours.)

It is our view that § 9756 of the Elections Code is clear and unambiguous on its face. It is not subject to special interpretation or construction therefore it means exactly what it says. Appellants have not complied with the clear language of the section. To permit them to be certified as nominees for public office would be giving them an unfair advantage over candidates who complied with the section. For instance, it would make it possible for them to procure signatures from citizens in advance when such citizens are not in a position to know all the candidates seeking the office. Also it would tend to disqualify another candidate who subsequently within the time set by the law secures the same signatures thus making the valid signatures upon the nomination papers below the required number. Furthermore, one starting date for all tends to prevent the nomination of candidates by citizens who have died, moved, or are no longer qualified. Gage v. Jordan, 23 Cal.2d 794, 804, 147 P.2d 387; Muehleisen v. Forward, 4 Cal.2d 17, 46 P.2d 969.

Appellants contend that § 9708 of the Elections Code providing for liberal construction makes their nomination papers valid. But this section by its very terms only applies to cases after an election has been held. Also, it applies only to cases where construction is necessary. Here there is no question of construing the statute. We have only a clear cut omission on the part of appellants to comply with a statute clear and unequivocal in its terms and provisions. Muehleisen v. Forward, supra.

In Uhl v. Collins, 217 Cal. 1, 17 P.2d 99, 85 A.L.R. 1370, the placing of the date of signing of an initiative petition was held to be mandatory. The statute before us likewise, § 9757, Elections Code, provides for the affixing of the date of signing. If the date of signing is mandatory the commencement of a period when signatures can be affixed must also be held to be mandatory. See Thompson v. Kerr, 16 Cal.2d 130, 104 P.2d 1021.

An election race like other races in life to be fair and just to all must have a certain starting point. To permit a contestant to get the jump on his opponent would be unfair and inequitable. The law providing for the start of the race here involved is clear. It was the clear duty of appellants to play the game according to the rules. This they have not done.

In our opinion the nominations of appellants are insufficient for the reason that all of the signatures thereon were signed on dates prior to the period in which they were permitted to be signed by law. § 9756, Elections Code.

Judgment denying petition for a writ of mandate affirmed.

Upon stipulation of the parties it is ordered that the remittitur issue forthwith.

NOURSE, P. J., and DOOLING, J., concur.

124 Cal.App.2d 219

In re KLEWER'S ESTATE.

NISSEN v. KOCH.

Civ. 20087.

District Court of Appeal, Second District,
Division 2, California.
March 29, 1954.

Rehearing Denied April 15, 1954.

Proceeding involving construction of will. The Superior Court, Los Angeles County, Otho G. Lord, J. pro tem., entered judgment declaring that decedent's entire estate passed under will giving to beneficiary decedent's settee and "personal things", and the aggrieved party appealed. The District Court of Appeal, Fox, J., held that decedent's securities, money and real property did not pass under the will.

Reversed with directions.

1. Wills ⇨439

In interpretation of will, ascertainment of testator's intention is fundamental rule of construction, to which all other rules are subordinate.

2. Wills ⇨449

There is no room for application of rule against intestacy if testator's language, taken in light of surrounding circumstances, will not reasonably admit of more than one construction. Probate Code, § 101.

3. Wills ⇨440, 449

A court's inquiry in construing a will is limited to ascertaining what testator meant by language which was used, and if he used language which results in intestacy, and there can be no doubt about meaning of language which was used, court must hold that intestacy was intended. Probate Code, §§ 101, 106.

4. Wills ⇨435

A will is not open to construction merely because it does not dispose of all of testator's property. Probate Code, §§ 101, 106.

5. Wills ⇨449

Courts are not permitted, in order to avoid conclusion of intestacy, to adopt construction based on conjecture as to what testator may have intended, although not expressed. Probate Code, §§ 101, 106.

6. Wills ⇨565(1)

Testatrix' securities, money and real property did not pass under will bequeathing testatrix' settee and "personal things."

See publication Words and Phrases, for other judicial constructions and definitions of "Personal Things".

George W. McDill, Los Angeles, for appellant.

Harry V. Peetris, Los Angeles, for respondent.

FOX, Justice.

Decedent left a will, which she wrote, that reads as follows:

"I give Mrs. G. E. Nissen my Rosewood Settee when I past on. Also my personal things."

The testatrix left an estate in excess of $25,000 consisting of cash in bank, stocks and bonds, real property, promissory notes secured by trust deeds, and two metal pins. Mrs. Nissen filed a petition to obtain a construction of the will. The trial court held that decedent's entire estate passed to Mrs. Nissen under the will. The correctness of the judgment is challenged by this appeal.

Testatrix was born in Germany. She spoke English somewhat brokenly and with an accent. She never married and had no issue. Her sole heirs at law are two nephews—one a resident of Germany, the other of Brazil. She lived alone in her own home in Temple City, Los Angeles County, and passed away in November, 1951, at 76 years of age. The will had been written by her some three years earlier.

Mrs. Nissen became acquainted with decedent as a next door neighbor in 1936. She spent "about every evening" with Mrs. Nissen when they moved into the neighborhood, since Mr. Nissen then worked at night. How long this continued does not appear. Decedent was "very fond" of the Nissen baby daughter and helped to take care of her. She also gave Mrs. Nissen suggestions about her cooking and showed her "how to make little things that were very tasty." When the testatrix was ill

Mrs. Nissen would take her food. She spent Christmas of 1936 in the Nissen home. From then on until she was declared an incompetent and sent to a sanatarium in February, 1949, the Nissens provided her with Christmas and Thanksgiving dinners. It appears from the scanty transcript that some time prior to the incompetency proceedings, which Mrs. Nissen attended at the suggestion of decedent's banker, the Nissens moved elsewhere. Thereafter the testatrix was only in the Nissen home "a couple of times" because, says Mrs. Nissen, "when we moved away it was hard to get her and take her back home." The testatrix offered Mrs. Nissen her rosewood settee several times prior to the execution of the will on September 29, 1948, but Mrs. Nissen had declined to accept it, though she had expressed admiration for it. On that afternoon testatrix had called the Nissens and asked Mrs. Nissen to come down. On their way to a dinner engagement they, with Mrs. Nissen's mother, visited the testatrix, who was in bed with a cold, "for a few minutes." Testatrix again offered Mrs. Nissen the settee and wanted them to take it home that night. This, of course, was impossible. "Then," says Mrs. Nissen, "she asked me to get a piece of paper out of her night stand, that she wanted to make a will, and for my mother and my husband to sign it." Decedent appears to have been somewhat of a recluse and to have lived in a very frugal manner.

[1] In the interpretation of a will, ascertainment of the testator's intention is the fundamental rule of construction, to which all others are subordinate. Estate of Salmonski, 38 Cal.2d 199, 209, 238 P.2d 966; Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893; Estate of Rutan, 119 Cal. App.2d 592, 598, 260 P.2d 111; Probate Code, sec. 101. In ascertaining such intention we naturally first look to the language used in the will. Here, after devising her settee to Mrs. Nissen, the testatrix added, "Also my personal things." What property does this expression cover? Probate Code, section 106, provides that: "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained."

In re O'Brien's Estate, 155 Misc. 803, 280 N.Y.S. 679, 680, is parallel to the instant case. There the will read: "'Mrs. Eliz. Donnelly, can have all my personal things, and furniture Radio, etc.'" There, as here, the legatee was not related to decedent and the testator also left, as in this case, a relative to whom he gave nothing. The O'Brien decision turned upon the intention of the testator in using the expression "personal things." In interpreting these words the court said: "There is no intimation in the will that he used the words in any sense other than their usual or ordinary meaning, to wit, goods and items of property having a more or less intimate relation to the person of the possessor. * * * There is nothing to indicate that the testator, in executing this will, had in mind any property other than his personal articles and his household things and furniture." This interpretation is in harmony with the ordinary sense in which the word 'personal' is used; viz., "pertaining to the person or bodily form." (Ballentine's Law Dictionary.) The expression most closely related to "personal things" that our courts have construed is "personal effects." In fact, these expressions appear to be substantially equivalent—the former being the layman's way of saying that which the lawyer expresses in traditional language. Among the cases dealing with the expression "personal effects" is the Estate of Sorensen, 46 Cal.App.2d 35, 115 P.2d 241. There the question arose as to whether a clause in a will bequeathing "All jewelry and personal effects" included money received by the testatrix for the sale of her home. It was held that the clause of the will embodying those words was not a general residuary clause and therefore did not include the money. In so holding the court went on to say that "it is obvious that this clause refers to clothing and ornaments or any other small articles which usually attend the person * * *." 46 Cal.App.2d at page 38, 115 P.2d at page 243. The court relied on and quoted from Barney v. May, 135 Minn. 299, 160 N.W. 790, 791, wherein it was held that neither money nor securities passed under the term "personal effects." "In common understanding", says the Minnesota court, "the expression 'personal effects,' without qualifying words, includes only such tangible property as attends the person, or, as variously stated, 'such tangible property as is worn or carried about the person' (citations), or 'goods and items of property having a more or less intimate relation to the person' * * *." (See to the same effect: Estate of Douglass, 70 Cal.App.2d 279, 161 P.2d 66; Child v. Orton, 119 N.J. Eq. 438, 183 A. 709; Gaston v. Gaston, 320 Mass. 627, 70 N.E.2d 527; Carr v. Railton, 66 R.I. 225, 18 A.2d 646, 20 A.2d 374.

Petitioner relies heavily on In re Arnold's Estate, 240 Pa. 261, 87 A. 590, 23 L.R.A. 1918A, 220; and In re Olsen's Estate, 9 Cal.App.2d 374, 50 P.2d 70. It is true that in the Arnold case the words "'and other personal things'" were used by the testatrix and it was held that her entire personal estate passed to her sisters under this language. In that case, however, the court found that it was the habit of the testatrix to speak of her property, which consisted of stocks, bonds, cash, household furniture, jewelry and clothing (but no real estate), as her "things." The testimony of the testatrix' habit was "so full and emphatic" that it constituted "strongly persuasive evidence that by the words 'and other personal things' she meant her entire residuary personal estate * * *." 87 A. at page 591. There was no such evidence in the instant case, and no reasonable basis for an inference that the testatrix used the words in other than their ordinary sense. In the Olsen case, supra, there were numerous bequests and finally a provision that "all my personal property" shall go to certain named persons. In view of the other provisions of the will, the context in which the language was used, the obvious unfamiliarity of the testatrix with the technical meaning of the words "personal property" it was held that the testatrix' real property was also included. This was in harmony with decedent's testamentary scheme and plan, and such an intention was readily ascertainable. Here, however, there is no testamentary plan or scheme, and no discernable intention on the part of the testatrix to will her money, securities and home to petitioner. In the language of the Estate of Maloney, 27 Cal.App.2d 332, at page 336, 80 P.2d 998, at page 1000, "to so hold would be to enter the field of conjecture and amount to a rewriting of the testatrix's will * * *."

[2-6] Petitioner relies on the presumption against intestacy. There is, however, "no room for application of the rule (against intestacy) if the testator's language, taken in the light of surrounding circumstances, will not reasonably admit of more than one construction. A court's inquiry in construing a will is limited to ascertaining what the testator meant by the language which was used. If he used language which results in intestacy, and there can be no doubt about the meaning of the language which was used, the court must hold that intestacy was intended. A testator has the right to make a will which does not dispose of all of his property but leaves a residue to pass to his heirs under the law of succession. * * * To say that because a will does not dispose of all of the testator's property it is ambiguous and must be construed so as to prevent intestacy, either total or partial, is to use a rule of construction as the reason for construction." Estate of Beldon, 11 Cal.2d 108, 112, 77 P.2d 1052, 1053; Estate of DeMoulin, 101 Cal. App.2d 221, 225 P.2d 303; Estate of Baird, 120 Cal.App.2d 219, 260 P.2d 1052. A will is not open to construction merely because it does not dispose of all of the testator's property. "Courts are not permitted in order to avoid a conclusion of intestacy to adopt a construction based on conjecture as to what the testator may have intended, although not expressed." Estate of Hoytema, 180 Cal. 430, 432, 181 P. 645, 646; Estate of Beldon, supra. Here there is no testamentary plan or pattern in the two-line instrument. The extrinsic circumstances fail to supply any such plan or pattern. Testatrix simply willed petitioner her redwood settee, which was her choicest piece of furniture, and for which petitioner had frequently expressed admiration. Then, apparently, as an afterthought, she added: "Also my personal things." To say that her securities, money and real property passed to petitioner under

this phraseology would be to rewrite her will, and to substitute the court's conjecture for the testatrix' intention. See Estate of Clippinger, 75 Cal.App.2d 426, 430, 431, 171 P.2d 567.

The portion of the judgment from which this appeal is taken is reversed with directions to enter a decree in accordance with the views expressed herein.

MOORE, P. J., and McCOMB, J., concur.

124 Cal.App.2d 292

NIERI v. NIERI.

Civ. 15779.

District Court of Appeal, First District, Division 2, California.

March 31, 1954.

Proceedings on order to show cause why defendant should not be held in contempt for failure to pay interests from time of due date of installments to be paid to plaintiff as her share of community property, as determined by divorce decree. The Superior Court, in and for the County of San Mateo, A. R. Cotton, J., entered judgment from which the plaintiff appealed. The District Court of Appeal, Gibson, J. pro tem., held that affidavit upon which order to show cause was issued was insufficient to give the court jurisdiction to pronounce any order of contempt, when it merely alleged the terms of the original agreement, and that stated sum was due as interest and had not been paid, without showing that judgment ordered the defendant to pay any interest.

Judgment affirmed.

1. Divorce 🔑269(10)

Affidavit in support of order to show cause why defendant should not be held in contempt for failure to pay interest on installments due plaintiff as her share of community property, according to divorce decree, which merely alleged the terms of the original agreement for payment of plaintiff's share of community property in four installments, and that stated sum was due as interest because installments were not paid on due dates and that interest had not been paid, was insufficient to give the court jurisdiction to pronounce any order of contempt, when it did not recite that judgment ordered defendant to pay any interest.

2. Contempt 🔑40

Proceedings in contempt are criminal proceedings.

3. Contempt 🔑54(4)

An affidavit in support of order to show cause why defendant should not be held in contempt, must state facts constituting the offense, and if it is defective, an adjudication of contempt based thereon cannot stand, since court would not have jurisdiction.

4. Appeal and Error 🔑185(1)

The rule that a point not raised in the trial court cannot be raised on appeal has no application where the trial court had no jurisdiction to make an order in the first instance, since jurisdictional questions can be raised for the first time on appeal.

5. Interest 🔑50

A tender of the first of four installments due on plaintiff's share of community property as determined by divorce decree, which was refused because of plaintiff's announced intention to move for a new trial and to take an appeal, stopped the running of interest on the obligation as to the first installment, and when the same reason existed for rejection of any subsequent tenders until judgment became final, defendant had a right to assume that tenders of subsequent installments would likewise be rejected until the appeal was disposed of, with result that no interest accrued on such installments until date of finality of judgment. Civ.Code, § 1504.

6. Interest 🔑50

A plaintiff who claimed right to interest on installments of her share in community property as determined by divorce decree, but who had rejected tenders because of her announced intention to seek a new trial and to appeal, was not entitled to interest from due date of each installment on theory that the installment checks should have been deposited with the clerk of the court during pendency of the appeal, since even in the event of such deposits no interest would have accrued.

7. Interest ⚿50

Where defendant was directed by divorce decree to pay plaintiff's share in community property in four installments, a rejection of tender of first payment because of announced intention of plaintiff to seek trial and to appeal, which was stated to be "without prejudice to the right of my client or yours" meant that rejection was without prejudice to defendant's rights, including the right of stopping of interest upon making his tender.

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Ropers & Majeski, George Doll, Redwood City, for appellant.

R. A. Rapsey, San Bruno, Paul DeMare, San Bruno, of counsel, for respondent.

GIBSON, Justice pro tem.

We deem the statement of facts as set forth in appellant's opening brief to be substantially correct so far as it goes, and we adopt it as such here. Omitting the headings and references to the transcripts, it is as follows:

"This appeal is from an Order Discharging Order to Show Cause entered by the Superior Court in and for the County of San Mateo on December 10, 1952. This appeal is taken on the basis of the Agreed Statement on Appeal signed by both parties. On June 23, 1949, the Superior Court in and for the County of San Mateo entered a judgment decreeing that the plaintiff-appellant was entitled to a divorce from the defendant-appellee, and further decreeing that the plaintiff-appellant should recover, as her share of the community property, the sum of $25,000.00, payable in four installments as follows: $6,250.00 on July 1, 1949, $6,250.00 on October 1, 1949, $6,250.00 on January 1, 1950, and $6,250.00 on April 1, 1950. On July 1, 1949, the defendant-appellee tendered to the attorney for plaintiff-appellant a check for $6,250.00 as payment on the first installment. At that time a motion for new trial and an appeal taken by the plaintiff-appellant were pending on the judgment entered June 23, 1949. The check was returned by the plaintiff-appellant's attorney in a letter dated July 12, 1949, to the defendant-appellee's attorney, stating in substance that the check would not be accepted because the motion for a new trial and appeal were pending, and suggesting that the check be deposited with the Clerk of the Court. The letter further stated that it was written with the distinct understanding that this was without prejudice to the rights of either party.

"The motion for a new trial was subsequently denied. On the appeal the judgment of June 23, 1949, was affirmed and said appeal became final on April 2, 1951. No tender was made of the second, third, and fourth installments of $6,250.00 each, which were due on October 1, 1949, January 1, 1950, and April 1, 1950 respectively. On June 15, 1951, the defendant-appellee paid the sum of $25,000.00 with interest thereon at the rate of 7%, from April 2, 1951, to June 15, 1951. The interest which plaintiff-appellant contends was properly due and payable on the 2nd, 3rd, and 4th installments of $6,250.00 each, from the due date of each installment to April 2, 1951, at the rate of 7%, amounts to $1,640.62.

"On August 26, 1952, the Superior Court issued an Order to Show Cause, ordering the defendant-appellee to show cause why he should not be judged guilty of contempt of Court and punished accordingly for failure to pay this interest of $1,640.62. On December 10, 1952, the Superior Court issued an Order Discharging Order to Show Cause. This appeal is from that order."

To the foregoing there should be added that on June 25, 1949, respondent tendered two more checks "ordered in the judgment" for $1,500 and $500, respectively, which tender was refused and said checks returned to the sender. It should also be pointed out that the affidavit upon which the Order to Show Cause was issued, after the title of court and cause, was as follows:

"State of California, County of San Mateo, ss: Ellen Nieri, being first duly sworn, deposes and says: That affiant is the plaintiff in the above entitled action; that heretofore, on the 23rd day of June, 1949, pursuant to regular trial before the above Court, a judgment was entered against defendant herein; it was adjudged and decreed that plaintiff have and recover from the defendant the sum of Twenty-Five Thousand Dollars ($25,000.00) cash and personal property not material herein; said payment of the sum of $25,000.00 was ordered and decreed to be paid as follows: $6,250.00 on July 1st, 1949; $6,250.00, October 1st, 1949; $6,250.00 on January 1st, 1950; $6,250.00, April 1st, 1950.

"The first of the above-mentioned four installments was tendered on the date due; on said date a motion for new trial was pending as was an appeal, and the first of the above payments was, therefore, returned pending the outcome of those proceedings; thereafter, motion for new trial was denied; judgment of the trial court was appealed and affirmed on appeal and on June 15, 1951, defendant paid affiant the sum of $25,000.00 with interest from April 2nd, 1951 to the date of payment, June 15th, 1951.

"Since the entry of the judgment herein, on June 23rd, 1949, until April 2nd, 1951, there has become due and payable, pursuant to said judgment, the sum of $1,640.62 as and for lawful interest on said judgment; that the defendant has paid no part of said interest and all of it is due and payable.

"Wherefore, affiant prays that an Order to Show Cause be issued in the above-entitled matter.

"Ellen Nieri."

We are satisfied the order of the lower court discharging the Order to Show Cause should be affirmed for several reasons.

[1] In the first place, the affidavit upon which the Order to Show Cause was issued was insufficient to give the Court jurisdiction to pronounce any order of contempt. It merely alleged the terms of the original agreement, that $1,640.62 was due as interest and had not been paid. Nowhere in the judgment was the respondent ordered to pay any interest. He was ordered to pay the principal sum, and that is *all* he was ordered to pay.

[2] Proceedings in contempt are criminal proceedings. Phillips v. Superior Court, 22 Cal.2d 256, 257, 137 P.2d 838.

[3] The affidavit must state facts constituting the offense, and if it is defective, an adjudication of contempt based thereon cannot stand, insofar as the Court would not have jurisdiction to make an order of contempt under such circumstances; and since the affidavit did not allege the violation of any order, there was, obviously, so far as the record here discloses, no contempt committed, and the only order the Court could make in the case at bar was the one it made, to-wit, discharging the order to show cause. Ballentine v. Superior Court, 26 Cal.2d 254, 260, 158 P.2d 14.

[4] The appellant does not seriously dispute this conclusion, but relies on the general principle that since this point was not raised in the court below it cannot be raised here. However, it is well settled this rule is not applicable where the Court had no jurisdiction to make an order in the first place. Jurisdictional questions can be raised for the first time on appeal. Emery v. Pacific Employers Insurance Co., 8 Cal.2d 663, 665-666, 67 P.2d 1046; Glass v. Bank of America Nat. Trust & Savings Ass'n, 17 Cal.App.2d 645, 647, 62 P.2d 764; Rodman v. Superior Court, 13 Cal.2d 262, 269, 270, 89 P.2d 109; Jacobs v. Board of Dental Examiners, 24 Cal.App.2d 359, 361, 75 P.2d 96; Costa v. Banta, 98 Cal.App.2d 181, 182, 219 P.2d 478.

In the second place, while the appellant urges the further thought that this appeal is also from an order denying a motion "that defendant pay interest on such judgment", the record does not disclose that there was ever such a motion before the Court. The agreed statement of facts, upon which this appeal is based, includes no statement that such fact existed. The judgment at the time of this hearing had become final. We know of no way it could be modified on motion except upon such proceedings as are permitted under Section 473, Code Civ.Proc., and the agreed statement of facts, which contains all the facts we are permitted to consider, shows no such proceedings. And at the oral argument respondent's counsel stated no such motion had been made, and this statement was not challenged by the opposition. What the Court no doubt intended to do, and did do, was to find that *under the proceeding then before the Court*, which was solely one to declare the respondent in contempt, the Court could not, and would not, order the appellant to pay interest on the judgment. Such conclusion was, of course, correct.

In the third place, the respondent tendered the appellant the first payment of $6,250 when it was due. The tender was refused on the ground that appellant intended to move for a new trial and take an appeal, and pending such proceedings such checks were being returned. No further tenders were made, but, as we have seen, soon after the judgment became final, respondent paid to the appellant the full $25,000, plus interest from the date the judgment did become final.

[5] Appellant admits that "there is no question that the amount of the first installment was tendered when due. Under Section 1504 of the Civil Code, an offer of payment stops the running of interest on the obligation. There is no question that interest on the first installment is therefore not payable", which properly states the law. She contends, however, that the rejection by her of the first check after tender, did not stop the running of the interest on the second, third, and fourth installments, payment of which were not tendered during the pendency of the proceedings on new trial and appeal, and relies on the case of Western Lithograph Co. v. Vanomar Producers, 62 Cal.App. 644, 648, 217 P. 534. This case is not helpful. There no tender was ever made, in any amount, at any time, consequently there was no rejection. In the case at bar, tender of the full amount due up to the date thereof was made, and is not questioned; and was rejected. On September 13, 1945, her notice of appeal was filed, and all subsequent payments became due thereafter. The same reason for rejection of the subsequent tenders, if made, existed until the judgment became final in April, 1951. Therefore, defendant had a right to assume that all tenders of such subsequent payments would likewise be rejected until the appeal was disposed of. Hossom v. City of Long Beach, 83 Cal.App.2d 745, 750, 189 P.2d 787; Retsloff v. Smith, 79 Cal.App. 443, 455, 249 P. 886; Bogue v. Roeth, 98 Cal.App. 257, 262, 276 P. 1071.

None of these facts existed in the Lithograph case, supra, and for the same reason the case of Ferrea v. Tubbs, 125 Cal. 687, 58 P. 308, cited by the appellant, can give her no comfort.

Some point is made of the fact that upon the return of respondent's checks appellant suggested that they be deposited with the Clerk of the Court. As appellant says in her opening brief on page 7, "The plaintiff-appellant's then attorney merely requested that the money be deposited in escrow with the Clerk of the Court pending the outcome of the appeal". (If there is any question about it, which there does not appear to be, this, in itself, shows appellant's position, relative to not accepting payments of installments as they became due, was the same pending appeal as it was while proceedings relative to procuring a new trial were going on.)

[6] In any event, it is not seen how appellant could have been benefited by respondent depositing the checks with the Clerk of the Court as she requested, since, with the checks reposing in the Clerk's files, she would receive no interest thereon. For this additional reason, she is in no position to complain.

[7] One more point remains to be considered. In the letter returning the check by appellant's counsel, he stated the return was "without prejudice to the rights of my client or yours". Obviously, this language is uncertain and ambiguous, and we are unable to determine what was meant thereby. It *could* have meant that appellant was not refusing for all time to accept the payments, come what may, but that she was merely attempting to hold everything in status quo pending the outcome of the case and to this extent she was not intending to surrender her rights to receive the amount of the judgment after the determination of

the case in the appellate courts. However, we do not think the language is susceptible to the interpretation that she intended to refuse payments until the case was finally decided, and because of this action on her part, and for which respondent was in no way responsible, collect interest from him also. If she did so intend, such could not be upheld, for the reason that in said letter the rejection was also made without prejudice to respondent's rights, and one of those rights was the stopping of interest upon making his tender. Walker v. Houston, 215 Cal. 742, 745–746, 12 P.2d 952, 87 A.L.R. 937.

For each and all of the foregoing reasons, we can see no merit in the appeal and the judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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124 Cal.App.2d 255

GRAYBIEL et al. v. BURKE et al.

Civ. 8381.

District Court of Appeal, Third District, California.

March 29, 1954.

Action in ejectment and for triple damages and for a temporary restraining order. From an order in the Superior Court for Siskiyou County, James M. Allen, J., restraining defendant from committing waste or cutting or removing timber from realty and restraining them from selling or sawing logs already removed, the defendants appealed. The District Court of Appeal, Schottky, J., held that the special administrator's right to recover possession of the realty and to enjoin the cutting of timber was not barred by limitations and that both the special administrator and the daughters of the deceased owner were person aggrieved by the alleged waste by the defendant and as such entitled to bring an action for an injunction and treble damages.

Order granting a preliminary injunction affirmed.

1. Limitation of Actions 🔑5(3)

Proceedings for probate of a will or for letters of administration are not subject to any statute of limitations. Probate Code, §§ 460, 461, 463.

2. Statutes 🔑231

All statutory provisions in all the codes must be read together and harmonized, if possible.

3. Executors and Administrators 🔑438(8)

Under the statute providing that administrator is entitled to possession of all the property of the decedent and may maintain an action for possession of the realty, the administrator may bring the action without joining the heirs. Probate Code, § 581.

4. Executors and Administrators 🔑1, 74

An "administrator" is a court appointed functionary, somewhat the same as a receiver, curator, guardian, or a trustee, and he has no personal interest, and his duty is to marshal the decedent's assets, apply part of them needed to pay his debts, and pass the residue to the heirs, all under the court's direction.

See publication Words and Phrases, for other judicial constructions and definitions of "Administrator".

5. Limitation of Actions 🔑80

Where decedent died in 1939 possessing realty with valuable timber, and widow's title and possession were acquired by the defendant, who actually entered upon the land before the plaintiff was appointed special administrator, action by the special administrator in ejectment and for damages for wrongful cutting of timber by the defendant was not barred by limitations on ground that neither the special administrator nor the decedent was seized or possessed of the property within five years before the commencement of the action as required by the statutes. Code Civ.Proc. §§ 318, 319, 321; Probate Code, §§ 300, 460, 461, 463, 581; Civ.Code, § 1007.

6. Descent and Distribution 🔑87

Where deed from widow of decedent to the defendant gave him a one-third interest in the property and the three daughters of the deceased husband were owners of the two-thirds interest, the defendant as a tenant in common with the daughters had the right to occupy the whole of the property, subject to the right of the special administrator, and possession by the defendant would normally be deemed to be possession by all of the heirs.

7. Tenancy in Common 🔑14

Where deed from widow of decedent gave the defendant only a one-third interest in the property and the three daughters of decedent were owners of the remaining two-thirds interest, acts of defendant in contracting to sell all of the merchantable timber on the realty and engaging codefendant to conduct logging operations, manifested an intention on the defendant's part to hold exclusively for himself and amounted to an ouster of the other cotenants who thereupon became entitled to recover common possession of the property.

8. Tenancy in Common 🔑26

The cutting of all of the merchantable timber on realty, when the cotenant authorizing it had at most an undivided one-third interest, would constitute waste and an injunction would lie in favor of the ousted cotenants.

9. Descent and Distribution 🔑87
Executors and Administrators 🔑129(2)

Where deed from widow of deceased to defendant gave him only a one-third interest in the property and the three daughters of decedent were owners of the other two-thirds interest and the defendant authorized the cutting of all merchantable timber on the land, both the special administrator of the decedent and daughters were persons aggrieved by the waste of the defendant cotenant and as such, were entitled to bring an action for an injunction and for treble damages. Code Civ.Proc. § 732.

Tebbe & Correia, Yreka, and Joseph P. Correia & Samuel R. Friedman, Yreka, for appellants.

Mark M. Brawman, Yreka, Taylor & Taylor, Modesto, for respondents.

SCHOTTKY, Justice.

This is an appeal from an order granting an injunction pendente lite restraining appellants (defendants below) from committing waste upon or cutting or removing timber or logs from certain real property located on the slopes of Mt. Shasta, and further restraining them from selling or sawing logs already removed and from selling lumber already produced therefrom.

The record shows that William Wallace Stewart acquired the real property here in controversy by a patent from the United States Government in 1890. Four years later, in 1894, Stewart married Annie Boomer; there is no showing that he ever was married before. Stewart retained ownership of the property until his death in 1939. He died intestate and was survived by his widow, Annie Boomer Stewart, and by three daughters, respondents Mason, Nelson and Forbes. It does not appear that any administration proceedings were had in connection with his estate until the appointment of respondent Graybiel as special administrator, in 1952.

Appellant Vincent M. Burke (hereinafter called appellant Burke) was engaged in the real estate business in Los Angeles, dealing principally in tax-delinquent lands. He obtained a title report covering the land involved here, which showed title in Stewart. Thereafter, in April, 1952, he got a certified copy of Stewart's death certificate from the State Department of Public Health; this showed the name of the widow and the home address. Burke then went to Modesto where the widow, Mrs. Stewart, resided, and obtained from her a quitclaim deed to the property. This deed is dated May 19, 1952, and Burke paid $100 for it. At the time of this transaction Mrs. Stewart did not remember the property, but before agreeing to sell her interest she called her attorney, Mr. Graybiel, in Turlock and had Burke talk with him by telephone. Burke told both Mrs. Stewart and Mr. Graybiel that the land had been sold to the state for delinquent taxes, although the title report apparently showed that all taxes had been paid except those for the tax year 1952–1953. Mrs. Stewart was then over seventy-five years of age. Burke subsequently obtained a second quitclaim deed from Mrs. Stewart, this one dated September 13, 1952. The second deed corrected an error in the property description.

Sometime after obtaining the first quitclaim deed, Burke engaged appellant Alexander to cut and log *all* of the merchantable timber growing on the tract in question. This was a complete logging contract and covered all operations from the falling of the trees to delivery of the logs at the mill. Alexander started to cut the timber on about August 15, 1952, and the first logs were removed from the property on September 12th. Meanwhile, during the first week in August, 1952, Burke had contracted to sell the logs to appellant DeMers Milling and Lumber Company (hereinafter called appellant Milling Company) which operated a sawmill near Yreka. The contract called for delivery of the logs at the millpond. Both of the above contracts were oral.

On September 17, 1952, respondent Graybiel petitioned the Superior Court in Stanislaus County for special letters of administration in the matter of Stewart's estate. The deceased was a resident of that county at the time of his death. The petition alleged, upon information and belief, that persons unknown were committing waste upon timber land of the estate of Siskiyou County, and further alleged that there was insufficient time to notify all interested persons in the ordinary manner. The order of appointment was made and letters were issued appointing respondent Graybiel special administrator of the estate, with the powers of a general administrator. This was done on September 17th, and on that same day respondent Graybiel, as special administrator, brought the present action against Burke, et al., in Siskiyou County. The action is one in ejectment and for triple damages, and the complaint prayed, among other things, for a temporary restraining order and an order to show cause why an injunction should not issue. The complaint alleges Graybiel's capacity as special administrator, alleges that as such administrator he is entitled to possession of all the land in question, and alleges, upon information and belief, the entry into possession by appellants, their acts constituting waste, the resulting damage to the land, and the fraudulent purpose prompting the entry. A temporary restraining order and order to show cause were issued, and on September 24, 1952, appellants made a return, wherein they admitted Burke's possession of the property and the logging operations thereon, and, by way of separate affirmative defenses, alleged that Burke was the owner of and entitled to possession of the land, that respondent Graybiel's cause of action was barred by the statute of limitations, Code Civ.Proc. secs. 318 and 319, and that Graybiel was guilty of laches in bringing the action, and appellants would be irreparably damaged by an injunction, in view of their expenditures and commitments based on Burke's title.

The order to show cause was heard on September 24, 25, 29, 30, and October 1, 1952. Just prior to the adjournment on September 25th, the court granted counsel's motion to allow amendment of the complaint so as to bring in the three daughters as parties plaintiff. The amendment to the complaint was filed and served on September 29th, the day when the hearing was next resumed. It alleges that respondents Mason, Nelson and Forbes are the surviving daughters of the decedent, Stewart; that the decedent died intestate; and that the daughters and their ancestor and predecessor were seized or possessed of the real property for more than five years prior to commencement of the action. The amendment contains a separate prayer asking that respondents be restored to possession and that appellants be enjoined from trespassing and committing waste on the premises.

It developed at the hearing that approximately two million board feet of timber, out of an estimated four million board feet available on the land, had already been cut when the restraining order went into effect. Of this, some 470,000 board feet had been delivered, in logs, to appellant Mill-half of it and sold the lumber, other than the "number four" grade. The logs remaining on the land were subject to weathering and substantial depreciation in value, unless removed and used. The losses which appellant Alexander and appellant Milling Company would suffer, in the event of a forced shutdown of the logging operations, were also brought out at the hearing. Following the hearing the trial court made its order granting a preliminary injunction and this appeal is from said order.

Appellants' principal contention is that the action by respondent Graybiel, as special administrator, was barred by sections 318 and 319 of the Code of Civil Procedure and that, therefore, the order granting the injunction was erroneous. They assert that the order was obtained upon motion of respondent Graybiel alone and that the daughters of Stewart are not respondents upon this appeal. However, as already pointed out, the record shows that during the hearing of the evidence the court granted a motion to amend the complaint so as to bring in the three daughters as parties plaintiff, and that said amendment was filed. The hearing proceeded and at its conclusion the preliminary injunction was granted, so there is no merit in appellants' contention that the order was based upon the original complaint rather than upon the complaint as amended.

As to appellants' contention that the action was barred by the statute of limitations, they argue that upon Stewart's death, in 1939, title to the real property vested in his heirs at law, Prob.Code, sec. 300, and with it presumptive possession, Code Civ. Proc. sec. 321. They argue further that the widow's title and possession were acquired by appellant Burke who actually entered upon the land before respondent Graybiel was appointed special administrator. Appellants then argue that neither the special administrator nor his predecessor (the decedent Stewart) was seized or possessed of the property within five years before commencement of the action and that the action was therefore barred by operation of sections 318 and 319 of the Code of Civil Procedure. Section 318 provides as follows:

> "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action."

Section 319 provides:

> "No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

Respondents in reply contend that the action by the special administrator is not barred by the statute of limitations, because his right to possession of the property relates back to the date of decedent's death and he therefore was possessed of the property within five years before commencing the action. Respondents quote the following language in Jahns v. Nolting, 29 Cal. 507, at page 510:

> "* * * At common law the title vested in the administrator, by relation, at the time of the death of the deceased; and, under the system in force here, the administrator's control of the property, by relation, extends back to the same point of time, and he is deemed in law from that time to have the possession, or to be entitled to the possession of the personal property, as the case may require. The administrator may, therefore, institute an action in the nature of the action of trover, in his own name—his special property being sufficient for that purpose—against a person who, after the death of the deceased, and before the

issuing of the letters of administration, converts to his own use the personal property of the estate of the deceased. His right of action in such case is the same as in case of a conversion after his appointment as administrator."

[1] It is settled law in California that proceedings for the probate of a will or for letters of administration are not subject to any statute of limitations. Estate of Hume, 179 Cal. 338, 176 P. 681. Section 460 of the Probate Code authorizes the appointment of a special administrator to take possession of the decedent's estate where no application has been made for letters testamentary or of administration and the circumstances require the immediate appointment of a personal representative. Section 461 of the Code provides that the appointment may be made *at any time* without notice or with such notice to such interested persons as the court may deem to be reasonable, and section 463 provides that the special administrator *must take possession* of the real and personal property of the decedent and preserve it from damage, waste and injury, and that he may commence and maintain suits and other legal proceedings for such purpose.

[2] It is also settled that all of the statutory provisions in all the codes must be read together and harmonized, if possible. As stated in In re Porterfield, 28 Cal.2d 91, at page 100, 168 P.2d 706, at page 712, 167 A.L.R. 675. "It is a well-recognized rule that for purposes of statutory construction the codes are to be regarded as blending into each other and constituting but a single statute. [Citing cases.]" See, also, In re Guardianship of Thrasher, 105 Cal.App.2d 768, 234 P.2d 230.

[3] The trial judge in an able memorandum opinion discussed the issues raised upon the application for a preliminary injunction, which are the same issues that are raised upon this appeal. We believe that said opinion correctly analyzes and determines said issues and adopt same as part of our opinion. We quote therefrom as follows:

"The question before this court is, Does the evidence show that plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the real property involved in this action, within five years before the commencement of this action? If it does not the action is barred and the motion must be granted.

"Section 581, Pro.C., provides, that the administrator is entitled to the possession of all the real and personal property 'of the decedent,' and may maintain an action for the possession of the real property. It has been held the administrator may bring this action without joining the heirs (Schade v. Stewart, 205 Cal. 658 [272 P. 567]). Strictly speaking the decedent has no real property after his death, because section 300, Pro.C., states 'when a person dies, title to his real and personal passes * * * to the persons who succeed to his estate,' under the laws of succession. Therefore this section must mean he is entitled to maintain an action to recover possession of real property title to which stands in the heirs at law of decedent, but to which decedent held title at the time of his death. His suit must be based on their title, and his right to possession for a limited purpose of paying decedent's debts. The heirs are not personally liable for decedent's debts, but they take title to his property subject to those debts. The statute of limitations does not run against those debts while there is no administrator appointed no matter how long there is a vacancy (Hibernian Savings & Loan Ass'n v. Farham, 153 Cal. 578, [96 P. 9]; 7 C.L.R. page 72, note 29). The heirs and every one that take under them takes the property subject to those debts. The right of possession which the administrator has to enable to maintain the suit being only for a limited purpose, is not a freehold estate, therefore it does not carry seisin with it. The seisin is in the heirs at law, and remains there until they are disseised. Their right to possession, that is the heirs' right to possession and seisin descended upon them immediately upon decedent's death, and remained with them until an administrator was appointed, and then the administrator became entitled to the right of possession for the limited purpose, and they still held the seisin.

[4] "An administrator is a court appointed functionary, somewhat the same as a receiver, a curator, a guardian, a trustee, but perhaps not exactly the same. He has no personal interest. His duty is to marshal the decedent's assets, apply the part of them needed to pay his debts, and pass the residue to his heirs, all under court direction. So in a suit of this kind his right to possession is based on their right to possession, and their seisin. While he may be the nominal plaintiff in this suit in ejectment, and while the sections in question use the word 'plaintiff' just as section 581 of the Probate C. uses the words 'property of the decedent' it must be held to mean property of the heirs at law, owned by the decedent at the time of death. So plaintiff must mean the parties who hold the title to the property, and whose title and right to possession is the basis of his action.

"The seisin of the holders of title, that is the heirs, continues until they are disseised by an adverse possessor. This is so because sections 318 and 319, C.C.P. must be read together with section 1007 of the C.C. (17 C.L.R. 7, 390 et seq.). It is not shown in this case that there was any person in adverse possession, if at all, not for over one year. Therefore the seisin and right to possession on which this action is based is within the five year period.

"There is no question but that the statute of limitations will run against the administrator, and the heirs, or any holder of legal title, but there must be an adverse possessor to start the statute running. There is not a case cited that holds otherwise. The case of Tynan v. Walker, 35 Cal. 634, cited by defendants' counsel, has a lot of language in it that might lead one astray, but when carefully considered is illustrative of the point just stated. In that case Walker the adverse possessor took adverse and hostile possession in 1854, just after Bell's death, and remained in such possession until 1866, almost thirteen years when an administrator was appointed of Bell's estate. In that case the heirs' title had gone by adverse possession, and they had been disseised, so the administrator had no title to stand on.

* * * * * *

"* * * It seems to me the fallacy of defendant's position here can be demonstrated if we follow the matter through to a final conclusion as to what would be the result if counsel is correct. According to him, if a man dies owing many debts, and having much property, and with heirs at law, and no administrator is appointed for his estate until after five years from the date of his death, and altho no one takes adverse possession of the land owned by the decedent at the time of his death, until possibly one year before the letters of administration were issued, and the administrator's suit commenced, and altho decedent's debts were not outlawed, and altho the heirs took the property subject to those debts, the administrator could not bring suit to recover the property to pay the debts, and would have to report 'no property.' If he says the heirs might bring the suit and recover the property, and it would still be subject to the debts, how is the administrator going to get it in his possession to pay those debts? If he started suit against them, they could plead the bar of the statute. They could not pay the debts themselves and relieve the property, because there is no procedure at law for them to ascertain just what the debts were. Perhaps the administrator could publish notice to creditors, and in that manner find out what the debts were. How was he to pay them, depend on the good graces of the heirs to voluntarily sell the property and pay the debts, or if they did not could he as administrator bring suit against them to pay the debts. We would find ourselves in a fine dilemma. It even might be possible by following this procedure of delaying five years before administration, and pleading the bar of the statute against the administrator and thus prevent him from taking possession of the property to pay the debts, for the heirs to dodge the debts entirely. This cannot be the law.

"The court is of the opinion that as long as the heirs at law have not lost their title by adverse possession, the administrator may bring suit to recover possession, even tho there was no administration of decedent's estate for more than five years after his death."

[5] We are satisfied that the respondent special administrator's right to bring the action to recover possession of the real property and to enjoin appellant from cutting timber thereon or removing timber therefrom was not barred by sections 318 and 319 of the Code of Civil Procedure. To sustain appellant's contention upon this point would indeed create an absurd situation and would permit the law to be improperly used by designing persons. While the administrator's right to maintain the action might be lost if someone actually in possession of the property had established a right to it by adverse possession, it would not be lost where, as in the instant case, appellant entered into possession of the property only a few months before the action was commenced.

[6–9] We conclude, therefore, that even if the respondent special administrator were the only party plaintiff the court would have been fully justified, under the evidence and the law, in granting the preliminary injunction. But in the instant case it appears that the deed from the widow to appellant would in any event only give him a one-third interest in the property, and that the three daughters of Stewart were the owners of a two-thirds interest in the property. As hereinbefore pointed out, the daughters were by order of the court and by appropriate amendment to the complaint made parties plaintiff during the progress of the hearing and the preliminary injunction was issued in their behalf also. Appellant Burke, as a tenant in common, had the right to occupy the whole of the property, subject to the right of the special administrator, and possession by him normally would be deemed to be possession by all of the heirs. Johns v. Scobie, 12 Cal.2d 618, 623, 86 P.2d 820, 121 A.L.R. 1404. However, his acts in contracting to sell *all* of the merchantable timber, and in engaging appellant Alexander to conduct the logging operations, manifested an intention on his (Burke's) part to hold exclusively for himself and amounted to an ouster of the other cotenants who thereupon became entitled to recover common possession of the property. Akley v. Bassett, 189 Cal. 625, 642, 209 P. 576; Zaslow v. Kroenert, 29 Cal.2d 541, 548, 176 P.2d 1. The cutting of all of the merchantable timber, when Burke had at most an undivided one-third interest, would undoubtedly constitute waste, Hihn v. Peck, 18 Cal. 640, 643, and an injunction would lie in favor of the ousted cotenants. Fuller v. Montafi, 55 Cal. App. 314, 320, 203 P. 406. Both the special administrator and the daughters were persons aggrieved by the waste and, as such, entitled to bring an action for an injunction and treble damages. Code Civ.Proc. sec. 732.

No other points raised require discussion.

The order granting a preliminary injunction is affirmed.

PEEK, J., and PAULSEN, J. pro tem., concur.

124 Cal.App.2d 388

J. J. HOWELL AND ASSOCIATES, Inc.

v.

ANTONINI.

Civ. 4680.

District Court of Appeal, Fourth District, California.

April 2, 1954.

Action for specific performance of contract to convey real property, to quiet title and for damages. The Superior Court, Fresno County, Strother P. Walton, J., ordered defendant to convey the property in dispute to plaintiff, quieted plaintiff's title thereto, and denied plaintiff's claim for damages, and defendant appealed. The District Court of Appeal, Mussell, J., held, inter alia, that evidence sustained findings that defendant agreed to sell and plaintiff agreed to buy property as described in escrow instructions, that plaintiff paid agreed purchase price, that deed omitted a portion of the property sold, that such omission was due to inadvertence and mistake which was not discovered by plaintiff until shortly before filing action, that plaintiff was owner of property described in escrow instructions, and that defendant had no right, title or interest therein.

Judgment affirmed.

1. Quieting Title ⚷44(4)
Specific Performance ⚷121(4, 8, 11)

In action for specific performance of contract to convey real property, to quiet title, and for damages, evidence sustained findings that defendant agreed to sell and plaintiff agreed to buy property as described in escrow instructions, that plaintiff paid agreed purchase price, that deed omitted a portion of the property sold, that such omission was due to inadvertence and mistake which was not discovered by plaintiff until shortly before filing of action, that plaintiff was owner, and was entitled to conveyance of, property as described in escrow instructions, and that defendant had no right, title or interest therein.

2. Appeal and Error ⚷1010(1)

Where judgment ordering defendant to specifically perform contract to convey real property by conveying property in dispute to plaintiff, and enjoining defendant from asserting any right, title or interest thereto, was based upon findings which were supported by substantial evidence, such judgment could not be disturbed on appeal.

3. Specific Performance ⚷114(2)

Fairness and adequacy of consideration was not required to be alleged in action for specific performance, where the consideration agreed upon had been accepted by defendant, who by his acceptance waived any claim of inadequacy.

4. Appeal and Error ⚷1071(6)
Trial ⚷388(1)

Where an action is tried before court without jury, in absence of a waiver, findings are required upon all material issues presented by pleadings and evidence, and if court renders judgment without making such findings, judgment must be reversed.

5. Trial ⚷397(2)

Where defendant in specific performance suit raised defense of estoppel based on plaintiff's acceptance, and retention for several months without objection, of deed which described less property than plaintiff had agreed to purchase, findings that omission from description was due to inadvertence and mistake and was not discovered by plaintiff until shortly before filing action, that defendant agreed to sell and plaintiff agreed to buy more property than was described in the deed, and that plaintiff was the owner of the property omitted from such description, were implied findings against issue of estoppel, and express finding upon defense of estoppel, under such circumstances, would add nothing to court's decision.

6. Appeal and Error ⚷1071(6)

Where evidence raises issue of estoppel, and action is tried upon that theory, and it appears from findings that the court impliedly found against the party claiming estoppel upon that issue, absence of express finding does not warrant reversal.

7. Trial ⚷397(1)

Where findings, taken as a whole, clearly show that they include court's conclusions upon material issues, it is unnecessary to make specific findings on each of material issues.

◆

John D. Chinello, Lawrence Kennedy, Fresno, for appellant.

Miles & Sears, Fresno, for respondent.

MUSSELL, Justice.

This is an action for specific performance of a contract to convey real porperty, to quiet title and for damages. The trial court ordered defendant to convey the property to plaintiff, quieted plaintiff's title thereto and denied its claim for damages. Defendant contends on his appeal from the judgment that the complaint does not state a cause of action for specific performance; that the evidence is insufficient as a matter of law to support the judgment and that it should be reversed for the reason that the trial court failed to make a finding on the material defense of estoppel raised by defendant.

On November 6, 1951, J. J. Howell, president of plaintiff corporation, and defendant signed escrow instructions at the office of the Home Title Company in Fresno. Defendant agreed to sell and plaintiff agreed to buy the property involved. The description of the land to be conveyed was discussed by Howell and defendant in the presence of Mr. Mathias, the escrow officer. At the request of Howell and defendant, he prepared a sketch describing the property to be sold as a rectangular parcel 100 feet north and south and 260 feet east and west. This sketch was prepared by Mathias from one drawn by Howell and the dimensions of the property shown on the sketch or diagram were given to him by Howell. Mathias then drew the escrow instructions and the property to be conveyed was described therein as "per sketch". The sketch or diagram was fastened to the escrow instructions by a paper clip and both Howell and defendant, after seeing the plat and sketch, signed the escrow instructions.

On November 20, 1951, Mathias prepared a grant deed from defendant to plaintiff describing the property to be conveyed as a rectangular parcel 100 x 200 feet, thus omitting to include a rectangular parcel 60 x 100 feet also described in the escrow instructions. At the trial, Mathias, when asked to explain why the deed in escrow between plaintiff and defendant contained a different description than that in the original instructions, replied, "I can answer it by saying that I don't know why. No, I have no explanation."

Plaintiff Howell testified that the first time he knew that he had received less property than described in the escrow instructions was about a month before the present action was filed. Defendant testified that he agreed to sell plaintiff the real property described in the deed, 100 x 200 feet; that he did not tell Howell he was selling the 60 x 100 feet omitted from the deed; that the description read to him by Mathias was 100 x 200 feet; that no sketch or diagram was attached to the escrow instructions when they were signed and that the deed subsequently signed and acknowledged before Mathias correctly reflected the transaction and sale.

[1, 2] The trial court found that the defendant agreed to sell and the plaintiff agreed to buy the property described in the escrow instructions as being 100 x 260 feet; that plaintiff paid the agreed purchase price therefor; that the deed omitted the east 60 feet of the property sold; that said omission was due to inadvertence and mistake; that the mistake was not discovered by plaintiff until shortly before the filing of the instant action; that plaintiff is the owner of the property described in the escrow instructions; and that defendant has no right, title or interest therein. The court concluded that plaintiff was entitled to recover the property omitted from the description in the deed. It ordered defendant to convey the property in dispute to plaintiff and enjoined him from asserting any right, title or interest thereto. Judgment was entered in accordance with these findings and conclusions. Since these findings are supported by substantial evidence, the judgment based thereon cannot be here disturbed. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557.

[3] Defendant's argument that the complaint fails to state a cause of action for specific performance is based on the assertion that plaintiff failed to plead and prove that there was an adequate consideration for the contract and that it was just and reasonable as to defendant. Citing such cases as Makay v. Whitaker, 116 Cal.App.2d 504, 509, 253 P.2d 1021; Mendiondo v. Greitman, 93 Cal.App.2d 765, 767, 209 P.2d 817; Mayer v. Beondo, 83 Cal.App.2d 665, 667, 668, 189 P.2d 327, 190 P.2d 23; Eischoltz v. Nicoll, 66 Cal.App.2d 67, 69–70, 151 P.2d 664; Haidopoulos v. Woolett, 5 Cal.App.2d 229, 232–234, 42 P.2d 1056. However, there is an exception to the rule stated where an agreed upon consideration has been accepted. As was said in Conway v. Moore, 70 Cal.App.2d 166, 174, 160 P.2d 865, 869:

> "Moreover, and in any event, fairness and adequacy of consideration need not be alleged where an agreed upon consideration has been accepted, the acceptance constituting a waiver of any claim of inadequacy. Peters v. Bin-

> nard, 219 Cal. 141, 25 P.2d 834; Fleishman v. Woods, 135 Cal. 256, 67 P. 276; Nicholson v. Tarpey, 70 Cal. 608, 12 P. 778; Meridian Oil Co. v. Dunham, 5 Cal.App. 367, 90 P. 469. It should be pointed out that the absence of more specific allegations of fairness and adequacy were not made a ground of special demurrer."

As in that case, there was no special demurrer interposed in the instant action. The evidence shows that plaintiff corporation borrowed money and paid the purchase price of the property involved from the funds so obtained and it is alleged in the complaint that plaintiff paid the agreed purchase price of the property. Under the circumstances, defendant's objection to the sufficiency of the complaint to state a cause of action is without merit.

[4–7] Defendant next contends that the trial court erred by failing to make an express finding on the material defense of estoppel raised by defendant. This defense was pleaded in defendant's answer and evidence was introduced that plaintiff accepted, recorded and retained the deed of November 20, 1951 describing the real property sold as 100 x 200 feet; that about a month before the instant action was filed plaintiff, in borrowing the money to pay the purchase price of the property involved, executed a trust deed describing the property subject to the trust deed as being the same as that contained in the deed of November 20, 1951; that taxes were paid by plaintiff and defendant in accordance with the description in said deed and that plaintiff for several months after receiving said deed failed to claim any other or different title. Where an action is tried before the court without a jury, in the absence of a waiver, findings are required upon all material issues presented by the pleadings and the evidence. If the court renders judgment without making such findings, the judgment must be reversed. Hicks v. Barnes, 109 Cal.App.2d 859, 862, 241 P.2d 648. However, in the instant case the trial court found that the omission of the property in dispute from the description in the deed was due to inadvertence and mistake and was not discovered by plaintiff until shortly before filing this action; that defendant agreed to sell and plaintiff agreed to buy the real property described in the escrow instructions and that plaintiff is the owner of the property described in said instructions. These are implied findings against the issue of estoppel and as was said in Lo Bue v. Porrazzo, 48 Cal.App.2d 82, 86, 119 P.2d 346, 348,

> "Where the evidence in a case raises the issue of estoppel and the action is tried upon that theory and it appears from the findings that the court impliedly found against the appellant upon that issue, the absence of an express finding does not warrant a reversal."

An express finding under the circumstances here presented would add nothing to the court's decision. Fair Oaks Bank v. Johnson, 198 Cal. 196, 203, 244 P. 335, where, as here, the findings made necessarily are against the allegation of estoppel in defendant's answer, they are sufficient. The findings, taken as a whole, or construed together show that they include the court's conclusions upon the material issues. Cleverdon v. Gray, 62 Cal.App.2d 612, 617, 145 P.2d 95.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

124 Cal.App.2d 393

PEOPLE v. EADS.

Cr. 947.

District Court of Appeal, Fourth District, California.

April 2, 1954.

Hearing Denied April 28, 1954.

Prosecution for conspiracy to offer bribe to sheriff with intent to influence him to permit conspirators to unlawfully conduct gambling establishment, and for the substantive offense. The Superior Court, Riverside County, Russell S. Waite, J., entered judgment of conviction against certain of defendants on the conspiracy count, and entered order denying new trial, and one defendant appealed. The District Court of Appeal, Barnard, P. J., held that there had been no prejudicial procedural errors.

Affirmed.

1. Witnesses ⚷283

Where two weeks elapsed after witness, who testified to recorded conversation, left stand, and no satisfactory reason was given for long delay in seeking to recall witness for further cross-examination after counsel had heard recordings, and no satisfactory reason was given for failure to make timely request that cross-examination be deferred until counsel had heard recordings outside presence of jury, trial court did not abuse discretion in refusing to recall witness for cross-examination.

2. Witnesses ⚷282½

Restricting cross-examination of prosecution witnesses by sustaining objections to questions on ground that questions had been previously asked and answered was not error.

3. Witnesses ⚷283

Court did not abuse its discretion in not permitting defense counsel to recall prosecution witness for further cross-examination to prove that witness had met certain person prior to date on which witness had stated that he had first heard of such person.

4. Criminal Law ⚷1168(2)

Defendant was not prejudiced by trial court's refusal to allow defendant to examine tape recordings of incriminating conversation after recordings were admitted into evidence and before they were played to jury, where recordings were made available for private examination shortly after they were played to jury and no claim was made that anything was discovered that would have had any effect on their authenticity or that could have affected verdict if it had been discovered sooner.

5. Criminal Law ⚷1120(1)

Record of criminal prosecution failed to support contention that trial court had not permitted cross-examination of witness, who testified from notes, in order to determine whether the notes were such as could be used to refresh memory. Code Civ.Proc. § 2047.

6. Witnesses ⚷255(8)

Where sheriff testified that he heard tape recorded conversation, that recordings were correct reproductions of conversations, that recordings were transcribed under his direction, and that he had added pencil notations of his own, it was not error to allow sheriff to testify from his notes over objection that notes were merely sheriff's interpretation of recordings. Code Civ.Proc. § 2047.

7. Criminal Law ⚷1166½(12)

Where sheriff had testified with respect to conversation with one defendant after co-defendants had been removed from sheriff's office, court's statement to jury that such conversation was not admitted against co-defendants and that motion to strike as to co-defendants would be granted for the reason that all the conversation could possibly show was consciousness of guilt on part of defendant or admission against interest which would not be binding on co-defendants, and court at conclusion of case instructed jury to disregard such comment, the making of such comment was not reversible error.

8. Criminal Law ⚷423(2)

Statements made by certain defendants outside presence of co-defendant, at time which jury could reasonably have found was during existence of alleged conspiracy in furtherance of its objects, were admissible as against co-defendant.

9. Criminal Law 🔑779

In prosecution for conspiracy to offer bribe to police officer, instruction, that declarations of alleged conspirator could not be considered against any other alleged conspirator unless alleged conspiracy was proved to have been in existence at time of declaration, was proper.

10. Criminal Law 🔑643

In criminal prosecution wherein tape recordings of incriminating conversation were played, court did not err in failing to instruct court reporter to transcribe the recordings as they were played to the jury. Code Civ.Proc. § 269.

11. Criminal Law 🔑1169(5)

Defendant was not prejudiced by admission of evidence of other crimes allegedly committed by co-defendant where motion to strike was granted, jury was instructed to disregard such testimony and instructed such testimony had been offered only as against the co-defendant, and jury at conclusion of case, was again instructed to disregard any testimony which had been stricken.

12. Criminal Law 🔑569

Evidence, in prosecution for conspiracy to offer bribe to sheriff with intent to influence sheriff to permit alleged conspirators to unlawfully conduct a gambling establishment, supported jury's implied rejection of defendant's contention that he had been entrapped into conspiring to offer bribe to the sheriff.

13. Conspiracy 🔑48

Criminal Law 🔑800(4)

In prosecution for conspiracy to offer bribe to sheriff with intent to influence him to permit alleged conspirators to unlawfully conduct a gambling establishment, instruction defining offense of gambling and describing duty of sheriff with respect to arresting persons who are committing public offenses, and instruction that previous instructions were not intended to suggest that any violation of gambling laws was charged but were given to assist in determining whether actions charged in indictment, if committed, might, or could tend to, influence sheriff in connection with his official duties, were material to the issues and were properly given.

14. Criminal Law 🔑1172(1)

In prosecution for conspiracy to offer bribe to sheriff with intent to influence him to permit alleged conspirators to unlawfully conduct gambling establishment, instruction on attempt, even if unnecessary, was not harmful.

15. Criminal Law 🔑784(4)

In prosecution for conspiracy to offer bribe to sheriff with intent to influence him to permit alleged conspirators to unlawfully conduct gambling establishment, instruction on circumstantial evidence was proper.

16. Criminal Law 🔑507½

In prosecution for conspiracy to offer bribe to sheriff with intent to influence him to permit alleged conspirators to unlawfully conduct gambling establishment, wherein defendant contended that police officer had also been acting as an accomplice so that his testimony was required to be corroborated, evidence was insufficient to show that police officer was an accomplice.

17. Criminal Law 🔑1166½(12)

Defendant was not prejudiced by court's remarks where court struck remarks from record and instructed jury to disregard them.

18. Criminal Law 🔑878(4)

Where overt act, alleged in support of count charging conspiracy to offer bribe to sheriff, also afforded basis for second count charging substantive offense, but overt act was alleged in somewhat different language in both counts, jury's disagreement on second count did not make verdict of guilty on conspiracy count inconsistent and invalid. Pen.Code, § 67.

* * *

Glenn C. Ames, Encina, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., William O.

Mackey, Dist. Atty. of Riverside County, Byron Morton, Deputy Dist. Atty., Riverside, for respondent.

BARNARD, Presiding Justice.

The appellant, one Bilbrey, one Parker, and a man using the name of Alvin Shaw, were jointly charged with conspiring to violate section 67 of the Penal Code, it being charged that they entered into a conspiracy to offer a bribe to the sheriff of Riverside County with intent to influence him to permit them to unlawfully conduct a gambling establishment. As an overt act it was charged that on January 20, 1953, they offered $500 to the sheriff to be delivered to him on January 23 or 24, and to deliver other sums as they were permitted by him to engage in gambling activities in that county. In a second count, they were charged with offering a bribe on January 20, 1953, with the intent to influence the sheriff in respect to permitting them to unlawfully operate a gambling establishment. A jury found Parker not guilty, found Eads, Bilbrey and Shaw guilty on Count I, and failed to agree on a verdict on the second count. Eads has appealed from the judgment, and from an order denying him a new trial.

The trial took five weeks and the record is voluminous. The sufficiency of the evidence is not attacked, and only a general statement of the factual background will be made. On December 31, 1952, a deputy sheriff received a telephone call from the Los Angeles Police Department calling his attention to Shaw. After making some inquiries he asked one Franks, a deputy constable at Palm Springs, to watch for Shaw, to report, and to "work on it," if he heard anything. On January 3, the appellant, who is a lawyer, approached Franks in Palm Springs, and told him that he was looking around with an eye to opening a gambling business. After saying "every police officer has a price," the appellant asked Franks if he could do him any good with the county or city fathers with respect to opening up gambling. Franks answered that this was possible, and the appellant called Shaw on the telephone. Shaw came over and in a conversation with Franks asked him if he could do any good with the county officers; said they would like to open up a gambling house; and told Franks that in return for his services "We will give you a piece of the business." Franks pretended to acquiesce, and Shaw then told Eads that he had offered Franks "a piece of the business if he could fix it with the sheriff or the county authorities." The appellant said: "I think that is a very fair offer." Shaw then said that they were leaving for Los Angeles and if Franks had anything to report he should call or fly up at their expense. The appellant handed Franks his card and said "Call me at these numbers." Franks reported this conversation to two of the sheriff's deputies.

On January 4, Franks told Shaw and the appellant that he had contacted the man who controlled the area between Palm Springs and Indio, and Shaw said, "Fine". Franks related this conversation to the two deputies, and they instructed him to find out more about the project. On January 10, Franks told Shaw that things looked good, and said he had incurred some expense in travel and in entertaining contacts. Shaw said they would take care of this, and said the appellant had advised him not to meet with the contacts Franks had lined up, but to deal directly with Franks as he was the pay-off man. Franks reported this conversation to the deputies, and received further instructions. On January 13, Franks told Shaw that he had some good "nibbles", but the sheriff wanted to know what type of game was to be run and where in the county it would be. Shaw said he would talk to the appellant and contact Franks in a few days. On January 15, Franks met Shaw and Bilbrey in Palm Springs. Franks told Shaw that the sheriff wanted $1,500 in advance and Shaw said he did not think that the "corporation" would go for that; that they wanted it on a percentage basis. Bilbrey said "I think that's a fair offer" and that he thought the corporation would pay the $1,500 in advance. Shaw told Franks to itemize his expenses and they would give him a check. On the same day, Franks reported this conversation to the deputies.

On January 18, Shaw and Parker came to Franks' home where a deputy sheriff, concealed in a broom closet, turned on a tape recorder and listened to the conversation over ear phones. Franks told them things were practically lined up, but the sheriff wanted a few details ironed out. Shaw stated that they wanted the sheriff to work on a percentage rather than a weekly basis, that the sheriff could make as much as $1,500 a night, and that a man from the sheriff's office could count the money every night. Franks told them that the sheriff would like to meet Shaw and his attorney, Eads, in his office, and Parker said he thought this was a good idea. On January 19, Shaw phoned Franks from the appellant's office and told him he was going in to see the sheriff. Franks called the sheriff and reported what Shaw had said. Shaw and Bilbrey came into the sheriff's office that afternoon and the conversation was taken down by means of a concealed microphone and a tape recorder. Among other things, the sheriff told them that he wanted to talk to Eads, and that he wanted to know how the matter of income taxes would be handled. Shaw expressed a willingness to pay $1,500 in advance, and said he would bring Eads the next day.

On January 20, Shaw, Bilbrey and the appellant went to the sheriff's office, and the conversation was taken down on the tape recorder. The appellant told the sheriff that Shaw was the head of the organization, and advised the sheriff to handle the income tax matter by paying all bills in cash, getting a safety deposit box, and being careful not to make any noticeable increase in his style of living. He also said they were going to keep this operation small and quiet and not play it wide open saying: "That is what blew up last time, if you remember, in San Bernardino." When the sheriff asked "Have you got any money on you now to cinch this thing" the appellant said, "Well, if you need some front we could bring some out tomorrow or the next day." Shaw said they would give the sheriff $500 and as soon as they were running they would give him another $1,000. When the sheriff asked when the money would be paid Shaw replied "Friday or Saturday". The sheriff then drew a gun, and the men were arrested. The appellant then asked the sheriff to "Let me off this hook". When the sheriff refused, the appellant said: "Because it is going to blow me up out of the water * * * you know that."

[1] The appellant's first contention is that the court erred in not permitting his counsel to cross-examine the sheriff, after an opportunity to hear the tape recordings. The sheriff was called as a witness on April 21. On April 22, after an examination on voir dire, the tape recordings were admitted into evidence without objection. It was then adjournment time, and counsel asked to be allowed to play the recordings before they were played to the jury. The court denied this request, on the ground that the tapes might be broken and that they must remain in custody of the clerk, but stated that counsel for defendants might examine the tapes after they were played to the jury. The next morning the tape recordings were played for the jury over an objection that counsel had not been allowed to hear them and that the witness had not been qualified as an expert in running such a machine. The court offered to allow counsel to select another operator and run the tape again for the jury, if desired. When the direct examination of the sheriff was finished on April 27, counsel for appellant stated that he had no cross-examination. After adjournment that day the court announced that, at their request, he had arranged to have the recordings played for defendant's counsel. The examination of witnesses continued for several days and the People rested on May 11. Counsel for the appellant then asked that the sheriff be recalled for "further cross-examination," saying that he could not cross-examine before he heard the recordings, and that he wanted the sheriff to explain some differences between the recordings and the notes used by him. It is now contended that the denial of this request was an abuse of discretion. Some two weeks had elapsed after the witness left the stand, and no satisfactory reason is given for the long delay, or for the failure to make a timely request that cross-examination be deferred until counsel had again heard the recordings. Nothing is

stated as to what the discrepancies are claimed to be, or their materiality. If such discrepancies existed they would furnish proper ground for argument to the jury but not with the witness. No prejudicial error appears.

[2] It is next contended that the court erred in unduly restricting appellant's cross-examination of two witnesses. It is argued that wide latitude should be allowed in cross-examination, and that the court sustained objections to numerous questions on the ground they had been previously asked and answered. The cross-examination of these witnesses, to which appellant makes only a general reference, takes up 252 pages of the transcript, more than 100 pages being by appellant's counsel, and no specific matter is pointed out. A reading of that part of the record discloses neither error nor prejudice.

[3] It is next contended that the court abused its discretion in not permitting appellant to recall the witness Franks for further cross-examination. The record discloses, in this connection, that the court told counsel that if there was anything he had failed to go into on cross-examination it would be allowed, and added "but if you merely wish to go over" some of the things already covered he saw nothing to be gained. Counsel then stated that Franks had said he first heard of Shaw on January 2 and "I want to prove that this man had lunch with Alvin Shaw on December 31, 1952." The court told counsel he was at liberty to do this by direct examination or by other witnesses, but not by arguing with Franks.

[4] It is next contended that the court erred in refusing to allow appellant to examine the tape recordings after they were admitted into evidence and before they were played to the jury. These recordings were made available to him for private examination shortly after they were played to the jury, and no claim is made that anything was discovered which would have had any effect on their authenticity, or which could have affected the verdict if it had been discovered sooner. Nothing material to the case is pointed out and no prejudice appears.

[5] It is next contended that the court erred in not permitting the appellant to cross-examine the sheriff on his notes of the conversations on January 19 and 20. It is argued that he was entitled to such a cross-examination in order to determine whether the notes complied with section 2047 of the Code of Civil Procedure, and that he was limited "to merely an examination on voir dire." The record shows that there was a searching examination on voir dire and appellant points to no question as having been erroneously disallowed. After the examination on voir dire had been finished counsel for the appellant said: "The defendant Eads has no objection to him referring to his notes." Later on, the court allowed counsel for the appellant to examine the witness at considerable length. The court let most of this in, but with respect to one or two questions said they were not proper on voir dire but could be asked on cross-examination. If the court later prevented cross-examination in this connection it is not pointed out by the appellant.

[6] It is next contended that it was error to allow the sheriff to testify from his notes, and that since these notes were merely his interpretation of the tape recordings it was error to exclude appellant's interpretation of the recordings. It is argued that these notes were transcriptions from the tape recordings, were not prepared by the witness when the facts were fresh in his memory, and were merely the witness' interpretation "of the testimony contained on the tape recordings." The sheriff testified that he had heard these conversations; that the recordings were a correct reproduction of the conversations; that the tape recordings were transcribed under his direction; and that he had added pencil notations of his own. The witness had heard the conversations and merely used the notes to refresh his recollection in part, and the notes thus used were not merely his interpretation of the recordings. Moreover, the appellant's counsel stated that he had no objection to this reference to the notes.

[7] It is next contended that the court erred in commenting upon the evidence in one instance without, at that time, instructing the jurors that they were the sole and exclusive judges of the weight and credibility of the evidence. In the instance referred to, the sheriff had testified with respect to his conversation with the appellant after the other defendants were removed from his office. Later, the court stated that this conversation was not admitted against the other defendants and that the motion to strike as to those defendants would be granted "for the reason that all that conversation could possibly show would be a possible consciousness of guilt on the part of the defendant Eads or an admission against interest which would not be binding on the other defendants under any circumstances." A little later counsel asked the court to instruct the jury at that time to disregard this comment. The court stated that he would instruct the jury in this regard at the conclusion of the case. This was done, the instructions in that respect being very full and complete. The comment in question was a mild statement of what the evidence might tend to show and was made in giving the reason for granting the motion to strike. No valid reason appears why the general instructions in that connection, given at the conclusion of the case, did not effectively protect the rights of the appellant and it cannot be held that reversible error appears.

[8, 9] It is next contended that the court erred in refusing, during the trial, to instruct the jury that evidence admissible as to certain defendants was not admissible as to all defendants, and in failing to instruct the jury to disregard all evidence which was stricken, at the time it was stricken. It is argued that evidence was received of the conversation of other defendants made out of the presence of the appellant, that this evidence was not admissible as against the appellant, that the court's failure to so instruct the jury at the time had the effect of leaving the damaging effects of such evidence in the minds of the jurors, and that this effect could not be removed by the instructions given at the conclusion of the trial. The evidence thus referred to consists of statements made by other defendants at a time which the jury could reasonably have found was during the existence of a conspiracy and made in furtherance of its objects, and this evidence was admissible as against the appellant. The court instructed the jury that the declaration of an alleged conspirator could not be considered against any other alleged conspirator, unless and until the alleged conspiracy was proved to have been in existence at the time of the declaration. The jury was also instructed to disregard any and all evidence which had been stricken. No error appears in this connection.

[10] It is next contended that it was error for the court to fail to instruct the court reporter to transcribe the tape recordings as they were played to the jury. It is argued that these recordings were in the nature of testimony, that section 269 of the Code of Civil Procedure requires that all of the testimony be taken down in shorthand, and that while some portions of the recordings were unintelligible and inaudible the recordings should have been taken down and these portions noted. When the witness was asked to play the recording to the jury the objection made was that counsel had not been allowed a prior hearing of the tape, and that the witness was not qualified as an expert in the operation of such a machine. The court overruled the objection stating that this was an exhibit in the case which the jury could have replayed as many times as it desired in order to hear it all, and then told counsel that they could likewise have the exhibit replayed, and compare it with the transcriptions. The recordings were then played and, after a recess, counsel asked that so much of the recordings as was intelligible be reported by the court reporter. The court then told counsel that the exhibit was admitted with their consent, and was played at the earliest convenient moment in accordance with their request; that they could have it replayed at any time; that if they had a witness who could operate the machine better they could have him play it again for the jury or they could hear it in private; and that "if counsel want the court reporters to transcribe so much of the tape recording as they can

get from hearing it they may copy all such portions of the exhibit as they can get into the record." It does not appear that the court's suggestions were complied with; that any effort was made to utilize the methods of augmenting the record provided by the Rules on Appeal; or that the taking of this down by the reporters at the time would have added anything to the transcriptions of the recordings as they were put into the record. Neither error nor prejudice appears.

[11] It is next contended that the district attorney was guilty of prejudicial misconduct in attempting to introduce evidence of other crimes committed by the defendant Parker. It is argued that this reflected on the appellant, and the impression on the minds of the jurors could not be removed by any instruction to disregard it. The evidence thus referred to consisted of one statement made by Parker to a police officer. A motion to strike was granted and the court immediately instructed the jury to disregard it telling them, among other things, that it was offered only as against the defendant Parker and that it could not possibly be construed as binding on any other of the defendants. At the conclusion of the case the jury was again instructed to disregard any testimony which had been stricken. No misconduct appears, and the instructions were sufficient to remove any indirect harm to the appellant if such there was.

[12] It is next contended that the evidence conclusively shows that the appellant was entrapped into conspiring to offer a bribe to the sheriff. It is argued that the conversations between Bilbrey, Shaw and Franks up to January 15 were concerned only with the possibility of opening up gambling in Palm Springs; that it was not until January 15 that the matter of bribing the sheriff was mentioned, and it was then first mentioned by Franks who said that the sheriff wanted $1,500 in advance; that the testimony of the sheriff and the recordings show that the conversation of the sheriff, while the parties were in his office, was directed toward getting the defendants to make a specific offer of money; that the evidence shows that the sheriff intended to entrap the defendants into making an offer of a bribe, which they had no intention of doing; and that the only guilty intent disclosed by the evidence originated in the minds of the officers. It is unnecessary to review the evidence in this connection. The question of entrapment was one of fact for the jury and, in submitting it to the jury, the court gave five instructions which fully and completely covered the law in this connection. Under the established rules the evidence amply supports the jury's finding in that regard. People v. Braddock, 41 Cal.2d 794, 264 P.2d 521.

[13, 14] It is next contended that the court erred by instructing the jury on immaterial matters. It is argued that three instructions relating to gambling were immaterial, and that another instruction on "attempt" was unnecessary. The first three of these instructions defined the offense of gambling, described the duty of the sheriff with respect to arresting persons who are committing public offenses, and told the jury that these instructions were not intended to suggest that any violation of the gambling laws was here charged but were given to assist in determining whether the actions charged in the indictment, if committed, might or could tend to influence the sheriff in connection with his official duties. These instructions were material to the issues. The instruction on attempt was a part of an instruction on intent. Assuming that it was unnecessary, no harmful effect appears.

[15] The next contention, that the court erred in instructing the jury on circumstantial evidence, is without merit. The complaint is that the court refused to give certain instructions, and modified others, which were offered by the appellant. The court gave complete instructions on this matter which fully covered every element contained in the refused instructions, with the sole exception that they did not mention the appellant by name.

[16] It is next contended that the court erred in refusing to give an instruction setting forth the rule that the testimony of an accomplice must be corroborated. It is ar-

gued that the testimony of Franks raised the question as to whether, even though he was acting as a police officer, he was not also acting as an accomplice; and that Shaw's testimony that Franks first approached him with an offer to "fix the top man" discloses the necessity for this instruction on corroboration. There was no evidence which would have supported a finding that Franks was an accomplice, and it was unnecessary to give this instruction. If it could be assumed that any corroboration was necessary, the record discloses an overwhelming amount of corroboration and no possible prejudice appears.

[17] It is next contended that the court was guilty of prejudicial misconduct in certain remarks made to defense counsel. Admitting that these remarks were made to counsel for the codefendants, it is argued that they would naturally be taken by the jury as reflecting on the appellant, since this was a conspiracy trial. We have carefully read each of the 22 citations to the record thus made, and find no possible prejudice in any of them. Most of them are trivial, all were justified by the circumstances, and some were made when the jury was not present. In one instance, under great provocation, the court said: "The unfortunate thing about it, under the rules apparently only the district attorney and the court can commit error. Defense counsel repeatedly does it here. I want no more of it. Now proceed." Shortly thereafter the court struck these remarks from the record and instructed the jury to disregard them. No prejudice appears, and the record discloses that the trial judge displayed, throughout the trial, a degree of patience under trying circumstances which comes close to setting a record.

[18] The final contention is that since the jury was unable to agree on a verdict on the second count, the verdict on the first count is inconsistent and cannot stand. It is argued that the first count set forth the same overt act, the offer of a bribe, which was alleged as a separate offense in the second count; that the jury in effect found that no bribe was offered; and that the disagreement on the second count was tantamount to an acquittal of the overt act alleged in the first count. Such cases as Oliver v. Superior Court, 92 Cal.App. 94, 267 P. 764 and In re Johnston, 3 Cal.2d 32, 43 P.2d 541, are relied on. In such cases there was an acquittal with respect to the controlling overt acts. Here, there was no acquittal with respect to the substantive offense, and no finding by the jury that there was no offer of a bribe. In alleging the overt act in the first count it was charged that the defendants offered on January 20, 1953, to deliver $500 to the sheriff on January 23 or 24, and to deliver other sums as they were permitted to engage in gambling activities. In the second count it was charged that the defendants corruptly offered a bribe to the sheriff on January 20, with the intent to corruptly influence him in connection with a gambling scheme. While there is a close similarity in the charges thus made, the language used was not identical and may well have confused the jury. In disagreeing as to the second count the jurors may have felt that there was a technical difference between offering on January 20 to pay $500 at a future date, and offering a bribe on January 20. Or they may have been in doubt as to whether the evidence was technically sufficient to establish an actual and completed offer of a bribe on January 20. Also, some of the jurors may have felt, in view of the similarity in the charges, that it would not serve the interest of justice to convict the defendants on both. Whatever the jurors had in mind they did not acquit the appellant on the second count, but did find him guilty as charged in the first count, including the overt act. There was no finding that the defendants did not commit the overt act alleged in the first count. No fatal inconsistency appears which requires a reversal. The record conclusively shows the guilt of the appellant, and reveals no error which could reasonably be held to have resulted in a miscarriage of justice.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

SHORE v. SHORE (two cases). *

Civ. 4683, 4684.

District Court of Appeal, Fourth District, California.

April 1, 1954.

Rehearing Denied April 27, 1954.

Hearing Granted May 27, 1954.

Actions for partition of certain personal property in possession of defendant, and to cancel deed and declare trust in an undivided one-half interest in certain realty held by defendant, which interest plaintiff conveyed to defendant under alleged agreement that it would be held by her and later re-deeded to plaintiff after determination of certain unliquidated claims against plaintiff. The actions were tried together. The Superior Court, Kern County, W. L. Bradshaw, J., entered judgment for plaintiff in each case, and defendant appealed. The District Court of Appeal, Griffin, J., held that plaintiff was entitled to a one-half interest in the personal property, but that evidence that plaintiff transferred the interest in realty to defendant with fraudulent intent of defrauding a creditor precluded his recovery of the real property.

Judgment for plaintiff as to personal property affirmed; judgment for plaintiff as to realty reversed.

1. Judgment ⊂⊃563(1)

Generally, denial of relief for want of jurisdiction is not a judgment on the merits and no question other than the jurisdictional one is concluded by such judgment, and such judgment will not prevent plaintiff from subsequently prosecuting his action in any court authorized to entertain and determine it.

2. Judgment ⊂⊃958(1)

To determine the character and scope of an adjudication, the entire record of the former action must be examined.

3. Judgment ⊂⊃732

Where court, in annulment action, specifically refused to make any disposition of property on grounds that the parties were in pari delicto in respect to their purported marriage, there was no issue determined in respect to such property, and hence the annulment decree could not be set up as res judicata in a subsequent action involving rights of parties in and to such property.

4. Marriage ⊂⊃54

Actions for partition of household personal property in possession of defendant, and to cancel deed and declare trust in an interest in realty held by defendant, were authorized to be brought after marriage of parties had been annulled, and question of validity or invalidity of marriage in no way affected character of property or relative rights of ownership.

5. Partition ⊂⊃19

Where, under bill of sale, the record title to personal property stood in joint names of plaintiff and defendant at time plaintiff commenced action for partition thereof, and plaintiff was as much in possession of such property as was defendant until he was put out of possession by a court order, partition action was authorized, and plaintiff was entitled to one-half interest in such personal property. Code Civ.Proc. § 752a.

6. Trusts ⊂⊃110

In action to cancel deed and declare trust in an undivided one-half interest in certain real property held by defendant, evidence sustained finding of an understanding or agreement whereby defendant was to hold plaintiff's interest in trust in the real property and to retransfer such title to plaintiff.

7. Fraudulent Conveyances ⊂⊃174(4)

Generally, where it appears that a conveyance was made with intent to defraud a creditor of the grantor, the agreement to reconvey comes within the maxim ex turpi causa non oritur actio, and cannot be enforced without a clear violation of principles of equity, but general rule is not applicable where offer was induced by grantee's actual fraud, undue influence, and violation of trust, or where grantor has purged himself of his prior fraudulent conduct.

8. Trusts ⊂⊃344

Courts will not allow a trust to be proven by a party to a fraud, if the trust was created for a fraudulent purpose.

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* Subsequent opinion 277 P.2d 4.

9. Fraudulent Conveyances ⚷188

In action to cancel a deed and declare trust in an interest in realty which plaintiff had conveyed to defendant under alleged agreement that it would be held by defendant and later re-deeded to plaintiff after certain unliquidated claims against plaintiff were determined, neither the evidence nor the findings were sufficient to support a conclusion that defendant fraudulently induced plaintiff to place the property in her name, or that she was guilty of a greater fraud than plaintiff.

10. Fraudulent Conveyances ⚷174(4)

In action to cancel deed and declare trust in an interest in realty which plaintiff had conveyed to defendant under alleged agreement that it would be subsequently re-deeded to plaintiff, evidence that an actual claim was made against plaintiff for an indebtedness, whether justifiably founded or not, and that plaintiff believed he might be found liable for such indebtedness and, to avoid its payment, transferred his interest in realty to defendant with fraudulent intent of defrauding such claimant, brought transaction within rule of ex turpi causa non oritur actio, and precluded plaintiff from recovering the realty from defendant. Civ.Code, §§ 3430, 3439.01, 3439.07.

Siemon & Siemon, Bakersfield, for appellant.

Kendall & Howell, Bakersfield, for respondent.

GRIFFIN, Justice.

These two actions were tried together and separate judgments were rendered in each case. Defendant appealed. Action No. 4683 was for partition of certain described household personal property then in the possession of the defendant.

Action No. 4684 was brought to cancel a deed and declare a trust in an undivided one-half interest in certain real property held by defendant which one-half interest plaintiff conveyed to defendant under some claimed agreement that it would be held by her and later re-deeded to him after certain unliquidated claims were determined.

Plaintiff Archie B. Shore and defendant Alberta Mae Shore lived together for about 14 years as husband and wife. A short time before the commencement of these actions Mrs. Shore brought an action for annulment against Archie B. Shore upon the ground that there was a void marriage by reason of the fact that Mr. Shore had a former wife living at the time from whom he had not been legally divorced. Mr. Shore filed an answer and cross-complaint and also sought an annulment upon the same ground. Both set up the fact that they had acquired certain real and personal property during the time they cohabited with each other. After the trial Mrs. Shore obtained a decree of annulment and was awarded the custody of their two children, the issue of this relationship. The decree made provision for their support. In the decree the court specifically refused to make any disposition of the property on the grounds that the parties were *"in pari delicto"* in respect to their purported marriage. The pleadings indicate that plaintiff herein had been previously married and had purportedly obtained a so-called Mexican divorce which proved to be invalid, and then married defendant in Mexico; and that both knew or should have known the Mexican divorce was not valid. After the entry of this decree plaintiff, one month later, brought these actions and defendant pleaded as a defense the former judgment as being *res judicata* in reference to the property involved and alleged ownership and possession of it.

On appeal from the judgment entered in favor of plaintiff in each case, defendant reaffirms the defense of *res judicata* and claims that plaintiff was estopped from recovering possession of the property by reason of his own fraudulent transfer of his interest to defendant, citing Tognazzi v. Wilhelm, 6 Cal.2d 123, 125, 56 P.2d 1227; and Anderson v. Nelson, 83 Cal.App. 1, 6, 256 P. 294; that the evidence and findings are insufficient to support the judgment in either case; that under the theory that the plea of *res judicata* was ignored by the court, and since each party was equally at fault, the law favors the party who is admittedly in possession, and accordingly the parties will be left in the position where they were found; that since the court found the parties were *"in pari delicto"* it in effect denied either one any relief in regard to their property rights, and accordingly the court may not subsequently, in an independent action between them, make any different disposal of the property in question, citing such cases as Oakley v. Oakley, 82 Cal.App.2d 188, 185 P.2d 848; Baskett v. Crook, 86 Cal.App.2d 355, 359, 195 P.2d 39; Ideal Hardware & Supply Co. v. Department of Employment, 114 Cal.App.2d 443, 250 P.2d 353; Olwell v. Hopkins, 28 Cal.2d 147, 168 P.2d 972; Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761; and Taylor v. Taylor, 66 Cal.App.2d 390, 152 P.2d 480.

In this connection it is argued that a judgment is a bar not only to rights asserted but also to rights which might have been asserted, citing Krier v. Krier, 28 Cal.2d 841, 843, 172 P.2d 681; and Section 1910, Code of Civil Procedure.

As to the estoppel alleged, defendant claims the one-half interest in the real property was deeded to her as a gift, as her sole and separate property; and that the testimony of plaintiff that defendant agreed to reconvey it to plaintiff under the circumstances was not sufficient to establish a trust; that in order to justify a court in determining, from oral testimony, that a deed which on its face purports to convey land absolutely in fee simple, was intended to be something different, such testimony must be clear, satisfactory and convincing, citing such cases as Sherman v. Sandell, 106 Cal. 373, 39 P. 797; and Pailhe v. Pailhe, 113 Cal.App.2d 53, 247 P.2d 838.

A similar contention is made as to the personal property, i. e., that the evidence in support of the finding is insufficient to show that plaintiff had a one-half interest therein which was subject to such a decree as here involved.

[1] It is a general rule that denial of relief for want of jurisdiction is not a judgment on the merits and no question other than the jurisdictional one is concluded by such a judgment. It will not prevent the plaintiff from subsequently prosecuting his action in any court authorized to entertain and determine it. Freeman on Judgments, 5th Ed., Vol. 2, p. 1546; Slaker v. McCormick-Saeltzer Co., 179 Cal. 387, 389, 177 P. 155; Uhl v. Uhl, 52 Cal. 250; Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390.

[2] To determine the character and scope of an adjudication, the entire record of the former action must be examined. Although there is a conflict between counsel as to whether all the property here involved was there involved, an examination of the files in that action, which were received in evidence, indicates that Mrs. Shore there alleged that the property there involved, both real and personal, was her separate property and that there was other community property there set up which was community property of the parties. That property is not here involved. Other and additional property is there alleged to be her separate property. Mr. Shore, in his answer, alleged that the property here involved, both real and personal, was community property and jointly acquired by them. Some additional community property was also alleged. He denied that any of the property alleged by Mrs. Shore to be her separate property was such, and alleged that it was community property.

Whether a court, under certain circumstances in an annulment proceeding, may dispose of property acquired by the husband and wife may be open to question. In Partrick v. Partrick, 112 Cal.App.2d 107, 245 P.2d 704, this court affirmed the lower court in a decree annulling a putative marriage, and dividing the property acquired by the parties where the evidence sustained the finding that both parties in good faith believed the marriage to be valid, and they had agreed to pool their earnings and share equally in all property resulting therefrom. To the same effect is Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761, where it is said (quoting from the syllabus):

> "A woman living with a man as his wife but with no genuine belief that she is legally married to him does not acquire by reason of cohabitation alone the rights of a cotenant in his earnings and accumulations during the period of their relationship."

It also held that lack of good faith would not preclude her from recovering property to which she would otherwise be entitled; that if a man and woman lived together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interest of each in such property, and that even in the absence of an express agreement to that effect, the woman would be entitled to share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition. See, also, Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342, where it is said (quoting from the syllabus):

> "In an action for divorce or for annulment, in the event the marriage sought to be dissolved was not validly contracted, it is sound practice to dispose of the property rights of the parties in the same action, thus avoiding a multiplicity of suits."

In Uhl v. Uhl, 52 Cal. 250, it was held that the plaintiff cannot, in one complaint, unite a cause of action to annul a marriage by reason of the former marriage of the plaintiff to one who is still alive, with a cause of action to quiet title to her separate property, in which the defendant falsely claims an interest.

In Wetmore v. Wetmore, 40 Or. 332, 67 P. 98, it was held that in an action for divorce plaintiff cannot compel a conveyance from defendant of land alleged to have been purchased with complainant's money, it not being an incident to the action. See, also, Houston v. Timmerman, 17 Or. 499, 21 P. 1037, 4 L.R.A. 716, 11 Am.St.Rep. 848; and Peck v. Peck, 66 Mich. 586, 33 N.W. 893. Here, the court specifically found that since the parties were *in pari delicto,* it "makes no finding concerning the character of the property" mentioned in the pleadings.

[3] Whether the court had jurisdiction in the annulment proceeding to order a reconveyance and division of the property acquired by the parties under the circumstances related, and what were its reasons therefor, we think, becomes immaterial since it specifically refused to make such disposition in that proceeding by such decree. That decree has become final and it is binding on both parties. There was no issue determined in this respect and accordingly the decree as entered may not be set up as res judicata in a subsequent action.

[4] The subsequent actions involving the rights of the parties in and to the property in question and whether a trust was created in reference to the real property were authorized under the decision of McWhorter v. McWhorter, 99 Cal.App. 293, 278 P. 454, 455, and cases cited, where it is said:

> "The chief contention of the appellant is that the evidence fails to support the findings of the court to the effect that the plaintiff lived and cohabited with the defendant 'in good faith' believing that their relationship was equivalent to what has been termed a common-law marriage. * * *
>
> "We are of the opinion that it is entirely immaterial, so far as the determination of this appeal is concerned, whether they lived together in good faith as husband and wife, or otherwise. * * * The question of the validity of the marriage in no way affects the character of the property of the relative rights of ownership."

In Baskett v. Crook, supra, the court found that the parties lived together as husband and wife and had no agreement or arrangement as to their property rights. There the husband had no property. He initiated an action to establish an interest in his wife's real and personal property held in her name. The court held that since there was no agreement concerning their property rights, plaintiff could not recover that property but it did equally divide certain war bonds purchased by the parties in their joint names.

In the instant case plaintiff testified that he purchased the furnishings, a residence, and the 12 units here involved, on April 8, 1950; that the title thereto was taken in his name and that of defendant under a joint tenancy bill of sale and joint tenancy deed; that the apartments were rented at the time of their separation; that Mrs. Shore received the rentals therefor; that he made a demand for the furniture and she refused; that a few days after the property was acquired, he and defendant talked over troubles he and his partner were having with one White who was trying to implicate them as partners or joint venturers with White in a building project; that in fact they were not such partners with White and so he thought the thing to do, under the circumstances, was to put the title to the apartments and all the things he owned "in her name" temporarily and hold it in trust, and "when this was over to put them back in my name like they always was". The evidence indicates that defendant agreed to do this. Mr. Shore was actually sued as such a partner or joint venturer with White but the action was subsequently dismissed as to Shore.

During their separation defendant opened a separate bank account to take care of the receipts and payments on the trust deed on the apartment house, and while the action against them was pending plaintiff executed a grant deed of his interest in the real property to Mrs. Shore under the conditions above set forth, but no bill of sale of the furniture was executed by him. There was a loan of $2500 on the real property. Plaintiff testified that since they bought the real property purely as an investment, he wanted to turn it as soon as possible and did not want any clouds on the title by virtue of the suit.

Mrs. Shore testified plaintiff placed the title to the property in her name as her own separate property, as a gift to her for her protection and that of the children, and that the furniture went with it; that she made the payments on the trust deed and furniture from the income; that she also worked in plaintiff's real estate office on occasions; and that nothing was said about her holding it in trust for him. She admitted receiving $800 paid to her by plaintiff to apply on the trust deed payments but claimed plaintiff owed that to her for money he had borrowed from the rental funds. She produced a neighbor as a witness (grantor of the real property) who appeared quite friendly to defendant but unfriendly to plaintiff. He testified he heard plaintiff remark, at the time he purchased the property, that plaintiff bought the apartments and furniture for defendant and the boys. Another witness testified that after plaintiff and defendant quarreled plaintiff told her he had given defendant the property so she and the boys would be taken care of but that he now wanted it back. Plaintiff denied any such conversation and placed in evidence the escrow instructions signed by both plaintiff and defendant requiring that title be vested in them as joint tenants. He testified he put up the cash down payment required from his business account and they traded in a residence they owned as joint tenants; that they took possession of the property on March 12, and on that same day he executed the deed to his wife; that after the suit was settled he prepared a deed for her to sign returning his interest therein to him, and she said she wanted to see her attorney before she signed it; that he was "dumfounded" when she refused, and she later brought an action for annulment; that he had, up to that time, been assisting her on rentals, and at that time advanced $800 on payment of an overdue trust deed. He then testified that she agreed to transfer it back to him when the litigation was terminated; that she thought it was a good plan and understood it; that they thought of placing the property in his brother's name but did not do so; that he lived in the house with her until he was "thrown out" by an order of court.

Plaintiff's partner testified that trouble arose as to Mr. White and White was endeavoring to implicate them under a building sales agreement on the theory that they were his partners in the transaction, and to make them liable for White's debts; that he and plaintiff and defendant discussed their property and that both plaintiff and his partner agreed, in defendant's presence, that they would do what they did do, put their property in their wives' names in trust, and that no mention was there made about any gift. Defendant then admitted that plaintiff asked her to sign the deed returning his property to him, but claims plaintiff threatened her and she refused to sign it. She then admitted being present when plaintiff and his partner discussed putting their property in their wives' names but claimed it was not because of the suits; that she did not remember the conversation but Mr. Shore never asked her to keep it in trust for him.

[5] Insofar as the personal property was concerned, the record title still stood in the joint names of plaintiff and defendant under the bill of sale at the time of the commencement of the action in partition. Plaintiff was as much in possession of that property as was defendant until he was "thrown out" of possession by a court order. The action in partition as to the personal property accordingly was authorized. Young v. Hessler, 72 Cal.App.2d 67, 164 P.2d 65; Section 752a, Code Civ.Proc. The judgment awarding a one-half interest in the personal property to plaintiff must be sustained.

[6] Defendant contends that no understanding or agreement was established by the evidence whereby defendant was to hold plaintiff's interest in trust in the real property and agreed to retransfer such title to plaintiff. We are not in accord with this conclusion. There was sufficient evidence in the record to support the court's finding in this respect.

Counsel for defendant recites respected authority such as Tognazzi v. Wilhelm, 6 Cal.2d 123, 56 P.2d 1227, to the effect that a person in an equity proceeding such as this may be estopped from recovering possession of property which he fraudulently transfers to another for the purpose of defrauding creditors or prospective creditors; that the law favors the one who is actually in possession; that he who comes into equity must come with clean hands; and accordingly, when this is not the case, the parties will be left where they are. Whether the court was authorized under the circumstances to decree that defendant held a one-half interest in the real property in trust for the benefit of defendant is the real and most serious question here involved.

[7] As a general rule, where it appears that a conveyance was made with intent to defraud a creditor of the *grantor*, the agreement to reconvey comes within the maxim "'*Ex turpi causa non oritur actio*,'" and cannot be enforced without a clear violation of the principles of equity. Allstead v. Laumeister, 16 Cal.App. 59, 116 P. 296, 297; 12 Cal.Jur. p. 1027, sec. 67. However, this rule is not without its exceptions. The rule is not applicable where the offer was induced by the grantee's actual fraud, undue influence, and a violation of the trust, Donnelly v. Rees, 141 Cal. 56, 74 P. 433; Green v. Frahm, 176 Cal. 259, 168 P. 114, or where the grantee is not *in pari delicto* with the grantor, Vitoreno v. Corea, 92 Cal. 69, 28 P. 95; Faria v. Faria, 100 Cal.App. 177, 280 P. 187, or where plaintiff has purged himself of his prior fraudulent conduct, as was held in Carman v. Athearn, 77 Cal.App.2d 585, 175 P.2d 926; and Stockwell v. McAlvay, 10 Cal.2d 368, 74 P.2d 504, upon which plaintiff here relies, and where the doctrine of "clean hands" was held not to apply. See, also, Restatement of the Law of Trusts, sec. 63, p. 199 et seq., where the claim could not have been enforced against the property so transferred.

The court found "*that at the time of said transfer* * * * unmeritorious claims were being made against plaintiff by attempting to involve plaintiff in a contracting business as a partner and to force plaintiff to pay claims which were not owed by him; * * * that in order to keep title to the hereinabove described real property free from said unmeritorious claims, plaintiff and defendant orally agreed that the interest of plaintiff * * * should be conveyed to defendant, and she should hold title" thereto "so that it could be sold * * * dealt with * * * without interference from said unmeritorious and improper claims." (Italics ours.)

From an examination of the evidence and the findings it is apparent that plaintiff has not brought his case within any of the exceptions noted. While the judgment appears to be just, counsel has furnished us with no authority which would justify such a decree in an action in equity. Our independent search has resulted in the conclusion that the general rule, under the evidence and findings of the court, must be applied. Plaintiff claims that he was not in fact a creditor of the plaintiff in the action against him and White, and that the determination of that action so indicated.

Section 3439.01 of the Civil Code defines a creditor to be "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." Section 3439.07 provides that "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

In Belling v. Croter, 57 Cal.App.2d 296, 134 P.2d 532, 537, in speaking of the purpose of concealment, it is said that it "may be best demonstrated by proof that it resulted in fraud, but the 'unclean hands' principle is equally applicable to cases of intent to defraud as to those in which the intent ripened into accomplishment"; and that "Equity, in administering its remedies, regards not alone the accomplished fact, but also the intent and purpose of the act", citing cases. Even in a tort action where the liability of the parties to an automobile accident had not been determined, it was held that one having a claim arising therefrom was a creditor, before the commencement of the action as well as afterward, within the meaning of section 3430 of the Civil Code providing that "A creditor, within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money."

[8] The rule that courts will not allow a trust to be proven by a party to a fraud, if the trust was created for a fraudulent purpose, is a time-honored rule and is not subject to many exceptions. Alaniz v. Casenave, 91 Cal. 41, 27 P. 521.

Chamberlain v. Chamberlain, 7 Cal.App. 634, 95 P. 659, is factually similar to the instant case, but there the defendant donee was found to be the one who falsely induced plaintiff to execute the deed.

[9] There is no evidence or finding in the instant case that would support a conclusion that defendant, the grantee, fraudulently induced plaintiff to place the property in her name or that she was guilty of a "greater fraud" than plaintiff.

In Withrow v. National Surety Co., 122 Cal.App. 242, 10 P.2d 83, in sustaining a demurrer to the complaint without leave to amend, the court held that in an action to quiet title to real estate, where it appeared that plaintiff had conveyed the property to plaintiff's sister under an agreement that she should hold title thereto temporarily on account of a threatened lawsuit against plaintiff and pending a settlement thereof, and the conveyance was without consideration and with the intent to defraud a creditor, plaintiff could not obtain any relief in a court of equity. It then held that plaintiff's act in conveying the property to his sister without a consideration, and on account of a threatened lawsuit, was not consistent with a prudential regard for his own interest as well as the utmost good faith toward the claimant, but was a selfish and unfair regard for his own interest and an unconscientious disregard of the lawful rights of others, conceived in fraud and based upon falsity, and it could not be justified; that a creditor, within the meaning of our law relating to fraudulent conveyances, is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money; and one having a claim arising from tort is a creditor, as well before as after the commencement of an action; that where plaintiff's conveyance to his sister was conceived in fraud, no enforceable trust arose.

In Allstead v. Laumeister, 16 Cal.App. 59, 116 P. 296, which was an action by a father to enforce a claimed trust agreement by the son, where the father had deeded the property to his son with intent to defraud his creditors and the son, in violation of his trust, subsequently deeded the property to his foster mother, the trial court found for the plaintiff, and the appellate court reversed the judgment and held that he who comes into equity as a plaintiff must come with clean hands; that the plaintiff's conduct in making a deed to his son, with an agreement for a return deed to him, on demand, having been conceived and founded on an intent to defraud his judgment creditor, there was nothing that either the son nor the father might do with the property conveyed that could relieve plaintiff from the consequences of his unconscientious part in the transaction; that the fact that the son and his grantee stood *in pari delicto* in reference to the concealment of the fraudulent intent of the father is immaterial and cannot relieve the plaintiff in equity; and that courts will not allow a trust to be proven by a party to a fraud if it was created for a fraudulent purpose. See, also, Estate of Xydias, 92 Cal.App.2d 857, 208 P.2d 378; Stone v. Lobsien, 112 Cal. App.2d 750, 247 P.2d 357; and Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557.

[10] While it does not appear in the instant case that plaintiff was in fact a debtor in relation to the suit instituted against him, it does affirmatively appear from the evidence and findings that the claimant claimed that plaintiff was a debtor by virtue of a joint venture or partnership and that an actual claim was made against plaintiff for this indebtedness, whether justifiably founded or not, and that plaintiff here believed he might be found liable for such indebtedness, and that to avoid its payment he did transfer his interest in the real property to his alleged wife with the fraudulent intent of defrauding such creditor if a judgment was obtained against him. Under the circumstances and authorities cited this court is bound by the established law, no matter how unjust it may seem, in holding that the transaction comes within the rule of "'*Ex turpi causa non oritur actio*,'" and accordingly plaintiff is precluded from recoving the real property involved in this equitable action.

The judgment in favor of plaintiff as to the personal property involved in partition action No. 4683 is affirmed. Judgment in favor of plaintiff as to the real property involved in the trust action No. 4684 is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

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124 Cal.App.2d Supp. 885

SHEMANSKI v. SAIR.

Civ. A. 8219.

Appellate Department, Superior Court,
Los Angeles County, California.
March 24, 1954.

Unlawful detainer proceeding, wherein plaintiff obtained judgment for restitution of premises and writ of possession was issued to and executed by a marshal. The Municipal Court of the Los Angeles Judicial District, Lucius P. Green, J., disallowed an item in cost bill, and plaintiff appealed. The Appellate department of the Superior Court, Patrosso, J., held that evicted defendant was liable for expense incurred by evicting officer in removing and storing defendant's personal property.

Order reversed with directions.

1. Forcible Entry and Detainer ⟹40

An officer executing a writ of possession, being under legal compulsion of removing defendant's personal property from premises and not being authorized to destroy it or leave it unattended on a public street, must remove it to an appropriate place for safekeeping. Pen.Code, § 370.

2. Forcible Entry and Detainer ⟹47

Evicted defendant was liable for expense incurred by evicting officer in removing and storing defendant's personal property. Code Civ.Proc. § 1034½.

3. Forcible Entry and Detainer ⟹47

Statute relating to costs in civil actions has no application to unlawful detainer actions, which are controlled by special provision. Code Civ.Proc. §§ 1033.7, 1034½.

4. Forcible Entry and Detainer ⟹47

Verification, to cost bill in unlawful detainer action, that "the items [and statements therein] are correct and that the disbursements have been necessarily incurred," was sufficient. Code Civ.Proc. §§ 1033, 1034½.

5. Forcible Entry and Detainer ⟹47

Where items in verified cost bill in unlawful detainer action appeared to be proper charges, bill was prima facie evidence that the same had been necessarily incurred. Code Civ.Proc. § 1034½.

6. Forcible Entry and Detainer ⚷47

Burden was on defendant to show wherein charges included in plaintiff's cost bill were unreasonable. Code Civ. Proc. § 1034½.

7. Forcible Entry and Detainer ⚷47

In unlawful detainer action, defendant did not sustain burden of proving wherein challenged charge in plaintiff's cost bill was unreasonable. Code Civ.Proc. § 1034½.

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Benjamin & Kronick, Los Angeles, for appellant.

Arthur F. Larrabee, Los Angeles, for respondent.

PATROSSO, Judge.

In this unlawful detainer proceeding plaintiff obtained judgment for restitution of the premises, following which a writ of possession was issued to, and was executed by the marshal. Thereafter plaintiff filed a cost bill after judgment wherein he claimed the sum of $371.37, which included $1 for the issuance of the writ and marshal's fees for executing the same in the sum of $370.37. Included in the latter figure was the amount of $345.67 paid to the marshal for removing and temporarily storing the personal property located in the premises, which latter item was, upon defendant's motion to tax, disallowed by the court, from which order plaintiff appeals.

Upon the hearing of the motion to tax, evidence was introduced to the effect that the marshal, in executing the writ, went to the premises, but found no one present. He thereupon posted a notice thereon directing the defendant to remove therefrom his property, which consisted of restaurant equipment. Five days later, the property not having been removed, a keeper was placed in charge, and the marshal secured the Republic Van & Storage Company to dismantle and remove the property and temporarily store the same. For these services the Storage Company made a charge of $345.67, which was paid by the marshal with funds provided by the plaintiff upon the marshal's demand therefor, it being the practice of the marshal's office not to accept or execute a writ of possession unless the plaintiff first makes a deposit of sufficient funds to remove and temporarily store the personal property of the tenant in a public warehouse.

Section 1034½, Code Civ.Proc., provides that "In unlawful detainer proceedings, the plaintiff who recovers judgment for the restitution of premises and who advances or pays to the sheriff or marshal the costs required by him for the eviction of any person or persons in possession or occupancy of said premises *and the personal property* of such person or persons" shall be entitled to claim such additional costs by filing a supplemental cost bill. In view of this express provision, there appears no doubt the amounts paid by a plaintiff to the marshal for *removing* the tenant's property from the premises are properly taxable as costs. The only question is whether this includes the costs paid to the marshal for packing, transporting and temporarily storing the same. We are of the view that it does.

[1] In Lee Chuck v. Quan Wo Chong Co., 1889, 81 Cal. 222, 229, 22 P. 594, 596, the Supreme Court said: "In order to constitute a full execution of the writ (of possession), the defendant *and its property* must have been removed from the premises, and the possession of the real estate given to the plaintiff * * *." (Emphasis added.) See to the same effect: Conniff v. Superior Court, 1928, 90 Cal.App. 169, 175, 265 P. 555. The officer executing a writ of possession, being under legal compulsion of removing the tenant's personal property from the premises, must of necessity make some disposition thereof. Obviously he is not authorized to burn or otherwise destroy it, and it is equally unreasonable to suppose that he may place and leave it unattended in a public street, which would obstruct the free use thereof and constitute a public nuisance under Penal Code section 370.

[2] In Com. v. Lennon, 172 Mass. 434, 52 N.E. 521, a constable who, in executing a writ of possession, deposited defendant's possessions on the sidewalk was held guilty of violating a city ordinance forbidding the placing of furniture upon sidewalks. Hence, it seems but reasonable to conclude that under such circumstances the officer has no alternative other than to remove the property to an appropriate place for safekeeping. This necessarily involves the incurring of expense, and it appears clear that section 1034½, Code Civ.Proc., was designed to authorize the recovery by plaintiff of the costs required to be paid by him to the sheriff or marshal for this purpose.

This conclusion, it may be noted, coincides with an opinion rendered by the Attorney General of California (No. 53/42, Nov. 16, 1953).

[3–7] Defendant further contends that the order appealed from is proper because the verification to the cost bill was defective in not stating that the costs were "reasonable, and, * * * reasonably and necessarily incurred." Section 1033.7, Code Civ.Proc., upon which this contention is based, is without application here. That section deals with the recovery of costs by judgment creditors after judgment in civil actions generally. Section 1034½, on the other hand, is confined in its application to unlawful detainer proceedings, and hence is controlling over the former in the specific cases to which it relates. 23 Cal. Jur. p. 762, sec. 136. Section 1034½, unlike section 1033.7, does not prescribe the form of verification, and that here used is in the language of section 1033, dealing with cost bills generally, namely, that "the items [and statements therein] are correct, and that the disbursements have been necessarily incurred". This is sufficient. And where, as here, "items appear to be proper charges, a verified memorandum of costs is *prima facie* evidence that the same had been necessarily incurred." Murphy v. F. D. Cornell Co., 1930, 110 Cal.App. 452, 454, 294 P. 490, 491. The burden was upon the defendant to show wherein the charge objected to was unreasonable, and no such showing was made.

The trial court, therefore, erred in striking from the cost bill filed November 26, 1952, the sum of $345.67. In view of the foregoing, plaintiff's appeal from the order of February 11, 1953, denying plaintiff's subsequent motion for an order allowing as costs the same item is rendered moot.

The minute order of January 14, 1953 (entered January 15, 1953) retaxing costs is reversed, with directions to tax costs thereon in the total sum claimed ($370.37). The appeal from the minute order of February 11, 1953 (entered February 16, 1953) is dismissed.

SHAW, P. J., and BISHOP, J., concur.

42 Cal.2d 550

PEOPLE v. BAKER.

Cr. 5535.

Supreme Court of California.
In Bank.
March 26, 1954.

Defendant was convicted of first degree murder. The Superior Court, Kern County, William L. Bradshaw, J., rendered judgment sentencing defendant to death, and he appealed. The Supreme Court, Traynor, J., held that evidence of defendant's conduct, indicating his sanity, at the trial over two years after the homicide, did not support the jury's finding that he was sane at the time of the alleged offense and that errors in the trial court's instructions on the questions of defendant's guilt, sanity and premeditation substantially and prejudicially affected his rights, so as to necessitate reversal of the conviction.

Judgment reversed.

1. Homicide ⚷234(1)

In prosecution for murder of defendant's wife, evidence supported jury's conclusion that defendant struck fatal blows on wife's head.

2. Homicide ⚷268

In murder prosecution, it was for jury to resolve conflicts in evidence and determine inferences to be drawn therefrom.

3. Homicide ⚷237

In murder prosecution, defendant's personal appearance, mannerisms and actions and character of his testimony and manner of giving it at trial over two years after homicide were insufficient to support jury's finding of defendant's sanity at time of offense, in absence of showing that his mental condition was the same at time of trial as immediately after victim's death.

4. Criminal Law ⚷311, 570(2)

On trial of issue raised by defendant's plea of not guilty of crime charged by reason of insanity, there is a rebuttable presumption that defendant was sane when crime was committed and he has burden of proving his insanity at such time by preponderance of evidence.

5. Criminal Law ⚷311

Proof that defendant was afflicted with permanent insanity, as distinguished from temporary or transient insanity, before commission of crime charged, dispels presumption of his sanity at time of crime and raises presumption that his previous insanity continued until such time.

6. Homicide ⚷294(1)

In murder prosecution, where there was ample evidence of defendant's insanity before killing and he was adjudged insane shortly after commission of crime, jury should have been instructed that proof of defendant's permanent insanity before commission of crime raised presumption that such insanity continued until time of offense, though evidence did not discharge defendant's burden of proving his insanity at such time as matter of law.

7. Criminal Law ⚷902

Though defendant could not complain of joinder for trial of his pleas of not guilty of murder and not guilty by reason of insanity pursuant to his counsel's stipulation, defendant did not by such stipulation, waive any errors, committed by trial court as result of such joinder, in instructing jury.

8. Criminal Law ⚷778(7), 810

In murder prosecution, instructions to jury that only conclusive presumptions are not rebuttable, that on issue raised by plea of not guilty, defendant is conclusively presumed to have been sane when offense was committed, that all persons are presumed to intend usual and probable consequences of their acts, and that any such presumption may be overcome by contrary evidence creating in juror's minds reasonable doubt that defendant's intent was as presumed, were erroneous as confused, contradictory and ambiguous and failing to inform jury in clear and unmistakable terms of principles which must guide their deliberations and particularly what part of evidence bearing on defendant's mental condition was applicable to issues submitted.

9. Criminal Law 🔑48

One charged with crime is legally sane, if he knows nature and quality of his acts and their wrongfulness.

10. Criminal Law 🔑48

"Soundness of mind," as distinguished from "legal sanity," means free from flaw, defect or decay, perfect of the kind, undamaged or unimpaired, healthy, not diseased or injured, robust, as impliedly recognized in Penal Code provisions that lunatics, idiots and insane persons are incapable of committing crimes and that idiots and lunatics are not of sound mind. Pen.Code, §§ 21, 26.

See publication Words and Phrases, for other judicial constructions and definitions of "Legal Sanity" and "Soundness of Mind".

11. Homicide 🔑294(1), 340(1)

In prosecution for first-degree murder, instruction that on issues raised by plea of not guilty, defendant is conclusively presumed sane and of sound mind at time of crime and that jury must find him guilty, if convinced beyond reasonable doubt that he unlawfully killed decedent, though jurors have some doubt as to his soundness of mind at present or at time of crime, which means that he is presumed to have had capacity to commit act, so far as sanity is concerned, but does not preclude finding that his mental state was such that he did not have intent necessary to constitute crime, was erroneous and prejudicial to defendant.

12. Homicide 🔑156(1)

In prosecution for first-degree murder, evidence of defendant's mental infirmity, not amounting to legal insanity, at time of crime, is admissible and should be considered by jury on questions of premeditation and deliberation.

13. Homicide 🔑27

Though moronity and mental condition caused by epileptic seizures, unless they amount to unconsciousness, are not within Penal Code provisions that lunatics, idiots and insane persons are incapable of committing crimes, such conditions may indicate some lack of healthy and robust mind and bear on question of capacity of one charged with first-degree murder to premeditate and deliberate. Pen.Code, § 26.

14. Criminal Law 🔑778(7)

In prosecution for first-degree murder, instruction to jury that on trial of issue raised by plea of not guilty, defendant was conclusively presumed to be of sound mind at time of crime was erroneous as telling jury that it could not consider evidence of defendant's moronity and effect on his mental faculties of many years suffering from epilepsy in determining his defense of lack of mental capacity to premeditate and deliberate.

15. Criminal Law 🔑810

In prosecution for first-degree murder, instruction that on trial of issue raised by plea of not guilty, defendant was conclusively presumed to be of sound mind at time of crime, was erroneous as in irreconcilable conflict with subsequent instructions.

16. Criminal Law 🔑1172(4)

On appeal from judgment on verdict of conviction, Supreme Court is not at liberty to speculate as to which of several irreconcilably conflicting instructions by trial court were followed by jury.

17. Criminal Law 🔑355

The Penal Code provision that jury must consider evidence of accused's intoxication at time of alleged crime in determining purpose, motive or intent with which he committed act, when actual existence of particular purpose, motive or intent is necessary to constitute any particular species or degree of crime, includes intoxication by drugs, as well as by intoxicating liquors. Pen.Code, § 22.

18. Homicide 🔑270

In prosecution for first-degree murder, evidence was sufficient to raise fact question for jury as to defendant's voluntary intoxication by overdose of hypnotic drugs at time of killing. Pen.Code, § 22.

19. Homicide 🔑294(2), 341

In prosecution for first-degree murder, where evidence raised fact question for jury as to defendant's voluntary intoxication by overdose of hypnotic drugs at time of killing, trial court's failure to instruct jury that it could consider such intoxication in determining whether defendant committed offense with premeditation and deliberation was error prejudicial to defendant especially in view of inadequate instruction that defendant's acts were no less criminal because of his intoxication when he committed them, without adding that such intoxication could be considered in determining degree of offense committed. Pen.Code, § *22*.

20. Criminal Law ⚷829(6)

In prosecution for first-degree murder, error in trial court's failure to instruct jury that it could consider defendant's voluntary intoxication by hypnotic drugs at time of killing determining whether he committed offense with premeditation and deliberation was not overcome by instructions that jury's finding of defendant's sanity would not preclude finding that his mental or nervous condition was such that he was incapable of deliberation or premeditation, as such instruction did not inform jury of weight to be given to fact of his intoxication, though responsive to defense that he was incapable of premeditation because of his moronity, psychological disorders and mental deterioration caused by epilepsy. Pen.Code, § *22*.

21. Criminal Law ⚷46

Accused's unconsciousness at time of his alleged commission of crime is a complete, not partial, defense to such charge. Pen.Code, § *26*, subd. 5.

22. Criminal Law ⚷53

Accused's voluntary intoxication at time of commission of crime charged can only have effect of negating his specific intent to commit crime, though such intoxication may at times amount to unconsciousness. Pen.Code, §§ *22*, *26*, subd. 5.

23. Homicide ⚷293

In prosecution for first-degree murder, where there was ample evidence of defendant's voluntary intoxication by overdose of hypnotic drugs at time of alleged crime and also evidence of his unconsciousness at such time because he was in clouded state of epileptic attack, trial court properly gave jury instruction based on Penal Code provision declaring accused's unconsciousness at time of alleged crime a complete defense, such defense being entirely separate from defendant's partial defense of intoxication by such overdose. Pen. Code, §§ *22*, *26*, subd. 5.

24. Criminal Law ⚷829(6)

In prosecution for murder of defendant's wife, defense that defendant was voluntarily intoxicated by hypnotic drugs at time of alleged crime was inadequately covered by instruction to jury on effect of defendant's unconsciousness at such time as against contention that he was not voluntarily intoxicated because he took pills and capsules to ward off attack of epilepsy and took his wife's pills by mistake. Pen. Code, §§ *22*, *26*(5).

25. Homicide ⚷270

In murder prosecution, whether imminent approach of epileptic attack was sufficient to render defendant's taking of hypnotic drug pills, having intoxicating effect, shortly before homicide, compulsive and hence involuntary, was a question for jury. Pen.Code, § *22*.

26. Homicide ⚷294(2), 341

In murder prosecution, trial court's failure to give jury complete instructions on question of defendant's voluntary intoxication by hypnotic drugs at time of killing was error prejudicial to him, in view of instructions that jury could consider defendant's intoxication only if they found that it was caused involuntarily and produced unconsciousness, as facts and inadequate partial instruction given on such question might have led jury to believe that defendant's intoxication was not involuntary. Pen.Code, §§ *22*, *26*, subd. 5.

27. Homicide ⚷294(2), 340(1)

In murder prosecution, instructions to disregard defendant's voluntarily intoxicated condition, if found by jury, at time of killing, in arriving at verdict, were erroneous and prejudicial to defendant. Pen. Code, §§ *22*, *26*, subd. 5.

28. Criminal Law ⚷824(1)

In criminal case, trial court, on its own motion, must fully and fairly instruct jury concerning law relating to facts of case as developed by evidence introduced at trial.

29. Criminal Law ⚿769

An instruction to jury is necessary, if vital to proper consideration of evidence by jury.

30. Criminal Law ⚿824(4)

In murder prosecution, where instructions given directed jury's attention away from vital issue raised by defendant's contention that he was voluntarily intoxicated by overdose of hypnotic drugs at time of alleged crime, verdict of conviction cannot be sustained merely because proper instructions were not requested by defendant. Pen.Code, § 22.

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Henry E. Bianchi, Bakersfield, for appellant.

Edmund G. Brown, Atty. Gen., and James D. Loebl, Deputy Atty. Gen., Ojai, for respondent.

TRAYNOR, Justice.

Defendant Wilbert Baker was charged by information with the murder of his wife, Clara Baker, on April 21, 1951. He entered pleas of not guilty and not guilty by reason of insanity. A doubt arose in the mind of the court as to the defendant's present sanity, and a trial on that issue was held on June 25, 1951 before a court sitting without a jury. Defendant was adjudged insane and was committed to the Mendocino State Mental Hospital under section 1370 of the Penal Code. On March 19, 1953, the superintendent of that hospital certified that defendant had recovered his sanity, and on March 27, 1953 he was returned to the sheriff to be held for trial. Penal Code, § 1372. By stipulation, the issues raised by the pleas of not guilty and not guilty by reason of insanity were consolidated for trial. The jury returned verdicts that defendant was guilty of murder in the first degree, without recommending life imprisonment, and that he was sane at the time the offense was committed. Defendant's motion for a new trial was denied. His motion for a determination of his present sanity, pursuant to section 1368 of the Penal Code, was also denied, and he was sentenced to death. The appeal to this court is automatic. Penal Code, § 1239(b).

Defendant was born and spent most of his life on an Arkansas farm. He had no formal schooling and cannot read or write. Tests performed at the Mendocino hospital, after the death of his wife, indicated that he is a moron with an Intelligence Quotient of about 70. Defendant's family moved to California in 1940, and ultimately settled in Bakersfield, where they lived at the time of the alleged offense. Defendant and his deceased wife had three children, Larry, Bob, and Merlene, who were 8, 10, and 12 years old respectively at the time of their mother's death. Defendant and his wife worked as agricultural laborers, when they were able to do so. His wife suffered from a back ailment for which she had undergone two operations, and defendant has a severe form of epilepsy that had prevented his working at a regular employment during the four or five years preceding his wife's death. His activities were confined to caring for the yard about their house, and his in-laws testified that he did a poor job of that. Defendant had his first epileptic seizure at the age of 15, and they have continued intermittently ever since. (Defendant was 44 years old at the time of the trial.) These seizures did not, however, interfere with his employment until 1944 or 1945, when they began to increase in frequency and severity. Defendant received occasional treatment at the Kern General Hospital for several years thereafter, and, on the advice of its doctors, he quit working. His condition became progressively worse until, in 1948, he was examined by Dr. Richard Loewenberg, Chief Visiting Psychiatrist at the Kern General Hospital, after having a particularly severe seizure. Dr. Loewenberg diagnosed him as an epileptic with clouded state and equivalents[1] and prescribed dilantin and pheno-barbital, anti-convulsant medicines used to control epilepsy. Several days later defendant had another severe seizure and was again taken to the Kern General Hospital and, on the recommendation of Dr. Loewenberg, he was committed to Camarillo State Mental Hospital. There he was diagnosed as an epileptic with clouded state, convulsive seizures, and psychosis. He was later paroled from Camarillo to the care of his wife. The evidence indicates that on his return from that institution his condition was much better for several months, but the clouded state and seizures returned, gradually increasing in frequency and severity until he was again committed to Camarillo. Between the years 1948 and 1951, he was committed to Camarillo three different times. After each commitment, he was paroled to his wife, and he was still on parole at the time she was killed. During these years he remained in the care of Dr. Loewenberg and continued to take the medicines that he prescribed. After a little experimentation, the dosage was fixed at 3–4 capsules of dilantin (one and one-half grains each) and 1 phenobarbital tablet (one and one-half grains) per day.

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[1] The clouded state is an equivalent or substitute for the epileptic convulsion. Dr. Loewenberg, in his testimony at the trial, defined the clouded state as follows: "Clouded state means a narrowing in of the state of consciousness in which from a superficial observation of the patient, he doesn't seem to have anything wrong

Clara Baker was killed at approximately 1:00 A.M., April 21, 1951. During the day of April 20, 1951, defendant stayed at home taking care of six or seven of his wife's sister's children, while she worked in the potato sheds. Defendant was alone with the children in the early afternoon, when he had a seizure and fell out the back door. As he regained consciousness, he found one of the little girls rubbing his face with a wet cloth. He went into the house and lay on the divan in the living room. The child put a cold wet cloth on his forehead, as she had seen defendant's wife do. Clara Baker returned home at 4:00 in the afternoon, accompanied by several women from the neighborhood, who left shortly thereafter. Defendant's children returned from school at 4:30. His daughter, Merlene, noticed that her father looked sick. At defendant's request, his son Bob gave him some of his medicine. Bob made an error and gave defendant Clara's pills, and he took them by mistake. He also took his own pills, and there is evidence that he took an overdose of pills later in the evening. Defendant and his wife had planned to go to a show that night, but Clara told him that he didn't look well and that they shouldn't go. At her suggestion he lay on the divan for a while. Defendant remembers nothing after that until he "awakened" in the Kern General Hospital three days later. Although defendant had no recollection of it, it was established that about 6:00 P.M. he called on his brother Robert, who lived two blocks away, to borrow money for the show. Robert Baker testified that defendant was staggering when he was at his house and that, as defendant was leaving, he staggered into the door facing. He helped defendant out, and told him to go straight home. The evidence indicates that he did return home directly, and that he remained there the rest of the evening.

During the evening of April 20th defendant's children were listening to the radio. They testified that their parents were bickering over trivial matters, as they had often done in the past. Defendant was complaining because they had not gone to the show, and because he wanted the family car to make a trip to Arkansas. The testimony of the children indicated that the quarrel was neither serious nor heated, but they also testified that at one point defendant threatened to kill Clara. There was further testimony that defendant had so threatened Clara several times in the past,

with him at all. He can move about. He might be able to talk. He can do all kinds of itemized actions. That means like winding a watch, taking a cigarette. There are hundreds of minor movements and motions that everybody does even without thinking about. But there are certain lacks of inhibitions. They can get extremely aggressive and violent. * * * A clouded state can last from a very short period of time to many days, and once in a while into weeks." It was also stated, by both doctors that took part in the trial, that an epileptic would have no recollection of what occurred while he was in a clouded state, that he would not be mentally responsible for his actions during that time.

and that the threats always occurred when defendant's seizures were becoming so severe that Clara would suggest that he return to Camarillo. Clara never seemed frightened by his threats and often remarked, as she did on the night of April 20th, that he should "go ahead and get it over with." The children went to bed and to sleep around 10:00 or 10:30. At that time, Clara was lying on the divan in the living room because its hardness would relieve her backache, and defendant was sitting on a chair in the kitchen with his feet propped up on another chair.

Sometime during the night, defendant's youngest child, Larry, was awakened by an unusual noise, "kind of like a pig." He went into the living room where he found defendant standing by the divan on which his mother was lying. She did not move or speak, and the child saw blood running down her nose and onto the floor. Defendant told the boy to "get back to bed before I knock hell out of you." From his bed Larry could see into the kitchen, and almost immediately he saw defendant go through the kitchen, in which a light was on, and out the back door. Defendant returned in half a minute, stayed in the kitchen for a short time, went out the back door again and did not return. Larry testified that he did not have anything in his hands when he saw him in the living room or when he passed through the kitchen to go out the back door. After defendant left the house the second time, Larry awakened his brother and sister. Merlene approached the divan to speak to her mother and got blood on the robe she was wearing. The children decided to go to an uncle's house a few houses away, but before they left Merlene noticed that a small paring knife was missing from the kitchen. The children testified that as they left the house they found the front door locked from the inside by a wooden latch. On their way out Merlene, who was barefooted, stepped on a burning cigarette butt on the walk between their front porch and the street. None of the children recalled having heard their dog bark at any time that night. They went to their uncle's house, and the police were called.

The police arrived at the Baker house at approximately 1:20 A.M., April 21, 1951. They found Clara Baker lying on the divan in the living room. The autopsy surgeon testified that death had been caused by two violent blows on the head. The wounds had bled profusely, and there was much blood over her face and body and on the floor under the couch. The right side of her skull, behind and below the ear and at the base, was extensively fractured. The nature of the wounds indicated that the blows were struck by a weapon "that had both something of an edge and some weight." The autopsy surgeon thought that the weapon was probably an "ordinary hatchet" or an axe.

Defendant was arrested at his brother Robert's house two blocks away. After he had left his own house the second time, defendant had apparently proceeded down an alley that ran alongside the house, then through a field to an irrigation canal into which he fell or jumped. He climbed out of the canal and went to his brother's house. Robert testified that defendant was wet from head to foot and was in "pretty bad shape" when he arrived. He helped him into the house and on to a sofa. Defendant told Robert, "We have to get over to the house." and Robert thought he also mumbled something about chasing someone. When the officers arrived a short time later, defendant was unable to stand by himself. In the police car, defendant told the officers that he did not kill his wife, that the killer was a "great big man about four feet tall." The police did not take defendant to jail, but took him to the Kern General Hospital. They did so, they said, because there appeared to be something wrong with him and because he was irrational and incoherent.

The police searched the Baker house and the surrounding area. The canal was drained and the bottom raked for one-half block on either side of the point at which defendant went into it. The Bakers' outside toilet was moved and the septic tank was pumped. The murder weapon was never found. The small paring knife that was missing from the Bakers' kitchen was found in the canal, but the prosecution admitted that it could not have been the murder weapon. Two of the officers followed defendant's tracks to the canal. They did so with the aid of one of defendant's shoes that had been taken from him at the time of his arrest. These two officers testified that defendant's tracks were the only fresh ones going down the alley and through the field, and that he appeared to be walking. On cross-examination, it was brought out that the alley was a hard-packed dirt path that was well-traveled, and that defendant's were not the only tracks in the field going toward the canal. One of the officers admitted that he could not say positively that defendant was not chasing someone down the alley, and the other officer, although contending that there were no other fresh tracks, admitted that he was "mainly interested" in those of the defendant when he searched the alley. Plaster casts were not made of defendant's or any other tracks. Defendant's clothes as well as a hatchet that was found in the Baker house were sent to the laboratory. There was testimony that the hatchet had no traces of blood, and that it did not appear to have been washed. In the People's closing argument, it was admitted that there were no blood stains on defendant's clothing. No effort was made to clean defendant's fingernails to determine if he had had blood on his hands since they were last cleaned. No evidence was introduced of any fingerprints taken in the Baker house.

At 2:35 on the afternoon of April 21st, Dr. Loewenberg interviewed defendant at the Kern General Hospital. He testified that defendant's tongue was coated, his left-eye-lid swollen, and his speech "glossy" and incoherent. Defendant told Dr. Loewenberg that he had taken too much medicine, that he didn't remember what had happened, that he couldn't see, that he didn't know where his wife was, that she was lying in the back bedroom and "[A] man with a black mask came in, I don't know what he was. Might be the guy who stole the orange trees. I'm not going crazy. I took four capsules today. Bring Dr. Loewenberg here. He is the guy who told me to take four capsules. * * * Where is my wife? She should be up here by now. They can't keep me here. I'm no criminal. I took too much of that medicine. * * * I want to know about my wife and kids. * * *" Dr. Loewenberg testified that defendant was definitely in a clouded state at the time of this interview, and that his incoherence was not caused by an overdose of medicine. After this interview the doctor advised the police that they could talk with defendant that evening, but he warned that defendant was quite "drowsy and dazed."

A deputy sheriff and an investigator from the district attorney's office interviewed defendant that evening. The deputy sheriff, who testified about this interview, said that defendant didn't talk rationally, that he acted drunk, and appeared not to be well. He testified that defendant couldn't remember his age, but said that he could remember part of what had happened the preceding evening. Defendant said that he and Clara had been quarrelling, that each had taken a bath and Clara had lain on the divan in the living room while defendant went to bed in the back bedroom. He asked Clara to join him, but she refused. Defendant then went to sleep, and woke up hearing a noise in the living room. He got up to investigate, saw a man run out the front door, gave chase and wound up in the canal. After the interview, the deputy sheriff told defendant's parole officer from Camarillo that he was "personally satisfied that [defendant] was not mentally responsible at the time of the offense." The same officers also interviewed defendant on April 23rd, after he had apparently regained consciousness. Defendant did not remember the previous interview. The deputy sheriff said that defendant still did not look well. He told defendant that Clara was dead, and asked him if he had killed her. Defendant replied, "I might have, but if I did I don't remember it." He said that he was unable to remember anything after 4:30 on Friday afternoon (April 20th) when his son had given him some medicine and Clara had persuaded him to lie down for a while. Dr. Loewenberg also saw defendant on April 23rd. He testified that defendant had torn his bed sheets into strips and tried to hide them. Although his speech was no longer glossy, he was unable to touch his finger to his nose in one motion. Defendant again complained about his eyes, saying that he had not been able to see for three weeks and that he had told his wife about it, but she had not believed him.

During his stay in the Kern General Hospital, defendant was observed having several convulsive seizures and periods of unconsciousness. On May 29, 1951, the court appointed three doctors to examine defendant to determine his sanity. All three doctors concluded that defendant had epilepsy with clouded state, and that he was insane at the time of the offense and was then unable to determine the difference between right and wrong. All three recommended his commitment to a mental hospital for the criminally insane.

Considerable evidence was introduced of defendant's medical history. This history showed that he has had epileptic seizures and periods of unconsciousness since he was 15 years of age. During the five-year period preceding his trial, he was consistently diagnosed by a number of doctors, psychiatrists, and neurologists as an epileptic with clouded state and equivalents. Sometimes the word "psychosis" was added to the diagnosis. The doctors also agreed that a person with such a disease could be dangerous, but that he had probably been released from Camarillo because it was thought that, with regular dosages of anticonvulsant medicines, he would be relatively harmless. The limitations of the hospital's facilities and personnel were also a factor in this decision. Dr. Loewenberg, who had treated defendant more than any other doctor, said that in his opinion, on the basis of the defendant's history and his condition on the day following the crime, defendant was not mentally responsible at the time of Clara's death, that he was in a clouded state at that time. Defendant's children testified that he frequently had "spells" and, although he appeared to them to be all right on the evening before Clara's death, the doctors testified that his seizures and clouded states could come on very quickly, in the space of a few minutes. The records of the Mendocino hospital showed that defendant was diagnosed there as an epileptic with clouded state and equivalents, and with psychosis. These records also show that Dr. R. S. Rood, superintendent of that institution, agreed with this diagnosis and thought that defendant was in a clouded state at the time of the offense. In his testimony at the trial, however, Dr. Rood said that he doubted whether that diagnosis was correct. His doubts arose, he said, because neither the records of Mendocino nor those of Camarillo disclosed that defendant had been observed in an epileptic seizure. He testified, however, that there were so many inmates in the yards of these institutions and so few attendants that seizures could easily go unnoticed. Defendant testified that he could remember having several seizures in each institution. In addition, the records of the Kern General Hospital contain several entries showing that nurses and doctors had observed defendant in a seizure, and Dr. Loewenberg had seen him in a clouded state on at least one occasion. Furthermore, as the defense pointed out, all during defendant's stay at both Camarillo and Mendocino he was given regular medication designed to reduce or prevent convulsive seizures. Dr. Rood also intimated that he thought defendant might not be an epileptic at all, but might have a heart disease known as paroxysmic tachycardia, or hysterical seizures, or he might be malingering. On cross-examination he admitted, however, that it was unlikely that a person with defendant's I. Q. could successfully malinger undiscovered for so long a period of time, and that it was unlikely that the 20 or more doctors who had diagnosed him were wrong. It should also be noted that Dr. Rood was not associated with the Mendocino hospital and did not see defendant until January 1953, less than three months before defendant was returned to Kern County to stand trial. So far as the record shows, Dr. Rood's connection with defendant after January, 1953 was limited to participation in one staff conference in February and another in March, 1953.

There was also considerable evidence about the nature of the drugs defendant took by prescription. The experts were agreed that both dilantin and phenobarbital were hypnotic drugs and, if taken in overdose, could be dangerous since they would remove the inhibitions of the person taking them. There was testimony that these drugs had an intoxicating effect similar to that of alcohol, and that defendant often acted drunk after taking his pills. There was also testimony that an overdose of these drugs could accelerate or aggravate the clouded state condition of an epileptic because persons in a clouded state lack normal inhibitions and sometimes become extremely aggressive and violent.

Defendant contends that the evidence is insufficient to sustain his conviction of first degree murder, that it was not shown that he committed the crime, and that, even if it could be inferred that he did, it was not shown that the murder was deliberate and premeditated.

[1, 2] Defendant points out that no blood was found on his person or on his clothes, that the murder weapon was never found, although an extensive search was conducted, and that the presence of the kitchen knife in the canal and the qualified character of the police officer's testimony about the tracks in the alley and the field, all tend to corroborate his statement that he chased an intruder and fell into the canal. Although the evidence is weak and there are many unexplained and apparently uninvestigated items of evidence pointing away from defendant's guilt, the record supports the conclusion that defendant did in fact strike the fatal blows. It is undisputed that he was in the house at the time of his wife's death and that his statements as well as his son's placed him in the front room with his wife shortly after the blows were struck. Except for defendant's statements, made at a time when the defense claims he was in a clouded state, there is no evidence that anyone else except the children was in or about the Baker house at the time of the offense. Shortly after the crime, defendant told police officers that he had chased an intruder out the front door. The children testified that the front door was locked from the inside. They also testified that they did not hear their dog barking at any time during the night. In support of his contention that it was not proved that he did strike the blows, defendant points to Merlene's testimony about stepping on a lighted cigarette in the path leading from their front porch to the street. Defendant testified that he had run out of cigarettes in the afternoon and had not smoked that evening. One of the children testified, however, that defendant was sitting by the kitchen stove smoking sometime after dinner. The jury could reasonably have concluded that defendant ran round the house and intentionally or accidentally dropped the cigarette when he ran out the first time after his son Larry was awakened. It was for the jury to resolve conflicts in the evidence and to determine the inferences to be drawn therefrom. People v. Daugherty, 40 Cal.2d 876, 884–885, 256 P.2d 911; People v. Green, 13 Cal. 2d 37, 42, 87 P.2d 821; People v. Perkins, 8 Cal.2d 502, 510, 66 P.2d 631; People v. Watts, 198 Cal. 776, 789, 247 P. 884; People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389.

[3] Defendant contends that the evidence is insufficient to support the verdict that he was sane at the time the offense was alleged to have been committed. The positive evidence was overwhelming that defendant was not sane, but the People contend that the "personal appearance, mannerisms, and actions of the defendant before the jurors during the trial, and the character of his testimony and manner of giving it, were matters properly to be considered by" the jury, People v. Chamberlain, 7 Cal.2d 257, 260–261, 60 P.2d 299, 300, and were sufficient to support the verdict of sanity. This contention cannot be sustained. Defendant was not brought to trial for more than two years after the death of his wife. During that period he was confined in a mental hospital and was not brought to trial until the superintendent of the mental hospital certified that he had recovered his sanity so as to be able to assist counsel in the conduct of his trial. There was no showing whatever that defendant's mental condition was the same at the time of his trial as it was immediately after the death of his wife. Under these circumstances the jury could not reasonably infer from defendant's conduct at the trial that he was sane at the time of the offense.

[4–6] The People also rely on the rebuttable presumption of sanity. On the trial of the issue raised by the plea of not guilty by reason of insanity, there is a rebuttable presumption that defendant was sane at the time the crime was committed, People v. Myers, 20 Cal. 518; People v. Loper, 159 Cal. 6, 11, 112 P. 720; People v. Williams, 184 Cal. 590, 593, 194 P. 1019; People v. Hickman, 204 Cal. 470, 477, 268 P. 909, 270 P. 1117; People v. Leong Fook, 206 Cal. 64, 67, 70, 273 P. 779; People v. Chamberlain, 7 Cal.2d 257, 260, 60 P.2d 299, and defendant has the burden of proving his insanity by a preponderance of the evidence. People v. Daugherty, 40 Cal.2d 876, 901, 256 P.2d 911. Proof that defendant was afflicted with a permanent insanity, as distinguished from a temporary or transient insanity, prior to the commission of the crime charged will, however, dispel the presumption of sanity and raise a presumption that his insanity continued to exist until the time of the commission of the crime. People v. Farrell, 31 Cal. 576, 581; People v. Francis, 38 Cal. 183, 188–191; People v. Lane, 101 Cal. 513, 518–519, 36 P. 16; People v. Schmitt, 106 Cal. 48, 53, 39 P. 204; People v. Findley, 132 Cal. 301, 307, 64 P. 472; People v. Keyes, 178 Cal. 794, 800–801, 175 P. 6; State of Oregon v. Garver, 190 Or. 291, 299–309, 225 P.2d 771, 27 A.L.R.2d 105 and authorities cited; see, 8 Cal.Jur. § 143; 27 A.L.R. 2d 121; 1 Wharton's Criminal Evidence § 212, 11th Ed., 1935. In the present case, there was ample evidence to establish defendant's insanity prior to the killing of his wife. He had repeatedly been diagnosed as an epileptic with clouded state and psychosis; he had been adjudicated an insane person and thrice committed to the Camarillo State Mental Hospital, and he was on parole from that hospital at the time of the crime. He was similarly adjudged insane shortly after the crime was committed. Although we cannot say as a matter of law that the evidence discharged defendant's burden of proving that he was insane at the time of the offense, the jury should have been instructed that proof of a permanent insanity prior to the commission of the crime raised a presumption that such insanity continued to exist until the time of the offense.

[7] Defendant also contends that the joint trial of his pleas of not guilty and not guilty by reason of insanity so confused the issues that defendant's right to a fair and impartial trial was prejudiced. Defendant's counsel, however, stipulated that the two pleas could be tried together. Although defendant cannot complain of the joinder as such, see People v. Hazelwood, 24 Cal.App.2d 690, 692, 76 P.2d 151; People v. Pettinger, 94 Cal.App. 297, 300–301, 271 P. 132; see also, People v. Dessauer, 38 Cal.2d 547, 554, 241 P.2d 238, he did not by his stipulation waive any errors that might have been committed, as a result of the joinder, by the court in instructing the jury.

[8] The court instructed the jury in part as follows:

"A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence. * * *

* * * * * *

"Upon the trial of the issue raised by the plea of not guilty, the defendant is conclusively presumed to have been sane at the time the offense is alleged to have been committed. * * *

* * * * * *

"A person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend the natural, probable and usual consequences of his own acts. Therefore when one person assails another voluntarily with a dangerous weapon likely to kill, and which does in fact destroy the life of the person assailed, the presumption is that such assailant intended death or other great bodily harm.

* * * * * *

"Any such presumption as I have mentioned, however, may be overcome by contrary evidence; and any such evidence is sufficient to overcome it which creates in the minds of the jurors a reasonable doubt that the defendant's intent was as so presumed. In the absence of evidence to the contrary, the presumption must prevail.

* * * * * *

"There has been testimony concerning the mental state of the defendant at the time of the offense charged against him in the information, and you will be instructed as to the law concerning the test of insanity as a defense to a criminal charge. Before you determine whether or not the defendant was legally sane or insane at the time of the offense alleged against him in the information, however, it will be necessary that you first determine his guilt or innocence.

"In determining the guilt or innocence of the defendant, you are to be governed by the conclusive presumption that the defendant was sane at the time the offense was alleged to have been committed. A conclusive presumption, as a matter of law, is not rebuttable. Therefore the conclusive presumption that the defendant was sane and of sound mind at the time of the commission of the crime charged in the information is not rebuttable, and if you are convinced from the evidence beyond a reasonable doubt that the defendant did unlawfully kill his wife, * * * then you must find the defendant guilty, even though you, as jurors, may have some doubt as to the present soundness of mind of the defendant, or some doubt of the soundness of mind of the defendant at the time of the commission of the crime, as charged in the information. This means that he is presumed to have the legal capacity to commit the act so far as sanity is concerned but it does not preclude you from finding that the mental state of the defendant was such that he did not have the intent necessary to constitute the crime.

"The defendant has entered a plea of not guilty to the crime charged in the information and has also entered a plea of not guilty by reason of insanity, thereby alleging that he was insane at the time of the commission of the offense charged in the information. After the issue raised by the plea of not guilty is determined it will be necessary for you to determine the issue raised by the plea of not guilty by reason of insanity if you should find defendant guilty of the crime charged in the information, because the law does not hold a person criminally accountable for his conduct if at the time thereof he was insane.

"The sole issue for you to determine in regard to the insanity plea is whether or not the defendant was sane or insane at the time of the commission of said offense. You must determine the condition of his mind at the precise time of the criminal conduct if he is found guilty of such crime. * * *

* * * * * *

"The burden of proving insanity is on the defendant. * * *

"The law presumes that the defendant was sane. That presumption may be rebutted but is controlling until overcome by a preponderance of the evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein.

* * * * * *

"You are reminded, however, that a person might be legally sane, as we define the term in dealing with the question of criminal responsibility, and yet be in an abnormal mental or nervous condition; and because of such condition he might be less likely or unable to have or to hold a specific intent or a certain state of mind, which is an essential ingredient of a certain crime. We have received evidence bearing on the mental and nervous condition of the defendant at the time of the alleged commission of the crime charged. Such evidence may be considered by you in determining whether or not the defendant did any overt act charged against him, and, if so, whether or not, at that time, there existed in him the specific mental factor which, as you have been instructed, must accompany that act to constitute a certain crime or degree of crime."

These instructions are confused, contradictory, and ambiguous. They did not inform the jury in clear and unmistakable terms of the principles that must guide their deliberations; in particular, they did not inform the jury what part of the evidence bearing on defendant's mental condition was applicable to the several issues submitted to them. The jury was first instructed that only conclusive presumptions are not rebuttable. It was then declared that on the issue raised by the plea of not guilty, defendant is conclusively presumed to have been sane at the time the offense was committed. Next, several presumptions are mentioned relating to the general proposition that all persons are presumed to intend the usual and probable consequences of their acts. The court then stated, "*Any* such presumption as I have mentioned, however, may be overcome by contrary evidence. * * *" (Italics added.) The court had just mentioned the conclusive presumption of sanity, and the quoted statement is in direct contradiction to the earlier statement that conclusive presumptions are not rebuttable. The remainder of the statement just quoted—"any [contrary] evidence is sufficient to overcome [the presumptions that have been mentioned,] which creates in the minds of the jurors a reasonable doubt that the defendant's intent was as so presumed"—may indicate that the court meant only that the presumptions that men intend the usual and probable consequences of their acts could be overcome by contrary evidence. The statement is susceptible of this construction, but the apparent contradiction involved must be weighed with the other elements of confusion and ambiguity that are discussed below.

[9, 10] Immediately after the instructions just discussed, the jury was again instructed that on the issues raised by the plea of not guilty, defendant is conclusively presumed *"sane and of sound mind* at the time of the commission of the crime charged. * * * [I]f you are convinced beyond a reasonable doubt that the defendant did unlawfully kill his wife, * * * then you must find the defendant guilty, even though you, as jurors, may have some doubt as to the present *soundness of mind* of the defendant, or some doubt of the *soundness of mind* of the defendant at the time of the commission of the crime, as charged in the information. This means that he is presumed to have had the capacity to commit the act so far as *sanity* is concerned but it does not preclude you from finding that the mental state of the defendant was such that he did not have the intent necessary to constitute the crime." (Italics added.) By the use of the word "intent" in the last phrase and in other instructions, it is clear that the court meant the intent involved in the elements of malice aforethought, premeditation, and deliberation. It is also clear from the context that the court used the phrase "sound mind" as the equivalent of legal sanity, for it was said that on the trial of the issue of not guilty a person is conclusively presumed to be of "sound mind." "Sound mind" and "legal sanity" are not synonymous. Indeed, in the instructions explaining legal sanity to the jury in this case the phrase "sound mind" was not used. As has been long established, a person is legally sane if he knows the nature and quality of his acts, and their wrongfulness, if any. People v. Kimball, 5 Cal.2d 608, 610, 55 P.2d 483; People v. Keaton, 211 Cal. 722, 724, 296 P. 609. "Soundness" of mind is defined as "free from flaw, defect or decay, perfect of the kind; undamaged or unimpaired; healthy, not diseased or injured, robust—said of body or mind." Webster's New International Dictionary, p. 2403. The distinction that these definitions draw between soundness of mind and legal sanity is impliedly recognized in section 26 of the Penal Code, which provides that lunatics, idiots, and insane persons are not capable of committing crimes. It is expressly provided in section 21 of the Penal Code that idiots and lunatics are not of sound mind; yet, if soundness of mind and legal sanity are synonymous, the express provisions of section 26 exempting idiots and lunatics from criminal responsibility would be superfluous because they would necessarily be included within the provision exempting the insane.

[11–13] The prejudicial nature of the instruction appears most clearly in the difficulties that it creates for the jury in the application of the rule stated in People v. Wells, 33 Cal.2d 330, 346–358, 202 P.2d 53, that evidence of a mental infirmity, not amounting to legal insanity, is admissible and should be considered by the jury on the questions of premeditation and deliberation. If the defendant has a "sound mind," that is, "a healthy and robust mind, neither diseased nor injured," it necessarily follows that he would not have a mental infirmity making him incapable of premeditating or deliberating. If an idiot or a lunatic were charged with a crime, an instruction that he was conclusively presumed to be of "sound mind" would create an obvious conflict with his statutory defense. Although moronity and the mental condition caused by epileptic seizures, unless they amount to unconsciousness, are not included within the exempting provisions of section 26 of the Penal Code, nevertheless these conditions may indicate some lack of a "healthy and robust mind" and do have bearing on the question of the capacity to premeditate and deliberate. In the present case, evidence introduced by the People as well as by defendant shows that defendant is a moron and has been, for many years, subject to epileptic attacks affecting his mental faculties in varying degrees and for varying lengths of time. At the trial, defendant testified that he did not remember anything that happened the night his wife was killed. One of his defenses was that if he killed his wife, which he did not remember doing, he did it while under the influence of an epileptic attack. Defendant claims that this condition amounted to legal insanity or, alternatively, that it negatived any element of premeditation or deliberation. The only evidence pointing to premeditation and deliberation is the testimony of the Baker children that defendant threatened his wife earlier in the evening. There was also testimony that defendant had threatened his wife's life several times during a three or four year period preceding the offense. But each of the several persons who testified about such threats qualified their testimony by saying that the threats were made just before defendant had an epileptic seizure or when defendant's epileptic condition had become so aggravated that his return to the Camarillo hospital was imminent. There is no evidence that during the intervals when defendant was free from the clouding effects of his disease, he had any animosity toward his wife or that he had ever harmed her. Further, the evidence is uncontradicted that defendant, when not suffering an attack of epilepsy, had a friendly, sunny, and harmless disposition, and there is no evidence that the Baker family life was anything but harmonious during the intervals defendant was free from the effects of his disease. In addition, there is the fact that when the Baker children went to bed on the night of the crime, the Baker household was peaceful. Clara was resting on the divan in the living room, and defendant was sitting propped up on two chairs in the kitchen. Their bickering about attending a show and about defendant's proposed trip to Arkansas had stopped.

[14] Defendant's conduct after the killing also points away from premeditation. He did not attempt as did the defendant in People v. Eggers, 30 Cal.2d 676, 185 P.2d 1, to hide the body or to mutilate it to prevent identification. Defendant claimed that he chased an intruder down the alley, and there is evidence of hallucinations in his medical history. Furthermore, defendant did not attempt to hide himself. Instead, he went almost immediately to his brother's house, where his only intelligible words were, "We have got to get over to the house." His brother, as well as the police officers who arrested him, testified that defendant was irrational and incoherent at this time. The police officers took him to the hospital rather than to jail. Dr. Loewenberg, who visited defendant at the hospital some thirteen hours after the crime, testified that defendant was then in a clouded state, and that, in his opinion, he was in a clouded state at the time of the killing. It was thus a very close question of fact whether or not the People had proved beyond a reasonable doubt that the killing was "willful, deliberate, and premeditated." It was, therefore, vital that the jury be properly instructed in clear and unambiguous terms. It was error for the court to instruct the jury that on the trial of the issue of not guilty, defendant was conclusively presumed to be of "sound mind." The effect of such an instruction was to tell the jury that it could not consider defendant's moronity and the effect on

his mental faculties of many years suffering from epilepsy in determining his defense based on lack of capacity to premeditate and deliberate.

[15, 16] Furthermore, this instruction creates an irreconcilable conflict with the subsequent instruction that the jury could consider defendant's mental state in determining whether he had the "intent" necessary to constitute malice aforethought, premeditation, or deliberation. The instruction also creates an irreconcilable conflict with the last paragraph of the court's instruction on defendant's plea of not guilty by reason of insanity. After the jury was instructed on the issues raised by this plea, that defendant has the burden of proving his insanity by a preponderance of the evidence, People v. Daugherty, 40 Cal.2d 876, 901, 256 P.2d 911, and that there is a rebuttable presumption that defendant was legally sane at the time of the commission of the offense, People v. Chamberlain, 7 Cal.2d 257, 260, 60 P.2d 299, the jury was then "reminded, however, that a person might be legally sane * * * and yet be in an abnormal mental or nervous condition; and because of such condition might be less likely or unable to have or to hold a specific intent or a certain state of mind, which is an essential ingredient of a certain crime. * * * [Evidence bearing on defendant's mental or nervous condition] may be considered by you in determining whether or not the defendant did any overt act charged against him and, if so, whether or not, at that time, there existed in him the specific mental factor which, as you have been instructed must accompany that act to constitute a certain crime or degree of crime." There is thus an "irreconcilable conflict in the instructions, and we are not at liberty to speculate as to which of them the jury followed. [Citations.]" People v. Deloney, 41 Cal.2d 832, 839, 264 P.2d 532, 536.

[17, 18] Defendant also complains of another instruction relating to the issue of premeditation and deliberation. He contends that the trial court erred in failing correctly to instruct the jury on the effect of his intoxication on the question of the intent with which he committed the acts charged. The jury was given an instruction [2] based on the first sentence of section 22 of the Penal Code: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition." Defendant contends the court erred in not giving an instruction [3] based on the second sentence of section 22: "But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury must take into consideration the fact that the accused was intoxicated

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[2] "Our law provides that 'no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such a condition.' This rule applies to intoxication from any cause when voluntarily produced by the person later charged with the crime; and it means that such intoxication, if shown by the evidence to have existed in the defendant when he allegedly committed the crime charged, is not of itself a defense in this case. It may throw light on the occurrence and aid you in determining what took place, but when a person in a state of intoxication, voluntarily produced by himself, commits a crime such as that charged against the defendant in this case, the law does not permit him to use his own vice as a shelter against the normal, legal consequences of his conduct." CALJIC No. 78–A.

[3] Such as CALJIC No. 78–B: "However, when the existence of any particular motive, purpose or intent is a necessary element to constitute a particular kind or degree of crime, the jury, in determining whether or not such motive, purpose or intent existed in the mind of the accused, must take into consideration the evidence offered to prove that the accused was intoxicated at the time when the crime allegedly was committed.

"Thus in the crime of murder in the first degree, it is a necessary element of the crime that the killing be willful, deliberate and premeditated. This fact requires an inquiry into the state of mind under which the defendant committed the act charged, if he did commit it. In pursuing that inquiry, it is proper to consider whether he was intoxicated at the time of the alleged offense. The weight to be given the evidence on that question and the significance to attach to it in relation to all the other evidence are exclusively within your province."

at the time, in determining the purpose, motive, or intent with which he committed the act." This sentence has been interpreted to include intoxication by drugs as well as by intoxicating liquors. People v. Sameniego, 118 Cal.App. 165, 173, 4 P.2d 809, 5 P.2d 653; People v. Lim Dum Dong, 26 Cal.App.2d 135, 140, 78 P.2d 1026. In People v. Coyne, 92 Cal.App.2d 413, 206 P.2d 1099, the trial court had instructed the jury in the language of the first sentence of section 22 only. In reversing the judgment of conviction of first degree murder, the District Court of Appeal said: "'[I]n determining whether or not the killing was so willful, deliberate, and premeditated as to constitute murder in the first degree, it is proper for the jury to consider how much his mental condition at the time was affected by intoxication; and, there being an express statutory declaration upon the subject of intoxication, a defendant in a murder case is entitled to have an instruction embracing such statutory declaration given by the court to the jury, where there is evidence which makes it applicable; and for the refusal of the court to give the instruction under discussion the judgment must be reversed, and a new trial ordered.' * * * The fact that an instruction on intoxication (though inadequate) was given, indicates that the trial judge had satisfied himself that the evidence was * * * sufficient to put that question 'within the province of the jury.' His judgment on this question would seem to settle all doubts in the matter. * * * The failure to give the instruction in the language of section 22 was unquestionably prejudicial error." 92 Cal.App.2d at pages 416–417, 206 P.2d at page 1101, quoting People v. Hill, 123 Cal. 47, 52, 55 P. 692; see also, People v. Vincent, 95 Cal. 425, 428, 30 P. 581; People v. Griggs, 17 Cal.2d 621, 625, 110 P.2d 1031; People v. Blake, 65 Cal. 275, 278, 4 P. 1; People v. Sanchez, 35 Cal.2d 522, 527–529, 219 P.2d 9. In this case there was ample evidence of intoxication in the record to raise a question of fact for the jury. There was evidence that defendant had voluntarily taken an overdose of both dilantin and phenobarbital on the night of the killing. Both of these drugs were described as hypnotics, as having the effect of removing the inhibitions of the person taking them, and as having an intoxicating effect similar to that of alcohol. There was testimony that when defendant had taken dosages of these drugs he acted groggy, like a "drinking man."

[19] The factual issue was thus raised, and the court's failure to instruct the jury that it could consider defendant's intoxication by drugs in determining whether or not defendant committed the offense with premeditation and deliberation was highly prejudicial. Indeed, the prejudicial effect of the failure to instruct was enhanced by the inadequate instruction given—that defendant's acts were no less criminal by reason of the fact that he was intoxicated at the time he committed them. The giving of such an instruction without adding that defendant's intoxication could, however, be considered in determining the degree of the offense committed, had the same effect as if the jury were told that defendant's drugged condition could not influence their decision on any issue submitted to them. Defendant's defense on the theory of intoxication—the difference between first and second degree murder—was thus completely negatived by the instructions of the court.

[20–23] The People contend, however, that the error was overcome by other instructions given by the court. The first of these [4] was a part of the instructions on insanity, which informed the jury that even if they found defendant sane, such a finding would not preclude them from finding that his mental or nervous condition was such that he was incapable of deliberation or premeditation. This instruction did not inform the jury of the weight to be given to defendant's intoxication. Instead, it was responsive to defendant's defense that he was incapable of premeditation because of his moronity, his psychological disorders, and the mental deterioration caused by his epilepsy. The defense based on intoxication raised an entirely separate issue and should have been covered by a separate instruction. Cf. People v. Sanchez, 35 Cal.2d 522, 528, 219 P.2d 9. The other two instructions, which the People claim overcome the error in failing to instruct on intoxication, informed the jury that there is a rebuttable presumption of consciousness,[5] that an act committed by a person in a state of unconsciousness is not a crime, and that the "*involuntary* intoxication produced by drugs or spiritous liquors" is an example of the unconsciousness that negates criminal responsibility.[6] (Italics added.) Unconsciousness is a complete, not a partial, defense to a criminal charge, Penal Code, § 26(5), and, although voluntary intoxication may at times amount to unconsciousness, yet it can only have the effect of negating specific intent, the applicable code section being section 22 and not 26(5). People v. Anderson, 87 Cal.App.2d 857, 860–861, 197 P.2d 839; People v. Sameniego, supra, 118 Cal.App. 165, 173, 4 P.2d 809, 5 P.2d 653. In this case there was ample evidence of voluntary intoxication, and there was also evidence that defendant was unconscious at the time of the offense because he was in the "clouded state" of an epileptic attack. The evidence of unconsciousness being present, the instruction based on Penal Code, section 26 (5) was properly given, for defendant's complete defense based on unconsciousness was entirely separate from his partial defense based on intoxication.

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[4] "You are reminded, however, that a person might be legally sane, as we define that term in dealing with the question of criminal responsibility, and yet be in an abnormal mental or nervous condition; and because of such condition he might be less likely or unable to have or to hold a specific intent or a certain state of mind, which is an essential ingredient of a certain crime. We have received evidence bearing on the mental and nervous condition of the defendant at the time of the alleged commission of the crime charged. Such evidence may be considered by you in determining whether or not defendant did any overt act charged against him and, if so, whether or not, at that time, there existed in him the specific mental factor which, as you have been instructed, must accompany that act to

[24–27] It is contended, however, that defendant was not voluntarily intoxicated "because he took his pills and capsules to ward off an attack of epilepsy, and because he took his wife's pills by mistake," and that, therefore, his defense was adequately covered by the instruction on the effect of unconsciousness. This contention cannot be sustained. There was no evidence of the nature of his wife's pills and thus nothing from which the jury could infer that those pills had created an intoxicated or unconscious condition. The fact that defendant took his own pills, which are conceded to have an intoxicating effect, to ward off an attack of epilepsy may or may not mean that defendant was involuntarily rather than voluntarily intoxicated. It is conceded that defendant took the pills knowingly, but whether or not the imminent ap-

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constitute a certain crime or degree of crime."

[5] "When the evidence shows that a defendant acted as if he was conscious, the law presumes that he then was conscious. This presumption is disputable, but is controlling on the question of consciousness until overcome by a preponderance of the evidence. * * * The rule of law just announced does not change, or make an exception to, the law which places upon the people the burden of proving defendant's guilt beyond a reasonable doubt." This instruction was specifically disapproved by this court in People v. Hardy, 33 Cal.2d 52, 63–64, 198 P.2d 865. In the present case, however, the instruction was requested by defendant and the error was, therefore, invited.

[6] "When a person commits an act without being conscious thereof, he does not thereby commit a crime even though such an act would constitute a crime if committed by a person when conscious.

"The condition of unconsciousness to which this instruction refers is by law distinguished and clarified from insanity, which is also in issue here, but is to be decided by you separately.

"The state of unconsciousness to which I refer in this present instruction is a condition experienced by a person normally sane, wherein there is no functioning of the conscious mind. * * * I shall cite a few examples of this type of unconsciousness to which this instruction refers: somnambulism * * *; the delirium caused by fever, involuntary intoxication caused by drugs or spiritous liquors; and restricted consciousness caused by epilepsy."

proach of an epileptic attack was sufficient to render his taking compulsive and thus involuntary was a question for the jury. Moreover, the fact that the court did give an inadequate instruction on voluntary intoxication was enough to create a doubt in the minds of the jurors. Although we might hesitate before holding that the absence of any instruction on voluntary intoxication in a situation such as that presented in this case is prejudicial error, when a partial instruction has been given we cannot but hold that the failure to give complete instructions was prejudicial error. The facts and the partial instruction given might well lead the jury to believe that defendant's intoxication was not involuntary, but the effect of the instructions given was that the jury could consider defendant's intoxication only if they found that it was caused involuntarily and, further, found that it produced unconsciousness. If the jury found that defendant was voluntarily intoxicated, the instructions told them to disregard that condition in arriving at their verdict. That such instructions were in error is beyond question, and that they were highly prejudicial cannot be doubted.

[28–30] It is finally contended that the trial court had no duty, on its own motion, to give an instruction based on the second sentence of section 22 of the Penal Code. Defendant admits that he did not request such an instruction, but argues that the trial court was obligated correctly to instruct the jury on all the factual issues raised by the evidence presented. As has been repeatedly held, "It is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. [Citations.] The court is not relieved of the duty to give instructions whose necessity is 'developed through the evidence introduced at the trial.' [Citation.] An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. [Citations.] * * * The circumstances of the case must determine whether the failure to instruct the jury constitutes prejudicial error." People v. Putnam, 20 Cal.2d 885, 890, 892, 129 P.2d 367, 369; see also, People v. Warren, 16 Cal.2d 103, 117, 104 P.2d 1024; People v. Holt, 25 Cal.2d 59, 64, 153 P.2d 21; People v. Bender, 27 Cal.2d 164, 176, 163 P.2d 8. A proper consideration of the issues developed through the presentation of the evidence at the trial of this case required that the jury be instructed on the possible effect of voluntary intoxication on the state of mind with which defendant did the acts charged. People v. Sanchez, 35 Cal.2d 522, 527–529, 219 P.2d 9. Moreover, this is not a case where there was a complete failure to instruct, but a case where partial instructions were given and, as given, were erroneous. The instructions given directed the jury's attention away from the vital issue raised by defendant's contention that he was voluntarily intoxicated. Their verdict was therefore, "uninstructed as to the law relating to the facts of [the] case [and] cannot be sustained merely because proper instructions were not requested." People v. Bender, supra, 27 Cal.2d 164, 176, 163 P.2d 8, 16.

Since the facts revealed by the evidence, entirely circumstantial in nature, show the case to be a very close one on the questions of guilt, sanity, and premeditation, we must conclude that the numerous errors reviewed herein substantially and prejudicially affected the rights of defendant. Accordingly, a reversal is necessary to prevent a miscarriage of justice.

The judgment and the order denying defendant's motion for a new trial are reversed.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concur.

SPENCE, J., concurs in the judgment.

42 Cal.2d 500

HOLM et al. v. SUPERIOR COURT OF STATE IN AND FOR CITY & COUNTY OF SAN FRANCISCO.

S. F. 18781.

Supreme Court of California, in Bank.
April 7, 1954.

On petition for rehearing.

Rehearing denied.

Prior opinion, 267 P.2d 1025.

CARTER, Justice (dissenting on denial of petition for rehearing).

The petition for rehearing herein calls attention to the fact that the record does not disclose that the photographs in question were taken by an agent of the city. This is correct. The record does not disclose by whom the photographs were taken. It is alleged in the affidavits that the photographs were in the possession of counsel for the city but there is no showing whatsoever that the photographs were taken by any one on behalf of the city or that they were acquired by the city in contemplation of litigation arising out of the accident here involved. Since the burden was on the petitioner here to show that the photographs were privileged, it is clear that he failed to make such showing. The majority opinion is therefore based upon the erroneous assumption that the photographs were taken by an agent of the city.

Since the decision in this case was filed my attention has been called to several authorities which support the ruling of the trial court here but which were not cited in any of the briefs. These authorities are Morehouse v. Morehouse, 136 Cal. 332, 68 P. 976, Freel v. Market St. Cable Ry. Co., 97 Cal. 40, 31 P. 730, Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451, Cordi v. Garcia, 39 Cal.App.2d 189, 102 P.2d 820. None of these authorities is cited in either the majority or dissenting opinions and were not considered by the court in the decision of this case.

In McKinley v. Southern Pacific Co., 80 Cal.App.2d 301, 314, 181 P.2d 899, 908, the court said: "The next contention of appellants Southern Pacific Company and its employees is that the trial court erred in granting respondents' motion to compel said appellants to produce written reports of the accident made by appellants Ahlborn and Shafer (the engineer and fireman) to their superior. Upon cross-examination of said appellants respondents brought out the fact that they had made written reports to B. E. Stone, their superior, and counsel for respondents thereupon demanded said statements and moved the court for an order requiring appellants to produce them, which motion was granted by the court over the objection of said appellants. Appellants concede that no prejudice resulted to them from said ruling but urge that it is a question of some importance and should be determined by this court. * * *

"In Morehouse v. Morehouse, 136 Cal. 332, 337, 68 P. 976, 978, the court, quoting from Ex parte Clarke, 126 Cal. 235, 239, 58 P. 546, 547, 46 L.R.A. 835, 77 Am.St.Rep. 176, said: 'When a witness is in court * * * and discloses the fact that he has a paper, document, or book which would be evidence in favor of the party desiring it, he may, in a proper case be rightfully ordered to produce it.' See, also, Freel v. Market St. Cable Ry. Co., 97 Cal. 40, 44, 31 P. 730; Hirshfeld v. Dana, 193 Cal. 142, 153, 223 P. 451; Cordi v. Garcia, 39 Cal. App.2d 189, 196, 102 P.2d 820. And in the latter case the court, after citing Morehouse v. Morehouse, supra, said that the right of defendants' attorney to inspect and use letters in question for impeachment purposes might have been properly granted.

"Appellants assert that no showing was made in this case that anything in the requested statements was material to the issues in the instant case, but it is difficult to understand how written reports by the engineer and the fireman to their superior as to the details of the accident could fail to be material. Where the engineer and fireman were witnesses and testified as to such details, and in the course of such testimony stated that they had made such written reports, it was, in our opinion, clearly proper for the trial court to grant respondents' motion to order appellants to produce said statements for respondents' use in further cross-examination. If there were statements in said reports inconsistent with the testimony of the witnesses, respondents were entitled to use them for impeachment purposes, and if there were no inconsistent statements in said reports, no possible injury could result to appellants. A trial court must be depended upon to exercise a wise discretion in such matters to protect a party from any unnecessary disclosure to others of the contents of his private books, papers and records, but no party has a right to refuse to produce any report or document which may have a bearing upon the facts of the pending litigation."

The decision in the McKinley case was rendered June 12, 1947, and a hearing was denied by this court on August 7, 1947. I respectfully submit that the majority holding in the case at bar is in direct conflict with all of the above cited authorities.

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42 Cal.2d 621

PEOPLE v. WESTERN AIR LINES, Inc.

L. A. 22881.

Supreme Court of California.
In Bank.
April 2, 1954.

Rehearing Denied April 28, 1954.

Proceeding brought, at instance of State Public Utilities Commission, in name of the People to collect statutory penalties from airline for increasing, without authorization, passenger rates for air coach service between Los Angeles and San Francisco. The Superior Court, Los Angeles County, Philbrick McCoy, J., sustained general demurrer to complaint without leave to amend, and from ensuing judgment of dismissal, the People appealed. The Supreme Court, Shenk, J., held, inter alia, that the status of the airline was that of a public utility subject to regulation as contemplated by the State Constitution, as well as to statutory penalties for violation of constitutional provisions.

Judgment reversed.

Schauer and Edmonds, JJ., dissented.

Prior opinion, 258 P.2d 581.

1. Administrative Law and Procedure 🔑303
Public Service Commissions 🔑6

The Public Utilities Commission is possessed of broad and comprehensive powers, including wide administrative, as well as legislative and judicial, powers. Public Utilities Code, § 2101 et seq.; Const. art. 12, § 1 et seq.

2. Judgment 🔑547

Where determinations of Public Utilities Commission have been appropriately and unsuccessfully challenged by direct attack and have run the gamut of approval by the highest courts, state and federal, such determinations should have conclusive effect of res judicata as to issues involved when they are again brought into question in subsequent proceedings between same parties. Public Utilities Code, §§ 1709, 1756.

3. Public Service Commissions 🔑32

Denial by Supreme Court of a petition for review of an order of Public Utilities Commission is a decision on the merits both as to law and facts presented in review proceedings, even though order of Supreme Court is without opinion.

4. Public Service Commissions 🔑11

Where the system of proceedings before Public Utilities Commission has been duly authorized by the constitution and the procedure is such as to satisfy requirements of due process, both state and federal, no valid objection can be made to it.

5. Public Service Commissions 🔑6.1

The Public Utilities Commission is not a judicial tribunal in a strict sense, but it possesses well established and well understood judicial power.

6. Carriers 🔑12(11)

Where Public Utilities Commission, in exercise of its judicial powers, determined that it had jurisdiction to fix intrastate fares of airline, that airline had status of a public utility subject to regulation, and that the Civil Aeronautics Act of 1938 did not deprive state of power to regulate airline's fares, and application for writ of review of such determination was denied, the determination became conclusive, so far as a subsequent action by state against airline to enforce penal provisions of Public Utilities Code, in which parties were the same and the same matters were at issue, was concerned. Public Utilities Code, §§ 1709, 1756, 2104, 2107; Civil Aeronautics Act of 1938, § 1 et seq., as amended, 49 U.S.C.A. § 401 et seq.

7. Carriers 🔑2

Under constitutional grant of plenary power to legislature to confer additional powers upon Public Utilities Commission, the additional powers must be cognate and germane to regulation of public utilities, and when power thus conferred relates to regulation of transportation companies, it must be cognate and germane to regulation of such companies that are in fact common carriers. Const. art. 12, §§ 22, 23.

8. Carriers 🔑5

Fact that airline transportation companies were not in existence when State Constitution was adopted in 1879 does not make such companies any the less "transportation companies" within meaning and contemplation of constitutional provisions subjecting transportation companies to government regulation and control. Const. art. 12, § 1 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Transportation Companies".

9. Constitutional Law 🔑12

A constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the state, and while the powers granted thereby do not change, they apply in different periods to all things to which they are in their nature applicable.

10. Carriers 🔑5

"Transportation" is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result.

See publication Words and Phrases, for other judicial constructions and definitions of "Transportation".

11. Carriers 🔑2

Sections of constitution which confer upon the Public Utilities Commission a comprehensive grant of power over rates of transportation companies are not out of harmony with, nor are they nullified or limited by, other sections of constitution which provide that such rates are subject to legislative control, but, in case of doubt, the special provisions of the former should prevail over the general provisions of the latter. Const. art. 12, §§ 17, 20, 22, 23.

12. Constitutional Law 🔑14

If it is impossible to harmonize or reconcile portions of a constitution, special provisions control more general provisions, and general and special provisions operate together, neither working the repeal of the other.

13. Constitutional Law 🔑15

In construing constitution, recourse may be had to the whole instrument to ascertain the intent and purpose of its provisions, and it should, if possible, be construed so as to avoid a repugnancy.

14. Constitutional Law 🔑29

A constitutional provision is self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced.

15. Constitutional Law 🔑29

Although a constitutional provision may be self-executing, the legislature may enact legislation to facilitate the exercise of powers directly granted by the constitution.

16. Constitutional Law 🔑92

If the constitution has vested a power, it is not within the legislative power, either by its silence or by direct enactment, to modify, curtail, or abridge the constitutional grant.

17. Statutes 🔑188, 206

Legislative intent should be determined from the language of the statute, and significance should be given, if possible, to every word, phrase, sentence and part of an act.

18. Statutes 🔑179

When a statute prescribes the meaning to be given to particular terms used by it, that meaning is generally binding on the courts.

19. Statutes 🔑179

The statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.

See publication Words and Phrases, for other judicial constructions and definitions of "Including".

20. Carriers 🔑4

The statutory definitions of "common carrier" and "public utility", each of which states that it "includes" the corporations thereafter enumerated are not limited to the inclusions. Public Utilities Code, §§ 203, 211, 216.

21. Carriers 🔑20(1)

Section of Public Utilities Code which subjects to penalties any public utility which violates constitutional or statutory provisions is not limited in its application only to public utilities enumerated in statutory definitions of public utility or common carrier. Public Utilities Code, §§ 203, 211, 216, 2101, 2107.

22. Carriers 🔑5

Airline carriers, like motor trucks and automobile stages, are forms of transportation unknown at time constitution was adopted, and irrespective of whether legislature has since that time acted with reference to them, they are within the regulatory powers of Public Utilities Commission. Const. art. 12, § 1 et seq.

23. Carriers 🔑5, 20(1)

Airline carrier was a "public utility", within ordinarily accepted meaning of that term and within meaning and contemplation of constitutional provisions for government control and regulation, and hence was subject to statutory penalties for violation of constitutional prohibitions. Public Utilities Code, § 2107; Const. art. 12, §§ 20, 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Utility".

24. Carriers 🔑2

Constitutional Law 🔑247, 303

Statutory provision that any public utility which violates constitutional prohibitions, in a case in which penalty has not been provided, is subject to penalty at not less than $500 nor more than $2,000 for each and every offense, as applied to airline carrier which, without authorization, increased its rates and demanded and received such increased rates for 69 days, was not so unreasonable and oppressive as to violate due process and equal protection clauses of Federal Constitution, in view of fact that the airline was not under any compulsion to increase its rates without a hearing, and could have obtained a determination of its rights and obligations under state law without exposing itself to risk of penalties. Public Utilities Code, §§ 2104, 2107.

25. Commerce 🔑5, 33(1), 47

The power of Congress under the commerce clause of Federal Constitution extends to the regulation of modes of interstate commerce unknown at time constitution was adopted, and includes the regulation of interstate operation of air carriers. U.S.C.A.Const. art. 1, § 8, cl. 3.

26. Commerce 🔑8(14), 13

The Civil Aeronautics Act does not extend economic regulation to intrastate transportation of persons or property other than mail, nor does it oust the states of control over rates therefor. Civil Aeronautics Act of 1938, § 1 et seq., 49 U.S.C.A. § 401 et seq.

27. Commerce 🔑8(14), 13

Any doubts as to whether Congress, in enacting Civil Aeronautics Act, intended to preempt the field of economic regulatory control of air transportation so as to include transportation of passengers solely between points within a state and not involving use of air space outside of state, should be resolved in favor of state power, for the principal reason that regulation of intrastate fares of common carriers traditionally has been subject to state regulation. Civil Aeronautics Act of 1938, § 1 et seq., 49 U.S.C.A. § 401 et seq.

◆

Everett C. McKeage and J. Thomason Phelps, San Francisco, for appellant.

Guthrie, Darling & Shattuck, Hugh W. Darling, D. P. Renda, Donald K. Hall and Matthew S. Rae, Jr., Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment of dismissal after a demurrer to the complaint had been sustained without leave to amend.

The action was brought to enforce the penalty provisions of section 2107 of the Public Utilities Code. It was brought in the name of the People at the instance of the Public Utilities Commission as authorized by section 2104 of that code. Companion cases are People v. United Air Lines, Inc., Cal.Sup., 268 P.2d 745, and People v. California Central Air Lines, Cal.Sup., 268 P.2d 744.

After setting forth the status of the Public Utilities Commission as a public agency operating under the constitution and statutes of this state, the complaint proceeds to allege that pursuant to law the commission has at all times had jurisdiction over the rates, fares, charges and tariffs of all transportation companies, common carriers and public utilities operating within this state insofar as their intrastate operations are concerned; that the commission directed its attorney to institute this action; that the defendant is a Delaware corporation having its principal place of business in the county of Los Angeles; that at all times involved the defendant was engaged in the intrastate transportation of passengers by air and furnishes such transportation for compensation to the public generally; that the defendant is a transportation company, a common carrier and a public utility by virtue of and within the contemplation and meaning of article XII of the state constitution, and of chapter 11 of part 1 of division 1 of the Public Utilities Code, as amended.

The complaint further alleges that on September 1, 1949, the defendant filed with the commission its Local Air Coach Passenger Tariff No. 1, establishing its rates for one-way adult air coach service between Los Angeles and San Francisco, California, at $13.60 and $27.20, one-way and round-trip, respectively; that under date of March 14, 1950, pursuant to investigation and hearing, the commission, by its order No. 43932 (49 Cal.P.U.C. 494) found fares for this service of $9.95 and $19.90, one way and round-trip, to be reasonable; that on April 14, 1950, the defendant filed its 3rd Revised Tariff No. 1 establishing these rates commencing June 1, 1950; that these were the lawful rates for this service until May 9, 1951; that effective May 9, 1951, the commission by its decision No. 45624 (50 Cal.P.U.C. 563) [dated April 24, 1951] authorized the defendant to increase the fares applicable to this service to $11.70 and $23.40, one-way and round-trip, respectively; and that the defendant had increased its rates for this service on March 1, 1951, without prior or any authorization, to $11.70 and $23.40, one way and round-trip, respectively, and had demanded and received this rate for each of the 69 days thereafter, to and including May 8, 1951.

It is further alleged that by reason of these acts the defendant had incurred a penalty to the People in the sum of $2,000 for each of the 69 days' violation of law, or a total penalty of $138,000. Judgment was prayed against the defendant in this sum, plus interest, costs of suit, and such other relief as to the court should appear just and proper in the premises.

The decision of the commission of April 24, 1951, No. 45624, was incorporated by reference in the complaint. It is there disclosed that this defendant, the United Air Lines, Inc., and California Central Airlines operated coach flights between the San Francisco Bay and the Los Angeles areas; that they had each made timely application to the commission to have rate increases to $11.70 and $23.40, one-way and round-trip, respectively, for this service approved as of March 1, 1951, but because sufficient data had not been furnished by them to the commission none of the applications had been granted as of that date. On March 6th the commission, on its own motion, ordered an investigation, and hearings were held as to the reasonableness, lawfulness and propriety of the fares of these companies for this San Francisco—Los Angeles air coach service. The carriers there challenged the jurisdiction of the commission to regulate in any respect the business of air transportation companies. Without waiving their objection to the jurisdiction of the commission they offered evidence to support the reasonableness of the increased fare and to show, in extenuation of their action, that the fare increase had been made in response to a request by the chairman of the federal Civil Aeronautics Board, which they believed to be compulsory upon them.

By its decision the commission determined that it had jurisdiction over transportation companies by virtue of sections 20 and 22 of article XII of the state constitution; that this jurisdiction extended to air transportation companies; that the Civil Aeronautics Act has not purported to extend economic regulation to intrastate transportation of persons or property by air other than mail, and that the state was free to regulate intrastate rates and fares of air carriers to the same extent as it regulates intrastate rates of railroads, trucking and bus companies, and telephone and telegraph utilities. It found that the fare increases in question were justified and would be authorized "for the future" and that reparations should be made to passengers who had paid the excess fare since March 1, 1951. The decision expressly advised the companies that they would thereafter be deemed to be transportation companies, common carriers and public utilities within the meaning of the state constitution and be subject to its prohibitions and requirements. It specifically called their attention to the provisions of section 76(a) of the Public Utilities Act, which provided as follows:[1]

> "Any public utility which violates or fails to comply with any provision of constitution of this state or of this act, or which fails, * * * to obey * * * any order * * * of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than five hundred dollars nor more than two thousand dollars for each and every offense."

The order was made effective as of May 9, 1951, 15 days after its date. Defendant's petition for review was denied by an order of this court on August 2, 1951, without opinion. A petition for rehearing was denied August 30, 1951. The United States Supreme Court on January 7, 1952, dismissed an appeal from the order denying the writ (Western Air Lines, Inc. v. Public Utilities Comm., 342 U.S. 908, 72 S.Ct. 304, 96 L.Ed. 679) "for want of a substantial federal question."

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; that the court had no jurisdiction of the subject matter of the action; that the plaintiff has not the legal capacity to sue; and that the complaint is uncertain, ambiguous and unintelligible in that it cannot be ascertained therefrom under what law the defendant has incurred a penalty to the People.

The special demurrer is without merit and will receive no further notice. The jurisdiction of the superior court to entertain the action and the right of the commission to direct its prosecution are supplied by section 2104 of the Public Utilities Code. The consideration of the general demurrer will dispose of the pertinent questions raised on the appeal.

At the outset it is urged by the plaintiff that the prior decision of the commission followed by the order of this court denying a writ of review and the dismissal of the defendant's appeal by the Supreme Court of the United States has resulted in res judicata as to certain issues involved in the present action. These include the determination (1) that the commission had jurisdiction to fix the intrastate fares of the defendant; (2) that the status of the defendant is that of a public utility subject to regulation as contemplated by the constitution of this state; and (3) that the Civil Aeronautics Act of 1938, as amended, 49 U.S.C.A. § 401 et seq., has not deprived this state of the power, through the commission, to regulate the defendant's intrastate fares.

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[1] This section was re-enacted in 1951 as section 2107 of the Public Utilities Code with no substantial change.

The determination as to these three questions was made, the plaintiff asserts, in the exercise by the commission of its judicial power, and was and is to that extent as conclusive as would be a final judgment of a court of record.

[1, 2] Under the constitution and statutes of this state the commission is possessed of broad and comprehensive powers. It has wide administrative powers. It has legislative powers, such, for example, as the fixing of rates of public utilities, the exercise of which is prospective in operation and legislative in character. Southern Pacific Co. v. Railroad Comm., 194 Cal. 734, 739, 231 P. 28. That it also possesses judicial powers may not be questioned. People v. Lang Transportation Co., 217 Cal. 166, 170, 17 P.2d 721. When its determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings, § 1709, Public Utilities Code. Direct attack is made available by application for writ of review to this court in accordance with the provisions of section 1756 of the Public Utilities Code. We are not herein dealing with a determination of the commission made in the exercise of its judicial power where no direct attack, on constitutional or other grounds, has been made within the time provided by section 1756. However it seems clear that where those determinations have been appropriately and unsuccessfully challenged, as here, by direct attack and have run the gamut of approval by the highest courts, state and federal, they should have the conclusive effect of res judicata as to the issues involved where they are again brought into question in subsequent proceedings between the same parties. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L. Ed. 1263.

[3] Whether the order of the Supreme Court of the United States dismissing the appeal of the defendant "for want of a substantial federal question" is res judicata in that court on the question of alleged federal control of intrastate rates, is not for this court to decide. It is established, however, that the denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. Southern California Edison Co. v. Railroad Comm., 6 Cal.2d 737, 747, 59 P.2d 808. This is so even though the order of this court is without opinion. Napa Valley Electric Co. v. Board of Railroad Com'rs, 251 U.S. 366, 40 S.Ct. 174, 64 L.Ed. 310. In the last cited case it was held at pages 372 and 373 of 251 U.S., at page 176 of 40 S.Ct. that a denial by this court of an application for a writ of review is "tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the state of California"; that the "absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company", and that it was "a final judicial determination" and "as effectual as an estoppel as would have been a formal judgment upon issues of fact." See also Funeral Directors Ass'n of Los Angeles and Southern California v. Board of Fun. Directors, 22 Cal.2d 104, 107, 108, 136 P.2d 785; Southern California Edison Co. v. Railroad Comm., supra, 6 Cal.2d 737, 747, 59 P.2d 808; People v. Hadley, 66 Cal.App. 370, 375, 226 P. 836; Southern Pacific Co. v. Van Hoosear, 9 Cir., 72 F.2d 903; Consolidated Freightways v. Railroad Comm., D.C.1951, 36 F.Supp. 269, 270; Adams v. Decoto, D.C.1927, 21 F.2d 221.

[4] The defendant relies on the case of Stratton v. Railroad Commission, 186 Cal. 119, 198 P. 1051, which contains declarations that appear to be contrary to other and later decisions of the courts on the subject. It was said in that case at page 126 of 189 Cal., at page 1054 of 198 P. that "the Commission is not a judicial tribunal in the strict sense". That statement is of course true. The commission is not a judicial tribunal constitutionally established as a part of the judicial department of the state. It is also observed that the commission is in the position of acting at times as informer, prosecutor, jury and judge in matters coming before it. This takes place, for example, when the commission on its own motion issues an order directing some person, firm or corporation within its regulatory jurisdiction to show cause why it should not be required to perform or not perform a certain designated act or be subject to discipline for performing an act contrary to law or public utility regulation. The proceeding may take on the character of an adversary proceeding in which the commission furnishes evidence, judicially passes upon the competence and weight of that evidence and makes an order based upon it. This kind of establishment was seriously criticized in its early stages by those affected by it. But it is the law that when the system has been duly authorized by the constitution of the state and the procedure is such as to satisfy the requirements of due process, both state and federal, no valid objection can be made to it. Due process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made. See Southern Pacific Co. v. Public Utilities Commission, 1953, 41 Cal.2d 354, 260 P.2d 70. When the commission has acted and an interested party is dissatisfied due process is further afforded by the right of petition for a writ of review to this court. And of course no law of this state could deprive a party whose rights were prejudicially affected of the right to apply to the Supreme Court of the United States for relief on federal constitutional grounds.

[5] So, while it is true that the commission is not a judicial tribunal in a strict sense, it does not follow that it does not possess well established and well understood judicial power.

It was also said in the Stratton case that "the Commission is essentially an administrative and legislative tribunal, and not a court", and the fact that the commission must make determinations of fact for its own guidance "does not make it a court, or change the character of its decrees from administrative or legislative orders into judicial judgments." These and other statements in the opinion in that case are inconsistent with the decisions of this court both before and after it on the subject of the judicial power of the commission. Insofar as they are so inconsistent they are overruled.

[6] There can be no question but that the commission exercised its judicial power in determining the three matters above referred to. They were involved and extensively presented to the commission in the prior proceedings and to this court on the application for the writ of review. They are at issue in the present case. The subject matter of the two proceedings is to that extent the same. The parties are essentially the same. Sunshine Anthracite Coal Co. v. Adkins, supra, 310 U.S. 381, 402, 60 S.Ct. 907, 84 L.Ed. 1263. The fact that other matters are also involved in the present case, such as the validity, force and effect of section 2107 of the Public Utilities Code, and the question whether the constitution itself prohibits certain designated action by public utilities, does not detract from the effect of those determinations as conclusive insofar as this case is concerned. See Dillard v. McKnight, 34 Cal.2d 209, 214, 215, 209 P.2d 387, 11 A.L.R.2d 835; Bernhard v. Bank of America, 19 Cal.2d 807, 811–813, 122 P.2d 892; Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916.

That conclusiveness arises by operation of law. It is the order and not the reasons for it that establishes its effectiveness. Bank of Visalia v. Smith, 146 Cal. 398, 402, 81 P. 542; 15 Cal.Jur. 66, 98–99, § 167. Attention is again called to the fact that when this court denied the writ of review in the prior proceedings no reasons for the order were given. Since the conclusions on this appeal with reference to the three stated questions are to be the same as those which to that extent formed the basis for the order denying the writ, and the judgment herein is to be reversed, it is deemed desirable to state all of the reasons for the reversal including those which led to the denial of the writ, to the end that none of the reasons for such denial be left to implication or conjecture.

In order to determine whether the defendant is amenable to state rate regulation under the provisions of the constitution and statutes as alleged in the complaint it is necessary to look first to the constitution. As adopted in 1879, section 22 of article XII provided for the election of three Railroad Commissioners and stated in part: "Said commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies * * *." In 1911 this section was amended to create a Railroad Commission in lieu of the former commission, and to provide:

> "* * * Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation * * * between the points named in any tariff of rates, established by said commission, than the rates * * * which are specified in such tariff. * * *"

Also added to this section in 1911 was the declaration:

> "No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the * * * Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

In 1946 section 22 was again amended, continuing the "Railroad Commission" in existence as the "Public Utilities Commission". The portions of the section above quoted were unchanged.

[7] The commission is therefore a regulatory body of constitutional origin, deriving certain of its powers by direct grant from the constitution which created it. (Pacific Telephone & Telegraph Co. v. Eshleman, 1913, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652; Morel v. Railroad Comm., 1938, 11 Cal.2d 488, 81 P.2d 144. The legislature is given plenary power to confer other powers upon the commission. (§§ 22 and 23, art. XII.) As to the scope of those powers we look to the legislation enacted in the exercise of that power, principally the Public Utilities Code, and to the decisions of this court in construing them. Such additional powers "must be cognate and germane to the regulation of public utilities, and when the power thus conferred relates to the regulation of transportation companies, it must be cognate and germane to the regulation of railroads or other transportation companies that are in fact common carriers. [Citing cases.]" Morel v. Railroad Comm., supra, 11 Cal.2d 488, 492, 81 P.2d 144, 146.

Section 20 of article XII as originally adopted in 1879 prohibited any railroad company "or other common carrier" from combining or contracting with another "common carrier" to have the earnings of one doing the carrying shared by the other not doing the carrying, and provided that whenever a railroad corporation should lower its rates of fare for the purpose of competing with any other common carrier, such reduced rate should not again be raised from that standard without the consent of the governmental authority in which shall be vested the power to regulate fares and freights. In 1911 this section was amended to read:

> "No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the * * * Commission provided for in this Constitution, that such increase is justified, and the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property."

Sections 20 and 22 directly confer upon the commission power over the rates of "transportation companies" and section 20 directly prohibits such companies from increasing their rates without commission authorization. The next inquiry is whether this defendant is a "transportation company" within the meaning of these sections.

From earlier times rates for the transportation of persons and property for hire as common carriers have been subject to government regulation and control. Munn v. State of Illinois, 94 U.S. 113, 125, 24 L.Ed. 77; People v. Budd, 117 N.Y. 1, 22 N.E. 670, 682, 5 L.R.A. 559. In matters within the jurisdiction of a state, such control has existed in California almost from our beginning. While administrative bodies at first were concerned with railroads and their associated activities, the language employed in article XII of the constitution of 1879, and subsequent amendments, clearly indicates the intention and purpose that such controls should extend not merely to "railroads" but to "railroads and other transportation companies". This latter phrase is so frequently employed in article XII as to leave no doubt as to its enlarging effect.

[8–10] The fact that airline transportation companies were not in existence when the constitution was adopted in 1879 does not make them any the less "transportation companies" within the meaning and contemplation of article XII. It was well said by the Supreme Court of Nebraska in State ex rel. State Railway Comm. v. Ramsey, 1949, 151 Neb. 333, at page 338, 37 N.W.2d 502, at page 506: "* * * A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1, 24 L.Ed. 708; 11 Am.Jur., Constitutional Law, § 51, p. 660; 9 Am.Jur., Carriers, § 4, p. 430. These principles have been held to be applicable to transportation by air. 'Transportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result.' Curtiss-Wright Flying Service v. Glose, 3 Cir., 66 F.2d 710, 712, certiorari denied 290 U.S. 696, 54 S.Ct. 132, 78 L.Ed. 599, * * * [citations omitted]."

The question in regard to each new type of transportation is whether the constitution excludes by necessary or even by fair implication all control over transportation companies of the character here involved.

Section 17 of article XII of the constitution provides:

> "All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control. * * *"

Section 23, as adopted and unchanged by the 1914 amendment, provides:

> "Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, * * * within this State, for the transportation or conveyance of passengers * * * or freight of any kind, * * * either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such con-

> trol and regulation by the * * * Commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The * * * Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the * * * Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. * * * Nothing in this section shall be construed as a limitation upon any power conferred upon the * * * Commission by any provision of this Constitution now existing or adopted concurrently herewith."

This section as originally adopted in 1879 merely provided for the districting of the state into three districts.

[11–13] The comprehensive grant of power over rates conferred upon the commission by sections 20 and 22 is not nullified or limited by the language appearing in sections 17 and 23 to the effect that such rates are "subject to legislative control." The provisions of these sections are not out of harmony, but if there is any doubt about it the special provisions of sections 20 and 22 should prevail over the general provisions of sections 17 and 23. The concluding sentence of section 23 confirms this conclusion. Under familiar rules of construction, if it is impossible to harmonize or reconcile portions of a constitution, special provisions control more general provisions, and the general and special provisions operate together, neither working the repeal of the other. Martin v. Board of Election Com'rs, 126 Cal. 404, 58 P. 932; 11 Cal.Jur.2d 352–3; 11 Am.Jur. 663. Recourse may be had to the whole instrument to ascertain the intent and purpose of its provisions and it should, if possible, be construed so as to avoid a repugnancy.

[14] The defendant urges that the provisions of sections 20 and 22 are too vague to be self-executing, and that the legislature has not provided any implementing legislation. "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced * * *." Cooley's Const. Limitations, 8th Ed., p. 167.

[15, 16] Although a constitutional provision may be self-executing the legislature may enact legislation to facilitate the exercise of the powers directly granted by the Constitution. Chesney v. Bryam, 1940, 15 Cal.2d 460, 463, 101 P.2d 1106. "It is not and will not be questioned but that, if the Constitution has vested such power, it is not within the legislative power, either by its silence or by direct enactment, to modify, curtail, or abridge this constitutional grant." Western Ass'n of Short Line Railroads v. Railroad Comm., 1916, 173 Cal. 802, 804, 162 P. 391, 1 A.L.R. 1455.

Furthermore, the omission of any express sanctions in article XII for enforcing the provisions of sections 20 and 22 does not justify the conclusion that those sections were not intended to be self-executing. Section 22 of article XII as adopted in 1879 directly imposed penalties, drastic ones, upon corporations and their officers, agents or employees for violation of the constitutional prohibitions against unauthorized rates, discrimination, etc. It is true that the 1911 amendment omitted these express sanctions. But the prohibitions of section 20 were added at that same time. Such prohibitions were not left to the discretion of the legislature. No legislation was required to make the constitutional language more prohibitory and no legislation enacted could limit or detract from it. Oakland Paving Co. v. Hilton, 69 Cal. 479, 483, 11 P. 3. But to aid in its enforcement section 24 of article XII has at all times provided as follows: "The Legislature shall pass all laws necessary for the enforcement of the provisions of this article." Sections 20, 22 and 23 are a part of that article. This action was filed against the defendant because it violated the prohibitions of article XII and section 2107 of the Public Utilities Code was reenacted pursuant to the mandatory duty of the legislature to pass all laws necessary to carry into effect the constitutional purpose.

[17, 18] Defendant urges that the legislature did not intend an air carrier to be included within the category of a "public utility" for the purposes of section 2107 or of any other part of the Public Utilities Code and that, therefore, the penalties prescribed in section 2107 are not applicable to and cannot be imposed upon it. Legislative intent should be determined from the language of the statute. Significance should be given, if possible, to every word, phrase, sentence and part of an act. Gates v. Salmon, 35 Cal. 576. When a statute prescribes the meaning to be given to particular terms used by it, that meaning is generally binding on the courts. Rideaux v. Torgrimson, 12 Cal.2d 633, 86 P.2d 826; In re Monrovia Evening Post, 199 Cal. 263, 248 P. 1017. Section 203 of the Public Utilities Code states: "Unless the context otherwise requires, the definitions and general provisions set forth in this chapter govern the construction of this part." The term "transportation companies" is nowhere defined in the code nor is there any specific reference therein to airline carriers. Section 211 defines "Common Carrier"[2] and section 216 defines "Public Utility."[3] Each definition states that it "includes" the corporations thereafter enumerated.

[19–21] The term "includes" is ordinarily a word of enlargement and not of limitation. Oil Workers International Union, C. I. O. v. Superior Ct., 103 Cal.App. 2d 512, 570, 230 P.2d 71. The statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions. Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301. The definitions contained in sections 211 and 216 of the Public Utilities Code do not appear to be limited to the inclusions. Section 216(a) leaves open for consideration what other types of entities are embraced within the words "Public Utility" when used in a particular context. § 203, Public Utilities Code. Section 2107 subjects to penalties any public utility which violates "any provision of the Constitution of this State or of this part". To hold that this section applies only to public utilities enumerated in the definition of "Public Utility" or "Common Carrier" would ignore the words "of the Constitution" contained therein and would violate the letter and purpose of chapter 11 on violations, of which section 2107 is a part. Section 2101 commands the commission to see that the provisions of the constitution affecting public utilities and violations thereof are promptly prosecuted. Other sections of that chapter provide the machinery for the prosecution of such offenses and the collection of penalties. Chapter 11 indicates an awareness by the legislature of its duty to provide for the enforcement of the constitutional provisions and its intention to fix the punishment for such violations.

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[2] § 211. "Common carrier" includes:

"(a) Every railroad corporation; street railroad corporation; express corporation; freight forwarder; dispatch, sleeping car, dining car, drawing-room car, freight, freight-line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading, and every other car corporation or person operating for compensation within this State.

"(b) Every corporation or person, owning, controlling, operating, or managing any vessel engaged in the transportation of persons or property for compensation between points upon the inland waters of this State or upon the high seas between points within this State * * *.

"(c) Every 'passenger stage corporation' operating within this State.

"(d) Every highway common carrier and every petroleum irregular route carrier operating within this State."

[3] § 216. "(a) 'Public utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof."

Confusion is asserted to have resulted from divergent holdings of this court on the question whether a carrier which is in fact a common carrier transportation company should be subject to rate regulation by the commission although not specifically mentioned in the constitution or the statute. This question was raised in 1901 in Board of Railroad Commissioners v. Market St. Ry. Co., 132 Cal. 677, 64 P. 1065. In that case the commission sought to compel the Market Street Railway Company to submit its records to the commission for regulatory purposes. The proceeding involved a combination of the constitutional sections as adopted in 1879 and an act of the legislature passed April 15, 1880, which specially excluded a street railroad from the definition of a "transportation company" as that term was used in the constitution. It was held that a street railway company had not been specially named in the constitution; that under the statute a street railway company operating within a municipality was not a transportation company within the meaning of the constitution and was therefore not subject to regulatory control by the commission. Obviously that case is not applicable here.

The scope of the regulatory powers of the commission under the constitution as amended in 1911 was considered in 1916 in Western Association of Short Line Railroads v. Railroad Commission, supra, 173 Cal. 802, 162 P. 391, 1 A.L.R. 1455. In that case the association, consisting of some fifteen railroads, filed a petition with the commission seeking to have it assume the regulation of certain motor truck and transportation companies conveying freight and passengers on the public highways as common carriers. The commission declined to entertain the petition on the ground that the law had not vested in it the power to do so. Mandamus was sought to compel the commission to assume jurisdiction. It appeared that the freight truck lines and the electric and motor bus passenger conveyances were transportation companies and common carriers operating intercity. It was held that notwithstanding the fact that they were not specifically mentioned in the constitution or the statutes they were undeniably public utilities and subject to the regulatory power of the commission. It was said, 173 Cal. at page 808, 162 P. at page 393, with regard to motor trucks and stages, that "nothing in the language of the grant excludes them, and no legitimate construction upon the phrase so oft quoted demands their exclusion. It must be, and therefore is held, that the constitution has granted regulatory powers over such corporations to the * * * commission by virtue of section 22, article 12, of the Constitution * * *." The Market Street Railway case was distinguished on the ground that that company was operating within a municipality and was not under the law subject to the commission's power of regulation.

The question of the power of the commission to regulate rates of taxicab companies operating wholly within a municipality required the attention of this court in In re Martinez, 22 Cal.2d 259, 138 P. 2d 10. The question there was whether the fares of taxicabs so operating were subject to regulation by the commission or pursuant to the provisions of a city ordinance. In that proceeding in habeas corpus the commission, as amicus curiae, stated that it had consistently taken the position that its jurisdiction pursuant to statutes enacted under the authority of section 23 of the constitution did not extend to the regulation of local taxicabs and for that reason it had never attempted to regulate their operations. This court concurred in that view and also held that consistently therewith there was a legislative intent to exempt taxicabs from state regulation. The court discharged the writ. An additional reason for the order was stated to be that no authorization in the commission to regulate taxicab fares could be found in the statute because taxicabs were not specially mentioned therein as common carriers. There was no occasion to indicate in that case that a private corporation, admittedly and conclusively shown to be in fact a transportation company, a statewide common carrier of passengers for hire, and a public utility, should be freed from regulation as to its intrastate rates pursuant to the grant of power to the commission under section 22 merely because it was not specifically named as such in that section or in the statute passed by the legislature under the authority of section 23.

[22] The argument of the defendant that the specific references in article XII to "railroads and other transportation companies" must for certainty limit the "other transportation companies" mentioned to ground carriers, is without merit. Airline carriers, like motor trucks and automobile stages, are forms of transportation unknown at the time the constitution was adopted, and whether or not the legislature has since that time acted with reference to them, they are within the regulatory powers of the commission under the principles laid down in the Short Line Railroad cases.

[23] It follows that the defendant air carrier is a public utility within the ordinarily accepted meaning of that term and within the meaning and contemplation of sections 20 and 22 of article XII of the constitution. It has violated the prohibitions of section 20 of that article. It is therefore subject to the penalties of section 2107 for violation of the constitutional provision.

Our conclusions in the present case are in accord with the determinations of this court in 1916 in the Short Line Railroad cases and with the holding in the proceedings wherein this court in August, 1951, denied the petition of this defendant for a writ of review to annul the order of the commission. Anything in the Martinez case which is out of harmony with these conclusions is overruled.

[24] In further support of its demurrer the defendant argues that the provisions of section 2107 as applied to it are unreasonable and oppressive and therefore in violation of the due process and the equal protection clauses of the Federal constitution, citing Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; Cotting v. Kansas City Stock Yards Co., 183 U.S. 79, 22 S.Ct. 30, 46 L.Ed. 92; Beckler Produce Co. v. American Ry. Exp. Co., 156 Ark. 296, 246 S.W. 1, 26 A.L.R. 1197; and Natural Gas Pipeline Co. of America v. Slattery, 302 U.S. 300, 58 S.Ct. 199, 82 L.Ed. 276. There is no merit in this contention. The defendant was not under any compulsion to increase its rates without a hearing before subjecting itself to the risk of penalties. It could have obtained a determination of its rights and obligations under California law without exposing itself to the risk of penalties.

No showing is made that the penalties prescribed by section 2107, $500 to $2,000 a day, are oppressive. While factors in extenuation of defendant's action may be considered by the trial court in determining the merits of this controversy, they are not proper matters for consideration on this appeal. It is observed, moreover, that under section 2104 of the Public Utilities Code, the action may be "compromised or discontinued on application of the commission upon such terms as the court approves * * *."

It is further contended by the defendant that any regulation of air carriers by states is barred by the Civil Aeronautics Act of 1938, as amended, 52 Stats. 977, 49 U.S.C.A. § 401 et seq., and is against the national interest. This question was squarely raised in the hearings before the commission in the prior proceedings and was determined by the commission and by this court contrary to the contention. It formed one of the bases of the appeal to the Supreme Court of the United States. The jurisdictional statement on that appeal recited the issues there to be: "(1) Has the Civil Aeronautics Act of 1938, as amended, pre-empted the entire field of civil aviation to the exclusion of the right or power of any state or state agency to exercise jurisdiction or authority over commercial air transportation" and "(2) Is the Order of the Public Utilities Commission of the State of California, purporting to regulate the air coach tariff over an [intrastate] segment of a federally certificated interstate air route, a burden on interstate commerce and thus in violation of subsection 3 of Section 8, Article I of the Constitution of the United States?" See Jurisdictional Statement, Western Air Lines, Inc., Petitioner, v. Pub. Util. Com. of the State of California, Respondent, S.F.No. 18427, p. 13. That appeal was dismissed by the Supreme Court "for the want of a substantial federal question." 342 U.S. 908, 72 S.Ct. 304, 96 L.Ed. 679. Mr. Justice Black and Mr. Justice Burton were of the opinion that probable jurisdiction should be noted. While it would seem that the right of the state commission to regulate the intrastate rates of this defendant and of others similarly situated has been judicially established and that this might be sufficient for the determination of this issue so far as this court is concerned, again we prefer, in view of the present arguments, to state the reasons why the defendant's contentions are not persuasive.

[25] It appears beyond question that the power of Congress under the commerce clause extends to the regulation of "modes of interstate commerce unknown to the fathers", In re Debs, Petitioner, 158 U.S. 564, 591, 15 S.Ct. 900, 909, 39 L.Ed. 1092 and includes the regulation of the interstate operation of air carriers. The extent to which Congress has asserted such jurisdiction over civil aviation depends upon the terms of the legislation which it has adopted. This legislation is chiefly embodied in the Civil Aeronautics Act of 1938, as amended. A review of that act indicates that two kinds of jurisdiction have been there asserted by Congress,—one over safety factors, the other over economic factors. We are not here concerned with the provisions of the act applicable to safety regulations except to note that the extent of federal jurisdiction over those factors, §§ 601–610, 49 U.S.C.A. §§ 551–560, seems to be based on the definition of "air commerce" contained in section 1(3), 49 U.S.C.A. § 401(3). It is there provided: "'Air commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

The jurisdiction asserted by Congress in the local economic regulatory field is not covered. Section 1(2), 49 U.S.C.A. § 401(2), defines "air carrier" as one engaged in "air transportation." "Air transportation" is defined in section 1(10), 49 U.S.C.A. § 401(10), to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." "Interstate air transportation" is defined by section 1(21), 49 U.S.C.A. § 401(21), to mean "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

> "(a) a place in any State of the United States, or the District of Columbia, and a place in any other State * * * or between places in the same State of the United States through the air space over any place outside thereof * * *
>
> "(b) a place in any State of the United States * * * and any place in a Territory or possession of the United States * * *
>
> "(c) a place in the United States and any place outside thereof * * *."

[26] Sections 601–610, 49 U.S.C.A. §§ 551–560, state the judisdiction asserted over safety factors of air carrier regulation; sections 401–416, 49 U.S.C.A. §§ 481–496, over economic factors. Rates and tariffs are controlled by the latter sections. Under those provisions and the definitions contained in section 1, 49 U.S.C.A. § 401, it seems clear that Congress has not sought to extend the economic regulation of the board to intrastate transportation of persons or property other than mail; nor has it attempted to oust the states of control over such rates.

Defendant urges that section 401(2), 49 U.S.C.A. § 481(2), is of special significance on the question of the jurisdiction of the board over intrastate rates because it authorizes the issuance of certificates of public convenience and necessity for the transportation of mail and all other classes of traffic for which authorization is sought between such points as "from Brownsville, Texas * * * to San Antonio, Texas." Obviously that section pertains to the necessity of federal certification. No question is here presented or determined as to the effect of this provision upon state certification; and the requirement of federal certification does not necessarily preclude state control of intrastate rates. The same observation applies to the provisions of section 403, 49 U.S.C.A. § 483, requiring air carriers to file tariffs with the board, of section 404, 49 U.S.C.A. § 484, requiring the observance of reasonable rates and charges, and of section 406, 49 U.S.C.A. § 486, empowering the board to fix the compensation to be paid to air carriers for the transportation of mail. The latter section authorizes the board to take into consideration "all other revenue of the air carrier" in determining the "need" of such carrier for compensation for carrying the mail to enable it under "honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." This language does not make it imperative that the board have exclusive control of "all other revenue". The only mandate is that it shall take all other revenue [including intrastate revenue] into consideration.

There is no language indicating that Congress intended to pre-empt the field of economic regulatory control of air transportation so as to include the transportation of passengers solely between points within a state and not involving the use of the airspace outside of the state. We are not concerned on this appeal with the question whether Congress could properly assert such power. There appear to have been no decisions of the United States Supreme Court defining the limits of such regulatory control.

Attention has been called to numerous recommendations and bills presented to Congress, prior to and since the enactment of the Civil Aeronautics Act of 1938 seeking to extend federal economic regulation to include intrastate operations of air carriers, and also to the fact that none of these has been enacted into law.[4] This would seem to strengthen the conclusion that Congress has not assumed control over carriers to the exclusion of state control as to their intrastate rates.

[27] Any doubts on the subject should be resolved in favor of state power for the principal reason, as stated, that the regulation of intrastate fares of common carriers traditionally has been subject to state regulation. It is true, as defendant points out, that Congress did not use language in the Civil Aeronautics Act of 1938, such as that employed in different legislation asserting its control over other kinds of common carriers in which it was expressly stated that such regulations shall not be construed to interfere with the exclusive exercise by each state of the power to regulate intrastate commerce. See Section 1(2), Interstate Commerce Act, 49 U.S.C.A. § 1 (railroads); § 202(b), Part II, Interstate Commerce Act, 49 U.S.C.A. § 302 (motor carriers); § 303(j), Part III, Interstate Commerce Act, 49 U.S.C.A. § 903 (water carriers). The failure to use such language in the Civil Aeronautics Act does not necessarily imply that federal regulation of air transportation was intended to exclude all state control. Rail-

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[4] Report of the Federal Aviation Commission, Sen.Doc.No.15, 74th Cong., 1st Sess. (Jan. 30, 1935) 237–239;

78th Congress: Lea-Bailey Aviation Bill introduced as H.R.1012 and S.246; revised form of Lea-Bailey Aviation Bill, H.R.3420; Boren Bill, H.R.4845; Reece Bill, H.R.4848.

79th Congress: Lea-Bill, H.R.674; Johnson Bill, S.541; Lea Bill H.R.3383.

80th Congress: Wolverton Bill, H.R. 2337.

81st Congress: Brewster Bill, S.423; Johnson Bill, S.445; Johnson Bill, S. 2435.

See also 1944 Natl. Assn. R.R. and Util. Comrs. Proceedings 221; 1945, id. p. 299; 1946, p. 210; 1947, p. 128; 1948, p. 69; 1949, p. 166; 1950, p. 106.

roads and motor carriers began as short-haul carriers. In their operations wholly within a state they have been traditionally subject to state regulation. In the early days of aviation the operating costs and necessarily the fares of the pioneering airlines were very high and as a consequence they could compete with surface carriers only on long hauls.[5] Consequently air transportation in this country has been predominately interstate and as such subject to federal control.

Also of significance in considering the extent of Congressional action is the attitude of the Civil Aeronautics Board in the exercise of its powers under the act. As stated this defendant and the other carriers concerned had put the questioned increase in fares into effect on March 1, 1951, without commission authorization because they had been requested to make such increase as of that date by the chairman of the Civil Aeronautics Board and they had considered his request to be tantamount to a demand. In the preceedings subsequently initiated by the commission the carriers denied jurisdiction on the part of the commission over their rates and asserted the exclusive jurisdiction of the board. On the appeal to the United States Supreme Court from our order denying a writ of review the question whether the board had exclusive jurisdiction was precisely in issue. The board apparently did not have sufficient interest to intervene. The commission states that in more recent litigation in which the board did intervene (Public Utilities Comm. of State of California v. United Air Lines, 346 U.S. 402, 74 S.Ct. 151, Nov. 30, 1953) it has indicated its present attitude that its jurisdiction does not extend to intrastate rates.

Since 1939 the carriers authorized to transport passengers by air between the mainland of California and Santa Catalina Island have been subject to detailed regulatory control by the federal board. Tariffs for those operations were filed with that board but had never been filed with or required by the state commission. Santa Catalina Island lies about 30 miles westward of the mainland and is a part of California. In September and December, 1951, the commission requested United Air Lines to file tariffs with it, asserting that the Catalina operations were not within the coverage of the Civil Aeronautics Act but were intrastate and subject to state regulation. No formal order was issued by the commission. In June, 1952, United Air Lines and Catalina Air Transport, a corporation, joined in a complaint filed in the United States District Court for the Southern District of California, 109 F.Supp. 13, praying for declaratory and injunctive relief, alleging that the California commission was threatening to bring penalty and reparation proceedings against them. The board intervened for the purpose of asserting its exclusive jurisdiction. A three judge court ordered an injunction, upholding the exclusive jurisdiction of the board. That judgment was reversed by the Supreme Court (74 S.Ct. 151, Nov. 30, 1953) on technical grounds, citing Public Service Commission of State of Utah v. Wycoff, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291. However in the brief on appeal filed on behalf of the board it was stated that there "is no issue here presented of whether the Civil Aeronautics Act would pre-empt the field of economic regulation of the Catalina operations if those operations involved only flights over California territory, as, for example, do flights between Los Angeles and San Francisco. United Air Lines [Inc.], v. Public Utilities Commission of California, 342 U.S. 908 [72 S.Ct. 304, 96 L.Ed. 679], where this Court dismissed an appeal from a rate order of the California Commission for want of a substantial federal question, involved air transportation between Los Angeles and San Francisco only, and is in apposite here." Brief for Appellee Civil Aeronautics Board, p. 13.

The argument that the interests of the United States require national uniformity in the regulation of air transportation through the total exclusion of state control is addressed to a matter of public policy which requires no consideration here.

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[5] See 11 Law & Contemporary Problems (1946) p. 429, at p. 459 et seq. and p. 488 et seq. for a symposium on this problem.

From the foregoing it follows that the demurrer was improperly sustained.

Judgment reversed.

GIBSON, C. J., and CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

It is my view that the opinions prepared for the District Court of Appeal in the companion cases of People v. United Air Lines, Inc. (reported at 258 P.2d 66), authored by Justice Wood[1] (Fred B.) and concurred in by Presiding Justice Peters and Justice Bray, and of People v. California Central Airlines (reported at 258 P.2d 577), authored by Justice Drapeau and concurred in by Presiding Justice White and Justice Doran, adequately discuss and correctly resolve the issues which are presented on this appeal.

By reference I adopt each of such opinions in its entirety but to the end of avoiding unnecessary repetition in this dissent of either factual statement[2] or discussion of law, while at the same time making clear the grounds which I find compelling to the conclusion reached, I set out here only the following portions of the opinion prepared by Mr. Justice Wood (pp. 68–71 of 258 P.2d):

"The sole issue upon this appeal is whether or not this defendant by charging the increased rates mentioned, during the period March 1 to May 8, 1951, incurred penalties which under certain circumstances the provisions of § 2107 of the Public Utilities Code by its terms imposes. That section declares that 'Any *public utility* which violates or fails to comply with any provision of the *Constitution* of this State or of this part [§§ 2101 to 2113; the Public Utilities Code], or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense.'[3] (Emphasis added.)

"The key words in this section are 'public utility.' Unless defendant is a 'public utility,' as that term is used in § 2107, it cannot be subject to the penalty which that section imposes.[4]

"For a definition, we turn to § 216 of the code. It states that '"Public utility" includes every common carrier, toll bridge corporation, * * * [and a number of types of corporations other than transportation companies] * * * where the service is performed for or the commodity delivered to the public or any portion thereof. * * *'

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[1] Formerly Legislative Counsel to the Legislature of California, with a long and distinguished service in the field of statutory interpretation.

[2] The material allegations of the complaint are correctly stated in the majority opinion of this court.

[3] "§ 2108 of the code states that every such violation is a separate and distinct offense, 'and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.'"

[4] "During oral argument counsel for plaintiff expressed the view that the clause of § 2107 in which the word 'Constitution' appears makes the penalty applicable to a 'transportation company' which violates any provision of Article XII even if such company is not a 'public utility' within the meaning of that term as used in the code.

"Logic is against such a view. The word 'Constitution,' appearing, as it does, in the object of the sentence, in no way changes or enlarges the meaning of the subject, 'any public utility.' Especially so in view of the fact that such a change is not necessary to give meaning and effect to the phrase in which the word 'Constitution' occurs. Numerous transportation agencies that are included in the code concept of 'public utility' are subject to the constitutional mandates and prohibitions as well as to those expressed in the code.

"Moreover, it would have been easy to broaden the subject of the sentence in § 2107 by adding 'corporation or person' to 'public utility,' as was done in § 2113 of the code, when the legislature was dealing with contempt of any order of the commission."

"Here the key words are 'common carrier,' defined in § 211 of the code as follows: '"Common carrier" includes: (a) Every railroad corporation; street railroad corporation; express corporation; freight forwarder * * * [several types of car corporations] * * * operating for compensation within this State. (b) Every corporation or person, owning, controlling, operating, or managing any vessel engaged in the transportation of persons or property for compensation between points upon the inland waters of this State or upon the high seas between points within this State, except as provided in Section 212. "Inland waters" as used in this section includes all navigable waters within this State other than the high seas. (c) Every "passenger stage corporation" operating within this State. (d) Every highway common carrier and every petroleum irregular route carrier operating within this State.'

"In this definition of 'common carrier' there is no specific mention of common carrier by air. It is true that this enumeration of carriers is preceded by the word 'includes,' which ordinarily is used by way of illustration or enlargement, not by way of limitation. Oil Workers International Union C. I. O. v. Superior Court, 103 Cal.App.2d 512, 570, 230 P.2d 71, and cases there cited. Here, however, it appears that 'includes' is used as a word of limitation. The enumeration of several types of common carriers (railroad, street railroad, vessels, passenger stage corporations, highway common carriers) suggests an intention to include only the carrier specifically mentioned. The history of this section, which finds its prototype in subdivision (*l*) of section 2 of the Public Utilities Act of December 23, 1911, Stats.1911, Ex.Sess., ch. 14, p. 18, at pp. 19–20, compels such a conclusion.

"To get the full significance of this history, we start with the state Constitution of 1879, which imposed certain obligations upon carriers for hire and used certain terms in referring to them. Section 21 of Article XII prohibited discrimination in charges or facilities for transportation by any 'railroad or other transportation company.' Section 22 of Article XII gave the railroad commission power to establish rates of charges for transportation of passengers and freight by 'railroad or other transportation companies'; implemented by the power to examine books of such companies, issue supoenas and other process, hear and determine complaints against such companies, take testimony, and punish for contempt. Section 19 of Article XII declared that no 'railroad or other transportation company' shall grant free passes or tickets at a discount to any public officer other than a railroad commissioner. Section 17 of Article XII said: 'All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control.' Section 18 used the expression 'railroad or canal company'; section 20, 'railroad company or other common carrier'.

"An Act of April 15, 1880, evidently designed to implement these provisions of the new Constitution, followed the pattern set by these sections of Article XII, in the terms which it used. Thus, the 1880 act used the term 'transportation companies,' defining it, somewhat narrowly, to mean and include companies operating railroads (other than street railroad) or steamboats from port to port or upon the rivers and inland waters. Stats.1880, ch. 59, § 14, p. 45, at 48. However, section 12 of this Act was designed to implement the constitutional powers and duties of the railroad commission to the full extent of the constitutional grant, without limitation as to types of companies affected. P. 48.

"The Railroad Commission Act of March 19, 1909, continued to use the expression 'transportation company,' enlarging it to include 'railroads operated for commercial purposes, express companies, sleeping car companies, and companies operating vessels engaged in carrying freight or passengers on the waters of this state.' Stats. 1909, c. 312, p. 499; § 11, p. 501.

"The Railroad Commission Act of February 9, 1911, followed much the same pattern. Stats.1911, Reg.Sess., c. 20, p. 13. In section 9 it declared: 'All railroad and other transportation companies, owned or operated by any individual, company, * * * or association are hereby declared to be common carriers, and under the jurisdiction, * * * of the commission and subject to the provisions of this act.' P. 16. But it continued to define 'transportation company' as meaning and including certain specified kinds of companies, adding several types of car companies. § 13, p. 17. It imposed a penalty of $500 to $2,000 per day for willful failure by any railroad or other transportation company to comply with certain requirements of the statute or failure strictly to observe any rate established by the commission. § 41, p. 36.

"At the special election held in October, 1911, the voters approved amendments to sections 20, 21, 22, and 23 of Article XII of the Constitution. These amendments enlarged the membership of the Railroad Commission from three to five, made the members appointive instead of elective, and to some extent enlarged the constitutional grant of power to the commission, including the power to order reparation to any shipper for excessive or discriminatory rates charged him. In so doing it retained the use of the expression 'railroad or other transportation company' when dealing with the direct grant of constitutional power to the commission. Significantly, these amendments used a different form of expression when conferring 'plenary power' upon the Legislature to confer additional powers upon the commission. The 1911 amendment to section 23 declared that every private corporation, individual, or association owning or operating a 'commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, * * * for the transportation or conveyance of passengers * * * express * * * or freight * * *, or for the transmission of telephone or telegraph messages, or for the production, * * * or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, * * * to or for the public, *and every common carrier*, is hereby declared to be *a public utility subject to such control and regulation* by the railroad commission *as may be provided by the legislature,* and *every class* of private corporations, * * * *hereafter declared by the legislature to be public utilities* shall likewise be subject to such control and regulation.' (Emphasis added.)

"We may assume, for present purposes, that 'common carrier' as thus used in section 23 meant the same as defined in section 17 of the same article: 'All railroad, canal, and other transportation companies'. We may further assume, for the purpose of discussion, that airline transportation companies were included in this definition of common carrier,[5] and hence, that a common carrier by air is a 'public utility' which section 23 gives the legislature power to subject to the control and regulation of the commission. Has the legislature done so, with this type of transportation company? The answer is furnished by the Public Utilities Act of December 4, 1911 [approved December 23, 1911], the first statute on this subject enacted after the adoption of the 1911 constitutional amendments. Stats.1911, Ex.Sess., c. 14, p. 18. Of prime significance, is the fact that the express 'transportation company' was neither defined nor used in that act. We there find the same pattern that now obtains in the code. 'Common carrier' was defined by subdivision (*l*) of section 2 of the Act as including certain specific types of transportation agencies (such as railroad corporations, street railroad corporations, car corporations, corporations operating vessels) without the use of 'transportation company' or other generic term. 'Public utility' was defined in subdivision (bb) of section 2 of that Act as including every common carrier and certain specific types of agencies (such as pipe line, gas, electric, telephone, telegraph, and water corporations, wharfingers and warehousemen) without the use of 'transportation company' or similar expression. In each of those subdivisions, the definition expressly applied to the term defined 'when used in this act,' a limitation now expressed in § 203 of the code.

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[5] "The defendant herein does not in this proceeding question that it is a 'transportation company' as that term is used in the Constitution and, as such, is subject to the jurisdiction which the Constitution directly confers upon the Commission over such companies."

"It would seem, therefore, that the absence of the term 'transportation company' from the code is no accident; that it is the result of an intentional act of exclusion. This fact, coupled with the specific enumeration of carriers in the statutory definition of 'common carrier,' suggests that the legislature, soon after the 1911 amendment of the Constitution, adopted the policy of not exercising its 'plenary' power over any new type of 'transportation company' (such as a stage line, truck line, or air line) until that type of transportation shall have been in operation long enough for the legislature to determine how much, if any, regulation and control over it should be given the commission in addition to that directly conferred by the Constitution.

"Not inconsistent with this view was the construction placed upon the statute by the commission and approved by the court in Western Ass'n of Short Line Railroads v. Railroad Comm., 173 Cal. 802, 162 P. 391, 1 A.L.R. 1455, decided in December, 1916. The question at issue was whether or not common carriers by truck or stage upon the highways, operating between cities in this state, were subject to the jurisdiction of the commission. The court held that jurisdiction over such carriers, as 'transportation companies,' was conferred by section 22 of Article XII of the Constitution.

"Concerning the lack of statutory regulation of carriers by stage or truck (methods of transportation that were relatively new in 1916), the court said: 'We agree with the construction placed by the commission upon the legislative enactments and with its conclusion that the Legislature inadvertently failed or deliberately declined to make a specific grant of power to the railroad commission to regulate the affairs of these classes of transportation companies. We need not here repeat the convincing reasoning of the commission in this behalf, since doubtless its views will find expression in its own official reports, and it is sufficient for the purposes of this determination to express our concurrence in and with them.' 173 Cal. at page 804, 162 P. at page 391.

"The history of statutory changes on this subject since 1911 indicates adherence to a policy of the legislature not to exercise its 'plenary' power over new types of transportation until experience might demonstrate a need therefor.

"An act adopted in 1917 imposed certain requirements upon the owners and operators of stages and trucks when functioning as common carriers. It placed them under the regulation and control of the commission. Stats.1917, c. 213, p. 330.

"The definition of 'common carrier' in the Public Utilities Act was enlarged in 1927 to include passenger stage corporations, Stats.1927, c. 42, p. 72 at 73, adding § 2¼ to the Act of 1915; in 1933, to add freight forwarders, Stats.1933, c. 784, p. 2083 at 2085, amending § 2 of the Act; in 1935, to include highway common carriers, Stats.1935, c. 664, p. 1830 at 1831, adding § 2¾ to the Act; and in 1949, to add petroleum irregular route carriers, Stats. 1949, c. 1399, p. 2440 at 2441, amending § 2¾ of the Act.

"Note should be made of a Supreme Court decision rendered in 1943 which held constitutional a certain city ordinance concerning taxicab service. We refer to In re Martinez, 22 Cal.2d 259, 138 P.2d 10. The court found that the legislature had not yet put taxicabs under the jurisdiction of the commission. After quoting the pertinent features of the statutory definitions of 'common carrier' and 'public utility,' the Court said: 'Nowhere in the quoted provisions of the Public Utilities Act, nor in its other provisions, do we find any reference to taxicabs or taxicab companies. Each of the many agencies designated in subdivisions (dd) and (*l*) is specifically mentioned and described in detail or is included in groups carefully described in the act. If the Legislature had intended to include taxicabs it would not have omitted reference to them while including detailed descriptions of all other agencies covered by the act, some of which perform similar services. Moreover, references in other parts of the act to common carriers "subject to the provisions of this act" indicate a legislative intention not to include all common carriers.' 22 Cal.2d at page 262, 138 P.2d at page 11.

"The court did not mention section 22 of Article XII of the Constitution, which by its own terms puts 'railroad and other transportation companies' under the jurisdiction of the commission to a limited extent. Section 22, perhaps, was deemed inapplicable because it refers to compensation for transportation of passengers or freight 'between the points named in any tariff of rates' established by the commission, and the city ordinance in question was 'confined in its effect to service performed within the city'. 22 Cal.2d at page 262, 138 P.2d at page 12.

"We note in passing that section 2113 of the code, relating to contempt of the commission and its power to punish such a contempt, is broader in its application than section 2107. Section 2113 applies to every 'public utility, *corporation, or person*'. That may well include a common carrier by air to the extent that such a carrier, viewed as a 'transportation company,' may be subject to the jurisdiction which section 22 of Article XII of the Constitution confers upon the commission. Our attention has been called to no other provision of the Public Utilities Act portion of the code which directly or indirectly mentions common carriers by air."

The foregoing quotation from the opinion of Justice Wood satisfies me that the judgment of the trial court should be affirmed, but, in view of the fact that the majority of this court have concluded that the judgment should be reversed, I deem it proper to add these observations:

The majority (if they must reach the decision they do reach) properly point out that the commission by its decision of April 24, 1951 (which by its own terms was not to become effective until May 9, 1951), "expressly advised the companies that they would *thereafter* be deemed to be transportation companies, common carriers and public utilities within the meaning of the state constitution and be subject to its prohibitions and requirements." (Italics added.) The majority opinion further states "It is also observed that the commission is in the position of acting at times as informer, prosecutor, jury and judge in matters coming before it" and "Confusion is asserted to have resulted from divergent holdings of this court on the question whether a carrier which is in fact a common carrier transportation company should be subject to rate regulation by the commission although not specifically mentioned in the constitution or the statute."

The majority opinion continues: "In further support of its demurrer the defendant argues that the provisions of section 2107 as applied to it are unreasonable and oppressive and therefore in violation of the due process and the equal protection clauses of the Federal constitution, * * * There is no merit in this contention. The defendant was not under any compulsion to increase its rates without a hearing before subjecting itself to the risk of penalties. It could have obtained a determination of its rights and obligations under California law without exposing itself to the risk of penalties.

"No showing is made that the penalties prescribed by section 2107, $500 to $2000 a day, are oppressive."

I strongly disagree with the last quoted statement. In my estimation the majority opinion on its face, by virtue of the very facts which I have quoted from it above, leads to the conclusion that to apply the penalties under the circumstances shown would be unjust and oppressive. To state, as do the majority, that "The defendant was not under any compulsion to increase its rates without a hearing before subjecting itself to the risk of penalties" seems to me to at least border on the edge of unreality or inaccuracy.

It must be remembered that the only misconduct of the defendant upon which the commission and this court rely for invoking, for the first time in the history of this state as against an air carrier, the penal provisions of section 2107 of the Public Utilities Code, is that it put in effect a fare increase which, as appears on the face of the majority opinion, not only in the case of this defendant but also in the cases of its fellow defendants, was "made in response to a request by the chairman of the federal Civil Aeronautics Board, which they [the air carrier defendants] believed to be compulsory upon them."

As to the element of compulsion in this respect, it is to be remembered that this defendant must use exclusively—whether in interstate or intrastate commerce—airplanes which are subject to federal regulation in respect to certification, maintenance, and operation; the airways over which they fly are federally equipped and operated; the number of passengers which any given plane may carry under varying conditions, its gross load, and the rates the defendant will receive for mail (if it has a mail contract) are all subject to exclusive federal control; likewise the defendant's crewmen must be federally certificated; regulations covering the hours they may work, their qualifications and the minimums of procedures for maintenance of proficiency, are all to be found in the federal Civil Air Regulations.

That the defendants in this and the companion cases (and their able counsel) had reasonable grounds for their course of conduct seems to me to be further indicated by the fact that until this day every judge who had passed upon the matter agreed with them; that includes two judges of the superior court and six justices of the District Court of Appeal. In the face of the fact that so many distinguished legal minds have concluded that on the facts pleaded the defendants cannot be held to be subject to the penal provisions of the statute relied on, it seems to me to be inescapable that at the very least such statute, insofar as concerns its applicability to defendants on the facts, must admit of differing conclusions by reasonable minds. In such circumstance I think that we should follow the usual rule and accord the benefit of any reasonable doubt to the defendant. "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. In other words, criminal statutes will not be built up 'by judicial grafting upon legislation * * * [I]t is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute.'" (People v. Ralph (1944), 24 Cal.2d 575, 581, 150 P.2d 401; People v. Valentine (1946), 28 Cal.2d 121, 143, 169 P.2d 1; see also In re McVickers (1946), 29 Cal.2d 264, 278, 176 P.2d 40; In re Bramble (1947), 31 Cal.2d 43, 51, 187 P.2d 411; People v. Chessman (1951), 38 Cal.2d 166, 182, 238 P.2d 1001; Ex parte Rosenheim (1890), 83 Cal. 388, 391, 23 P. 372; People v. Sayre (1937), 26 Cal.App.Supp.2d 757, 761, 70 P.2d 546.)

For all of the reasons above stated, I would affirm the judgment.

EDMONDS, J., concurs.

Rehearing denied; EDMONDS and SCHAUER, JJ., dissenting.

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42 Cal.2d 877

PEOPLE of the State of California, Plaintiff and Appellant, v. CALIFORNIA CENTRAL AIRLINES, a corporation, Defendant and Respondent.

L. A. 22880.

Supreme Court of California.
In Bank.
April 2, 1954.

Appeal from Superior Court, Los Angeles County; Philbrick McCoy, Judge.

Everett C. McKeage and J. Thomason Phelps, San Francisco, for appellant.

John W. Preston, Jr., Los Angeles, for respondent.

PER CURIAM.

This appeal is from a judgment of dismissal after a demurrer to the complaint had been sustained without leave to amend. The complaint presents the same issues as those involved in the case of People v. Western Air Lines, Inc., Cal.Sup., 268 P. 2d 723. Any difference in factual background in that this company is not federally certificated, that it operates entirely intrastate, and that it did not petition for review of the commission's decision and order of April 24, 1951, does not affect the result.

The judgment is reversed.

SCHAUER, Justice (dissenting).

For the reasons and upon the grounds stated in my dissenting opinion in People v. Western Air Lines, Inc., Cal.Sup., 268 P.2d 723, this day filed, I would affirm the judgment.

EDMONDS, J., concurs.

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42 Cal.2d 878

PEOPLE of the State of California, Plaintiff and Appellant, v. UNITED AIR LINES, Inc., a corporation, Defendant and Respondent.

S. F. 18900.

Supreme Court of California.
In Bank.
April 2, 1954.
Rehearing Denied April 28, 1954.

Appeal from Superior Court, San Mateo County; Edmund Scott, Judge.

Everett C. McKeage and J. Thomason Phelps, San Francisco, for appellant.

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, Colin C. Kelley, San Francisco, Mayer, Meyer, Austrian & Platt, John T. Lorch and Edmund A. Stephan, Chicago, Ill., for respondent.

PER CURIAM.

This appeal is from a judgment of dismissal after a demurrer to the complaint had been sustained without leave to amend. This defendant concedes that the Public Utilities Commission has the power of regulatory control over transportation companies by direct grant from the state constitution. Otherwise the issues are the same as those involved in the case of People v. Western Air Lines, Inc., Cal.Sup., 268 P.2d 723. The concession does not affect the result.

The judgment is reversed.

SCHAUER, Justice (dissenting).

For the reasons and upon the grounds stated in my dissenting opinion in People v. Western Air Lines, Inc., Cal.Sup., 268 P.2d 723, this day filed, I would affirm the judgment.

EDMONDS, J., concurs.

Rehearing denied; EDMONDS and SCHAUER, JJ., dissenting.

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124 Cal.App.2d 422

PEOPLE v. QUIJADA.

Cr. 5110.

District Court of Appeal, Second District,
Division 3, California.
April 7, 1954.

Defendant was convicted of robbery with a prior conviction of burglary. The Superior Court of Los Angeles County, Benjamin J. Scheinman, J., entered judgment and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that, where two and a half months had elapsed before court denied motion for new trial of defendant who had not filed an affidavit of newly discovered evidence and thereafter all representations were made to court that defendant had received information that third person had stated that he had committed the robbery and that another person had indentified third person as robber, but no request was made for production of such persons, and defendant stated that they could not be produced to testify to such facts, motion was properly denied.

Judgment and order affirmed.

1. Criminal Law ⚷260(11)

In prosecution for robbery, it was for trial judge to determine effect of discrepancies and uncertainties in testimony of state's witnesses.

2. Criminal Law ⚷566

It is not required, in a criminal proceeding, that description of defendant by a witness be free from discrepancies and uncertainties.

3. Criminal Law ⚷260(11)

In prosecution for robbery, matter of weighing sincerity and accuracy of defendant's witnesses was for court as trier of fact.

4. Criminal Law ⚷1159(4)

Upon the evidence in prosecution for robbery, determination that people's witnesses were truthful, not mistaken, was conclusive upon appeal.

5. Criminal Law ⚷958(6)

Where two and a half months had elapsed before court denied motion for new trial of defendant, who had not filed an affidavit of newly discovered evidence, and thereafter oral representations were made to court that defendant had received information that third person had stated that he had committed the robbery, and that another person had identified third person as robber, but no request was made for production of such persons, and defendant stated that they could not be produced to testify to such facts, motion was properly denied.

◆

David C. Marcus, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Martin M. Ostrow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

The defendant, Ruben Quijada, was charged in an amended information with the crime of robbery, with a prior conviction of burglary. He waived jury trial and was found guilty of robbery in the first degree. The court also found a prior conviction of burglary. From the judgment, and from an order denying his motion for a new trial, defendant brings this appeal.

The argument of the defendant is directed to the question whether the testimony of the witnesses who identified him as the perpetrator of the robbery was legally sufficient. This evidence may fairly be summarized as follows: Marie Navarro, cashier of the Monterey Theater, testified: At about 8:50 p. m. on January 28, 1953, defendant walked up to the box office where she sold tickets and told her to give him all the money. She refused. Defendant reached through the window with his left hand and seized the coin till. The witness struggled with him for possession of the coin till. At this point defendant displayed a revolver which he had concealed in a newspaper and threatened her with death. The witness then ceased resistance, and defendant ran away southward with about $85 in coin and currency. Clarence Frankfourth, a patron of the theater, testified that he saw the robbery from the foyer of the theater, first watching defendant's reflection in one of the mirrors in the side of the lobby, and then, upon changing his position to get a better view, observing him directly through the glass side wall and glass front of the cashier's booth; that he saw a struggle and saw the gun in defendant's right hand; that defendant ran away, with Frankfourth in pursuit about a quarter of a block behind; defendant turned the corner to the west, ran to the end of the block, turned north, ran nearly to the end of the block, entered a car parked at the curb and drove away. This witness noted the license number of this car, which was later found to be registered in the name of defendant's brother-in-law. Another theater patron, Jerome Hastings, also saw the robbery from the foyer of the theater, and testified that defendant was the robber. He further testified that when defendant ran away he followed in the street, using a bicycle which he found parked in front of the theater; that he followed defendant around the first corner; he overhauled him at the second corner; defendant paused under a street light and said to him, "Which way did he go?" "Call the cops."; the defendant then ran northward up the street after the witness turned aside to look for assistance; some minutes later, after failing to find assistance, he renewed the pursuit; he did not see anything more of defendant, and that a half-block up the street from the point at which he had overhauled defendant he found a hat resembling that which defendant had been wearing. James Speck, an employee of the theater, also witnessed the robbery from the foyer of the theater, but did not pursue the defendant. His testimony covering the events up to the defendant's departure was similar to that of witnesses Frankfourth and Hastings. Each of these four witnesses had a good opportunity to observe the defendant and testified unequivocally that he was the man who committed the robbery. According to the witnesses the robber wore a brown hat that was too small for him. The hat found by Hastings was placed upon defendant's head at the trial and was too small for him and was described by the witnesses as similar to the one worn by the robber.

[1, 2] Defendant stresses the facts that there was some conflict in the evidence as to whether the witness Hastings could have seen the robber's face from the foyer of the theater and that the witness Marie Navarro failed to make accurate description of defendant's hairline and the condition of his facial hair, and did not notice during the robbery that two fingers were missing from his left hand. It was for the trial court to judge the effect of the discrepancies and uncertainties in the testimony of these witnesses. It is not required that description by a witness be free from discrepancies and uncertainties. People v. Johnson, 21 Cal.App.2d 673, 70 P.2d 198; People v. Duenas, 74 Cal.App.2d 846, 851–852, 169 P.2d 987; People v. Shaheen, 120 Cal.App.2d 629, 261 P.2d 752.

For the defense, defendant's brother-in-law testified that defendant did not possess a hat, a gun, or trousers and jacket such as the robber had worn. He also testified that he had examined the premises and that he was unable to see the front of the cashier's box, where the robber had stood, from the places in the foyer from which witnesses Frankfourth, Hastings and Speck had allegedly observed defendant as he carried out the robbery. The trial court visited the premises accompanied by both counsel and presumably made its own observations. Finally, defendant's brother and sister testified that defendant was at home with them on the night of the robbery.

[3, 4] The weighing of the sincerity and accuracy of defendant's witnesses was, of course, for the trier of fact. People v. Alexander, 78 Cal.App.2d 954, 178 P.2d 813; People v. Duenas, supra. Upon the evidence the determination that the People's witnesses were truthful, and not mistaken, is conclusive upon the appeal.

[5] Defendant made a motion for a new trial but filed no affidavit of newly discovered evidence. Two and a half months elapsed before the court denied the motion. Thereafter new counsel orally represented to the court that he had received information that one Zuliaca had stated to two prisoners in the jail that he, and not defendant, had committed the robbery and that another person had identified Zuliaca as the robber. No request was made for the production of these persons and it was stated by counsel that they could not be produced to testify to the facts, as stated. The motion for a new trial was properly denied.

The judgment and order denying motion for a new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

124 Cal.App.2d 472

HILL v. WILSON et al.

Civ. 19992.

District Court of Appeal, Second District,
Division 3, California.
April 8, 1954.

Action for injuries sustained by plaintiff when as a passenger on a bus he left the bus and proceeded around to the front and walked into the side of defendant's passing automobile. Judgment of the Superior Court of Los Angeles County, H. S. Farrell, J., for the defendant, the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that plaintiff was contributorily negligent as a matter of law and that the evidence of defendant's negligence was insufficient for the jury.

Judgment affirmed.

1. Automobiles 🔑**217(2)**

Where there was no crosswalk where plaintiff attempted to cross intersection it was the plaintiff's duty to yield the right of way to passing automobiles.

2. Negligence 🔑**136(9)**

Contributory negligence is not established as a matter of law, even upon undisputed facts, if reasonable minds could reach different conclusions upon the question.

3. Automobiles 🔑**217(1), 226(2)**

Plaintiff who left bus and proceeded around to the front and attempted to cross the street at a place where there was no crosswalk and who walked into the side of a passing automobile of the defendant was contributorily negligent as a matter of law which negligence was proximate cause of the accident.

4. Automobiles 🔑**245(6)**

In action for injuries sustained by plaintiff who after leaving the bus walked around to the front and into the side of defendants' passing automobile, evidence of defendants' negligence was insufficient for the jury.

5. Automobiles 🔑**160(1)**

A motorist has the right to rely upon the observance of the law by pedestrians and until he knew, or by ordinary care would have known that he would not be given the right of way by pedestrians as he passed a bus, he had a right to assume that they would yield him the right of way at a place not the regular crosswalk.

Abels & Johnson, Ulma A. Abels, Los Angeles, for appellant Hosie Hill.

Henry R. Thomas, Wayne Veatch, Henry F. Walker, Los Angeles, for respondent Los Angeles Transit Lines.

H. Thomas Ellerby, Los Angeles, for respondent Wilson.

SHINN, Presiding Justice.

In this action against Los Angeles Transit Lines and Rowland W. Wilson plaintiff appeals from a judgment of nonsuit in a nonjury trial. The question is whether there was legally sufficient evidence to support findings that either defendant was negligent and that plaintiff was not guilty of contributory negligence. We are satisfied that findings of liability of either defendant would have had no support in the evidence.

Plaintiff boarded a bus of Los Angeles Transit Lines at 41st and Central in Los Angeles. The bus travelled south and came to a stop headed west on 58th Street about 100 feet east of Central. 58th Street is 40 feet wide. Also, stopped in front of plaintiff's bus, were two or more busses which were some distance from the north curb and two or more which were at the curb. Cars were parked at the curb. The bus plaintiff rode was 6 or 8 feet from the curb. Plaintiff, unaccustomed to travel on busses, told the driver his destination and was told that he should go west to Central Avenue, then one block south to Slauson, where he would transfer to a bus at the southwest corner. There were numerous people alighting from the bus and plaintiff testified that the driver told him to follow them. According to plaintiff some of these people started across 58th Street to the south curb, and he left the bus on the right or north side, as the other people had done. He passed some two feet in front of the bus, walked about two feet to the south of the bus, where he observed the car of defendant Wilson approaching from the east, and about the length of the bus away. (The bus is 38 feet long.) Plaintiff and the car came together at the point where plaintiff first saw the car. According to plaintiff the car was coming at a speed of 30 or 35 miles per hour. Plaintiff testified he was "swiped" by the car and knocked down. He was not struck by the front of the car. He did not look to the east before he reached the point where he collided with the car. Wilson applied his brakes and stopped his car within its own length. According to plaintiff it stopped "right there". The foregoing recital is from plaintiff's testimony.

[1] Although the question of negligence of defendants is argued fully in the briefs we shall consider first the question of contributory negligence. Plaintiff's testimony developed a clear case of contributory negligence. There was no marked or unmarked crosswalk at the point where plaintiff started to cross 58th Street. He had to go west to Central, then south to Slauson. He alighted from the north side of the bus. There was nothing to prevent him from walking to Central Avenue on the north side of 58th Street and crossing at the intersection. Passengers who were transferring to a bus to be taken at Central and Slauson would naturally have taken that course. The bus driver told plaintiff to follow the other passengers. Although plaintiff testified that some of them crossed 58th Street at the point where the bus was stopped, there was no evidence that the bus driver told plaintiff to follow anyone across the street. However, plaintiff stepped out two feet in front of the bus and two feet beyond it and walked into the side of an automobile. Since there was no crosswalk there it was plaintiff's duty to yield the right of way to passing automobiles. Vehicle Code, § 562; Sanal v. Meador, 108 Cal.App.2d 820, 239 P.2d 908. He did not do this. He could have looked to the east while he was still protected by the bus. He did not have to walk out into a position of danger, one from which, as he said, he could not escape after he saw the car. It is clear that he was still moving when he collided with the car since he was not struck by the front of it, and the car did not change direction. Wilson testified under section 2055, Code of Civil Procedure, that he stopped his car behind the bus for a minute or more and was proceeding at not over 10 or 15 miles per hour at the time of the collision. We only mention Wilson's testimony as to his stopping because plaintiff's argument assumes it to be the fact.

[2] We are not enlightened in plaintiff's brief as to how he justifies his conduct except by the statement: "It would, therefore, logically follow that the plaintiff herein had a right to rely on the instructions of the bus driver to alight at the place that he did, and to follow the other pedestrian traffic." It is true, of course, as plaintiff says, that contributory negligence is not established as a matter of law, even upon undisputed facts, if reasonable minds could reach different conclusions upon the question. We are of the opinion, however, that reasonable conclusions, from whatever source, would not be contrary to our own.

[3] If plaintiff's evidence had been to the effect that he merely stepped beyond the bus in order to see whether cars were approaching, and was unable to get back out of the way of a car coming at a wholly unexpected and excessive speed, there might have been some excuse for his conduct. But his estimate of the speed of the Wilson car at 30 to 35 miles per hour was little short of ridiculous. If, as he states in his brief, the car had come to a standstill some 40 feet away it would have been an impossibility for it to be accelerated to the estimated speed. And if, as plaintiff testified, the car came to an immediate stop when he walked into it, the speed of its approach was necessarily moderate. Under the admitted facts plaintiff was guilty of negligence as a matter of law, and since he walked into the car in negligently attempting to cross the street, his negligence was a proximate cause of the accident.

[4] Upon the question of defendants' negligence it is undisputed that the bus driver afforded plaintiff an opportunity to alight, and that he did alight from the bus

in complete safety; plaintiff's conduct after that was his own responsibility. The driver did not direct plaintiff to cross the street where there was no crosswalk, and even if he had done so it would have been a mere act of courtesy, and not in the performance of any duty owed to plaintiff. He was a working man, not a child.

[5] Defendant Wilson had a right to rely upon observance of the law by pedestrians, and, until he knew, or in the exercise of ordinary care would have known that he would not be given the right of way by pedestrians as he passed the bus, he had a right to assume that they would yield him the right of way. We have, then, the case of a man driving a car at a speed which enabled him to stop in a car's length, and alert to his surroundings, charged with negligence by a pedestrian who, in violation of his duty to yield the right of way, walks out suddenly from in front of a standing bus and into the side of the car. Since the streets do not belong exclusively to pedestrians, and they have a duty to obey the law equal to that of motorists, the uncontroverted facts we have related made it the duty of the court to relieve the motorist of responsibility without undue delay. The judgment of nonsuit was proper. Our only difficulty is in understanding why the defendants moved for a nonsuit instead of submitting the case. The bus driver had testified as a witness for plaintiff. Wilson had testified fully as to the circumstances of the accident. No purpose would have been served by producing testimony contradictory of that of plaintiff. And yet defendants moved for a nonsuit and ran the risk of a reviewing court's discovering some possible basis of liability under the rules governing nonsuits. Fortunately for them we are of the opinion that plaintiff's evidence clearly established absence of liability.

In view of our conclusion as to plaintiff's negligence there are no other points requiring discussion.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

PEOPLE v. HEDDERLY.*

Cr. 5056.

District Court of Appeal, Second District,
Division 1, California.

April 6, 1954.

Rehearing Denied April 19, 1954.

Hearing Granted May 6, 1954.

Defendant was convicted in the Superior Court, Los Angeles County, David Coleman, J., of grand theft, and he appealed from an order denying his motion for new trial and the judgment. The District Court of Appeal, Drapeau, J., held that when defendant was charged with the unlawful taking of money belonging to insurance company for which he was handling a group insurance account, exclusion of evidence by which defendant sought to disprove the existence of requisite criminal intent, by showing that premium money was used for costs for which the insurance company had agreed to reimburse him, was reversible error.

Orders reversed and cause remanded for new trial.

1. Embezzlement ⚿11(1)

Insurance agent, specializing in group insurance, who, by virtue of agreement between insurance company, the groups, and the agent, was to collect the premium money and do the necessary clerical work for trustees appointed to collect the premium money, and to pay it to the insurance company, with the trust account being maintained under provision of insurance code making misappropriation of fiduciary funds punishable as theft, was guilty of theft of funds belonging to the insurance company if he converted to his own use money from the trust fund. Pen.Code, §§ 506, 506a; Insurance Code, § 1730.

2. Embezzlement ⚿5

Intent to convert property to the use of the person charged with the unlawful taking is essential to conviction of embezzlement.

3. Embezzlement ⚿39

In prosecution of insurance agent, engaged in handling premiums collected by trustees for members of group insurance plan for payment to insurance company, for grand theft by appropriation of money belonging to the insurance company, wherein it appeared that defendant was collecting premium money for the insurance company from several groups, exclusion of evidence by which defendant offered to prove that money was used for costs of collection for which insurance company had agreed to reimburse him, was error since it related to existence of requisite intent. Pen.Code, §§ 506, 506a; Insurance Code, § 1730.

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* Subsequent opinion 274 P.2d 857.

Bernard C. Brennan, William E. Cornell, and Harold Judson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Dep. Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant, William D. Hedderly, was convicted of ten counts of grand theft. He waived a jury and was tried by the court.

Defendant was an agent of Pacific Mutual Life Insurance Company. He was convicted of taking $22,140 that had been deposited by him in a bank to pay insurance premiums to the insurance company.

Proceedings were suspended as to Counts 1 through 10 of the amended indictment and defendant was granted probation, on condition that he spend six months in the county jail, and make restitution. He appeals from an order denying his motion for a new trial, and from the judgment of conviction.

One major defense has been emphasized and asserted by defendant at every stage in these proceedings: that there is a material variance between the indictment and the proof in the case.

The indictment charges the unlawful taking of money belonging to Pacific Mutual. Defendant contends that the money did not belong to that company.

To understand this defense it is necessary to set forth the relations of defendant, the insurance company, and the persons insured.

Defendant specialized in group insurance, particularly for trade associations. Associated Plumbing Contractors of California desired to secure health, accident, and other insurance, for plumbers employed by members of that association. So arrangements were made for the insurance company to carry the risk, and for the plumbers and members of the association to contribute moneys to pay the premiums therefor.

A trust was set up by indenture, appointing trustees to collect the premium money, and to pay it to the insurance company.

It was agreed among the insurance company, the groups, and defendant that defendant would collect the money, do the clerical work, billing, and general administrative work for trustees of several such groups.

The shortage here involved was in money collected by defendant from the Associated Plumbers group and from the Western States Meat Packers Association, and deposited by defendant in a trustee account in Crocker First National Bank of San Francisco.

It was agreed between defendant and the insurance company that he would be paid 5% for his services in writing the insurance, and 3% more for his services in collecting the premium money.

So, argues the defendant, under the facts in this case he cannot possibly be guilty of grand theft because:

(a) The offense, if any, was embezzlement. An indispensable element of embezzlement is that the person defrauded must have been the owner of, and have title to, the property involved, and

(b) Title to the money here in question was in the trustees for the groups insured and was not in the insurance company at all.

This contention is untenable for the following reasons:

Defendant was entrusted with, and had under his control property belonging to the insurance company, within the meaning of Section 506 of the Penal Code. This section provides that every person who fraudulently appropriates property of another to any use or purpose not in the due and lawful execution of his trust is guilty of embezzlement. Section 506a declares that every such person who collects money shall be deemed to be an agent for the person for whom he collects it.

[1] Section 1730 of the Insurance Code provides that all funds received by any person acting as an insurance agent, broker, or solicitor, life agent of any type, are held by such person in his fiduciary capacity. "Any such person who diverts or appropriates such fiduciary funds to his own use is guilty of theft and punishable for theft as provided by law." The signature card of the trustee account, over defendant's signature, recited: "The above account is maintained under the provisions of Section 1730 of the Insurance Code of California."

A similar contention was made in People v. Applegate, 91 Cal.App.2d 163, 204 P.2d 689. In that case it is said:

"The main point here raised, i. e., that the information was defective because the evidence showed that ownership of the money placed in defendant's hands was in the landowners rather than the Association, appears to us to be more technical than real. * * * (91 Cal.App.2d at page 171, 204 P.2d at page 694.)

* * * * * *

"It is conceded that the property here involved (the money) was not owned by defendant or his Corporation. He did not have title thereto. He merely held it as a trustee as between the owners and the Association. * * * (91 Cal.App.2d at page 172, 204 P.2d at page 694.)

* * * * * *

"In People v. Gallagher, 100 Cal. 466, 35 P. 80, the court sustained a conviction for embezzlement where the money converted had never been in the possession of the person having legal title. In People v. Treadwell, 69 Cal. 226, 10 P. 502, 509, it was held that an endorser of a note who turned it over for collection still had an interest in it sufficient to sustain an averment of an ownership on a charge of embezzlement. Then follows the conclusion that 'Any legally recognizable interest in property is sufficient for that purpose.' In People v. Torp, 40 Cal.App.2d 187, 104 P.2d 542, money was given by one Austin to defendant Torp, an attorney, to pay over to one Gaine for the purchase of certain property. Defendant delivered to Austin a deed executed by Gaine and appropriated the money received therefor to his own use. The information did not allege whose money it was. Defendant there raised the same point as here indicated and argued that it was necessary to establish legal title to the money which was paid by Austin to Torp. The court there held that the evidence showed that defendant held the money as trustee and appropriated it to his own use and not in the due and lawful execution of his trust; that the title to the property involved need not be absolute, for any 'legally recognizable interest' is sufficient; that to establish legal title thereto was unnecessary; that it was sufficient if the money was given to defendant by Austin and was given as a trust fund for a specific purpose; that 'Whether the legal title to the money was in the Austins, the Gaines or Mrs. Costa, is immaterial in this criminal proceeding. As far as the defendant is concerned he had no legal title to the money and his possession was for a limited purpose only. He cannot, in defense of his act, raise the question of title as between others.' See, also, Seavey v. State Bar, 4 Cal.2d 73, 47 P.2d 281; People v. Foss, 7 Cal.2d 669, 62 P.2d 372. * * *" 91 Cal.App.2d at pages 172, 173, 204 P.2d at pages 694, 695.

The evidence in support of the people's case is substantial and sufficient. Indeed, defendant makes no contention to the contrary. Testimony of auditors showed the amount of shortage in the trustee account. Defendant was the only person authorized to draw upon it. His conduct in destroying some of his records, and in selling his house and paying to the insurance company what he thought the shortage then was was evidence of knowledge of guilt.

The only argument defendant makes on this appeal is the same technical one of ownership of the money in the trust account. Therefore, except for one thing, the case could be left at this point with an affirmance. Let's see if we can make this clear.

The record has been examined from beginning to end, including the exhibits and the contents of the judgment roll in the Clerk's office. Some parts of the record have been gone over more than once. It presents a baffling question. What really did happen to the money defendant is charged with taking?

Defendant also collected premiums for several other groups insured with Pacific Mutual. The business grew rapidly. It was a new type of business for the insurance company.

The trial judge commented that the accounts were loosely kept, to say the least.

Defendant has insisted all the way through the case, even in his statements to the Probation Officer after his conviction, that the collection of the premiums cost him more than the 3% allowed him by the insurance company; that when he brought this situation to the attention of his superiors in the insurance company he was told time and again not to worry about that, to keep right on going, that losses in the collections would be taken care of by the insurance company; and that it was his constant practice to intermingle funds in the trust accounts of the several groups. He testified that sometimes he would put in money and sometimes he would take money out of one or more of these accounts, including the account here in question, and that the insurance company well knew at all times what he was doing. He also testified that he put back into these accounts all of his commissions received from time to time except what was required for his living and business expenses.

From the "feel" of this case which the record discloses, intuition of experience that outruns analysis, this Court is of the opinion that there may be something lacking in that essential requisite in a criminal prosecution that always a defendant must be found guilty beyond all reasonable doubt.

Here we have an able, well-educated man, with a wife and three children, striving to build up a business. He spent three years in military service in the second world war as a tanker overseas. His friends believe in him. His brother offered to turn over his restaurant to help his finances. His wife wrote a letter to the Probation Officer that in terms of trust and confidence in her husband has strengthened the faith of this Court in the innate goodness and loyalty of womankind. Even the workmen, beneficiaries of the group insurance, have expressed their confidence in defendant.

Undoubtedly the trial judge and the Probation Officer felt that there were ameliorating circumstances in defendant's case. The Probation Officer recommended probation with a fine. The trial judge followed that recommendation, but with six months in the county jail. He said it didn't seem right to treat the theft of over $20,000 as lightly as the Probation Officer recommended when every day he was sending men to the penitentiary for thefts of sums trifling when compared with that amount.

Nothing in the record shows any undue diversion of money to defendant's personal use. When he bought his home he borrowed a large part of the purchase price. When he sold it at a profit, he turned the money over to the insurance company.

Defendant's iteration and reiteration of a pseudo defense when he said over and over again "Suppose I did take the money, I couldn't be guilty because I didn't take it from the insurance company?" tended to obscure what may be a real defense. No one who listens to that kind of a defense can have much sympathy for the man who makes it. It is like one who has lost the focus of truth, and sees all things out of perspective.

[2] It has always been the law of embezzlement that intent to convert property to the use of the person charged with the taking is essential. In one of the first definitions of embezzlement by our Supreme Court in California, in Ex parte Hedley, 31 Cal. 108, it is said that a defendant charged with embezzlement "must convert the money to his own use, with the intent to steal and embezzle it."

[3] Therefore, it was error for the trial court to sustain objections to evidence offered by defendant as to what was done in collecting premium money of other insurance groups that he was taking care of for the insurance company; to narrow the issues to the one trustee account of the two groups already mentioned.

For example, consider the following from the reporter's transcript of defendant's testimony on direct examination:

"Q. In 1951, did you sell a plan to the Arizona Plumbers' Union? A. I did.

"Mr. Loucks. I will object to the question as incompetent, irrelevant and immaterial.

"The Court. Sustained.

"Q. By Mr. Judson. Did you open an office, or did Group Consultants open an office, in Phoenix, for the purpose of collecting those premiums?

"Mr. Loucks. I will object to the question as incompetent, irrelevant and immaterial.

"The Court. Sustained.

"Q. By Mr. Judson. And did you sell a plan to the Plumbers' Union Local No. 38, in San Francisco?

"Mr. Loucks. I will object to the question as incompetent, irrelevant and immaterial. I am assuming that that is not one, the A.P.C. contract. Is that right, Mr. Judson?

"Mr. Judson. Yes, that is correct, uh huh.

"Q. By Mr. Judson. Did you sell a plan to the Union Local—Plumbers' Union Local Nos. 342 and 444, in Oakland, California?

"Mr. Loucks. I will object to the question on the ground it is incompetent.

"The Court. Are they in this group plan?

"Mr. Judson. No, they are not, your Honor.

"The Court. Well, counsel knows the Court's ruling on those matters. I think it is trespassing on the ruling of the Court."

Defendant is entitled to have his defense of intent fully presented to a judge or jury. He has the right to prove, if he can, the agreement for reimbursement that he testified to; and to also prove, if he can, what caused the shortage in the trustee account that he is accused of converting to his own use. If that money was used to pay expenses of collection in other group plans and if defendant was promised reimbursement, it goes to the vital question of intent. On a new trial of the cause that must be ordered, the entire history of defendant's transactions with the insurance company and with all the groups for which he made collections shall be at large.

Defendant purports to appeal from the "judgment" of conviction, but in the instant case the proceedings were suspended and no judgment was pronounced, defendant having been granted conditional probation. However, under the provisions of section 1237 of the Penal Code, as amended in 1951, an order granting probation "shall be deemed to be a final judgment within the meaning of this section".

For the foregoing reasons, the order granting probation and the order denying defendant's motion for a new trial are, and each is, reversed and the cause remanded for a new trial.

WHITE, P. J., and DORAN, J., concur.

124 Cal.App.2d 280

GRAY v. SUTHERLAND et al.

Civ. 15553.

District Court of Appeal, First District,
Division 2, California.

March 31, 1954.

Action by corporate president against assistant secretary for breach of contract to purchase corporate stock. The trustee in bankruptcy of the corporation intervened seeking to recover amounts allegedly withdrawn by the corporate officers from the company for the purpose of allegedly paying part of the purchase price of the stock. From a judgment in the Superior

Court for the County of Alameda, Chris B. Fox, the plaintiff and defendant appeal. The District Court of Appeal, Nourse, P. J., held that the trustee in bankruptcy was entitled to recover the withdrawals on the ground that they were unauthorized under the code section, and that inasmuch as the officers acquired the fund in violation of the fiduciary duty upon a constructive trust, the trustee was also entitled to recover the fund in behalf of all creditors under the common law.

Judgment affirmed.

1. Bankruptcy 🔑304

In action for breach of contract to purchase corporate stock wherein trustee in bankruptcy of the corporation intervened seeking to recover a sum of money allegedly withdrawn by the seller and buyer from the corporation for the purpose of paying part of the purchase price of the stock, finding supported judgment in favor of the trustee.

2. Bankruptcy 🔑282
Corporations 🔑153

"Unauthorized dividends" within code section authorizing recovery thereof by the corporation or its trustee in bankruptcy with interest are dividends not lawfully declared and include illegal distributions of capital to stockholders. Corporations Code, §§ 827, 1510.

See publication Words and Phrases, for other judicial constructions and definitions of "Unauthorized Dividends".

3. Corporations 🔑152

Authority to declare dividend and to authorize withdrawals or distributions is vested in the board of directors. Corporations Code, §§ 800, 824.

4. Corporations 🔑153

The Code section authorizing recovery of unauthorized dividends from stockholders with knowledge thereof is not limited to withdrawals or distributions when not made out of available surplus or profit or when there is reasonable ground to believe that distribution will endanger the financial position of the corporation. Corporations Code, §§ 1500, 1501, 1510.

5. Bankruptcy 🔑282
Corporations 🔑153

Where there was an absence of authorization by the board of directors for withdrawals from the corporation by the president and stockholder which were used to make payments on an agreement to purchase stock by corporate secretary from the president, president was charged with full knowledge of the withdrawals in view that they were made for his personal use and benefit and not for the benefit of the corporation, and restitution was required in suit by trustee in bankruptcy of the corporation. Corporations Code, §§ 1500, 1501, 1510.

6. Corporations 🔑153

There is no presumption in a closed corporation that informal withdrawals under whatever name made are presumed to be valid dividends in the sense of authorized distribution of surplus or profit. Corporations Code, §§ 800, 824, 1500, 1501, 1510.

7. Corporations 🔑152

Under the code sections requiring declaration, authorization or ratification of dividends and withdrawals by the board of directors, a withdrawal without such authorization is prima facie unlawful, and no exception is made for closed corporations. Corporations Code, §§ 800, 824.

8. Corporations 🔑152

While a certain informality in declaring dividends is excused under certain circumstances in closed corporations when no interest of creditors are involved, corporation must comply with a statutory provision as to the manner of declaring dividends. Corporations Code, §§ 800, 824.

9. Corporations 🔑153

Presumption of legality attaching to a declaration of dividends by directors as prescribed by the code section does not attach to an informal taking by stockholders in violation of the statute and the burden to show circumstances excusing the violation and legalizing the taking is on those committing the violation. Corporations Code, §§ 800, 824–826, 1500, 1501, 1510.

10. Bankruptcy 🔑282

Trusts 🔑102(1)

Where corporate president and assistant secretary caused withdrawal of corporate funds without corporate authorization for the purpose of making installment payments on the purchase price of stock which the secretary had purchased from the president, the withdrawals were essentially a tortious taking imposing a common-law liability because of breach of a fiduciary duty and officers held funds upon a constructive trust and the trustee in bankruptcy of the corporation was entitled to recover in behalf of all the creditors.

11. Bankruptcy 🔑282

In action by trustee in bankruptcy of corporation to recover withdrawals used to make payments on a contract to purchase stock in the corporation, liability of the buyer of the stock was not dependent on his being a director and he could be held liable for breach of fiduciary duty as assistant secretary of the corporation by colluding with the president and sole stockholder as a disloyal fiduciary without being a fiduciary himself.

12. Common Law 🔑11

The common law is not repealed by implication or otherwise, if there is no repugnancy between it and the statute and it does not appear that the legislature intended to cover the whole subject.

13. Common Law 🔑11

Statutes are not presumed to repeal the common law otherwise than as the act expressly provides.

14. Corporations 🔑312(3)

The code sections regulating liability of corporate directors based on authorization of certain unlawful corporate acts do not regulate torts committed by them in any other manner, whether in their capacity of directors or not, and the sections are not inconsistent with the common-law liability for the unlawful taking of corporate funds by director in his own behalf and in violation of his fiduciary duty. Corporations Code, §§ 824–827.

15. Bankruptcy 🔑305

Where corporate trustee in bankruptcy recovered against corporate president and assistant treasurer for alleged unlawful withdrawals of corporate funds, contention of secretary that to avoid a multiplicity of suits, the judgment should have provided for the president's liability over to the secretary in case the latter should satisfy the judgment as authorized by section 827 was not sustained where the judgment was not based on any authorization or ratification by the secretary prohibited by section 824 so that section 827 had no application. Corporations Code, §§ 824, 827.

◆

Fitzgerald, Abbott & Beardsley, Oakland, for appellant James C. Sutherland.

Stanley D. Whitney, Alameda, Stanley C. Smallwood, Oakland, for appellant Ralph M. Gray.

Jerome L. Schiller, San Francisco, for respondent Samuel Eckstein, etc.

NOURSE, Presiding Justice.

This is an appeal on the judgment roll only. Although the case started out as an action of Gray against Sutherland for breach of a contract to purchase from Gray all the stock of Gray Manufacturing Company (further called the Company), the appeal is mainly by Gray and Sutherland from a judgment for Eckstein, the intervener, Trustee in Bankruptcy of said Company (further called the trustee), who recovered $7,000 withdrawn by Gray and Sutherland from the Company for the purpose of paying part of the purchase price of said stock.

On May 21, 1947, Gray and Sutherland signed an agreement by which Gray sold his 1,500 shares of stock of Company to Sutherland for $15,000, $2,500 down, the balance $1,000 a month with interest starting July 15, 1947, seller to retain title to the stock until fully paid for, buyer to have the management of the corporation from the execution of the agreement, seller to obtain consent for the transfer of the stock from the Commissioner of Corporations, the stock being held in escrow by order of said commissioner.

Gray's amended complaint alleged default in the payment of the instalment of February 15, 1948; Sutherland's answer alleged the invalidity of the agreement because of failure to obtain in advance the consent of the commissioner as required by the escrow, that the subsequent consent obtained November 13, 1947, was ineffectual and that defendant had rescinded on the ground of the invalidity, adding a cross-complaint for the $2,500 down payment. When the trustee intervened the complaint and cross-complaint were dismissed.

The complaint in intervention, filed May 6, 1949, alleged Company's adjudication in bankruptcy on March 8, 1949, and the appointment of the trustee on April 27th; that Gray was President, Director and holder of all 1,500 shares of stock of Company; the execution of the stated agreement of sale of stock; that after the execution of the agreement Sutherland became Assistant Secretary and Director of said Company and that Gray and Sutherland managed and controlled the Company and completely dominated its Board of Directors and management; that Gray and Sutherland orally agreed to withdraw from the treasury funds wherewith to make the payments to be made by Sutherland under the agreement; that accordingly from July, 1947, until January, 1948, they made seven withdrawals of $1,000 each; that no consideration was received by Company for said withdrawals and that they were made solely for the use and personal benefit of Gray and Sutherland.

The answers to the complaint in intervention differ. Gray admits to be stockholder of record but denies ownership because of the agreement of sale, alleges that about May 21, 1947, the management of Company passed to Sutherland and that since then Sutherland only has been in active control; he denies the oral agreement to withdraw funds from Company, admits having received $7,000 from Sutherland but denies knowledge of its source. Sutherland denies the validity of the sale, admits an oral agreement that the installment payments due to Gray would be made by Company and alleges that this understanding was an inducement for the signing of the sales agreement and that he did not know that the sales agreement and the payments made by the Company thereunder were illegal, that he never actually managed or controlled Company, that he accepted the office of Assistant Secretary and Director in the belief that the sales agreement was valid, that he did not cause the payment from Company funds of the $7,000 withdrawn to himself or at all, but admits that they were paid by Company to Gray.

Both Gray and Sutherland amended their answers to the complaint in intervention to set up counterclaims against the corporation in the form of common counts. The answers of the trustee to said counterclaims allege among other things the defenses that the counterclaims are provable in bankruptcy and only entitled to the same percentage as other general creditors of the bankrupt company, whereas the claim of the trustee is one to recover assets illegally removed from Company having the character of trust funds for the benefit of creditors of Company, which trustee is entitled to recover without any off-set which would give claimants preference over other creditors and further that there is no mutuality between the claims of the trustee and the counterclaims.

The findings of the court comprise approximately the truth of the stated allegations of the complaint in intervention of the trustee (there is no finding that Gray and Sutherland dominated the Corporation) and of his stated defenses to the counterclaims and further that both Gray and Sutherland had full knowledge of the withdrawals from the treasury of the Company and that they were made with the intent to apply them for their own use and benefit and not for the use and benefit of Company; that the withdrawals were never authorized or ratified by the Board of Directors of Company; that when the funds were withdrawn there were existing creditors of the Company which have never been paid; there are also findings as to the escrow order and regulations, and the absence of prior consent and granting of subsequent consent by the commissioner.

The conclusions of law are in substance: 1. That Gray and Sutherland took and withdrew the seven amounts of $1,000 each from the treasury of Company "without right, leave or authority" and without consideration solely for their own personal benefit. 2. That the sale contract was invalid. 3. That the sums withdrawn were trust funds for the benefit of the creditors of Company and that the trustee is entitled to have them without any off-set. 4. That trustee have judgment for the sums withdrawn with 7% interest from the date of each withdrawal. 5. That Gray and Sutherland take nothing.

Gray and Sutherland have filed and briefed their appeals separately. Both contend that the allegations of the trustee and the findings are insufficient to state a cause of action for statutory liability under the Corporations Code or the corresponding previous provisions of the Civil Code (the Corporations Code went into effect on September 19, 1947, and some withdrawals were made before, some after that date), and that these statutory provisions are so exhaustive that no common law liability can exist apart from them.

[1] Appellants do not attack any of the findings, which contain facts not alleged in the pleadings, as being outside the issues of the case. The only question before us on this judgment roll appeal is, therefore, whether the findings support the decision. We have concluded that they do.

Both appellants urge at length that the findings are insufficient as a basis for liability under sections 824–826, Corporations Code. This may be conceded. Under those sections a director who authorizes or ratifies the unlawful withdrawal or distribution of assets of a corporation among its stockholders is held liable only "for its debts and liabilities existing at the time of the violation and for the full amount of any loss sustained by such holders and owners of shares, other than shares upon which any such payment or distribution was made * * *." Here there were no such innocent shareholders and no amount of debts or liabilities for which defendants could be liable was found. The sections are moreover clearly inapplicable because the liability in this case is not based on any ratification or authorization by defendants as directors, authorization or ratification by the Board of Directors having been expressly negatived in the findings.

[2] Liability of appellant Gray, who was found to be the only stockholder, can be based directly on section 1510, Corp. Code, which reads in part: "Any shareholder or owner of shares who receives any dividend not authorized by this division, except a distribution covered by Section 5012, with knowledge of facts indicating the impropriety thereof is liable to the corporation or to its receiver, liquidator, or trustee in bankruptcy for the amount so received by him with interest thereon at 7 percent a year until paid." Before its enactment sec. 364, Civil Code, as amended in 1945, Stats. 1945, p. 2451, contained a provision so similar that it need not be separately stated. Prior to the 1945 amendment it had been held with respect to section 364, supra, in Oilwell Chemical & Materials Co. v. Petroleum Supply Co., 64 Cal.App.2d 367, 374, 148 P.2d 720, that unauthorized dividends in the meaning of that section were dividends not lawfully declared and also all illegal distributions of capital under whatever name to stockholders. The same must apply to section 1510, Corp.Code, which is derived from section 364, Civil Code. Also in the Corporations Code and in its section 1510 itself there are indications of said wide meaning of dividends as used in said section. The exception made in the section itself for "a distribution covered by Section 5012" does not relate to a dividend in the narrow meaning of a distribution of surplus. Moreover the fact that section 827, Corp.Code, gives a wide extent to the duty of the shareholder who has knowingly received an unauthorized dividend, withdrawal or distribution to reimburse a director who has satisfied a liability based on such violation indicates that the direct duty of the shareholder to make restitution to the corporation or its trustee will be equally extensive.

[3–5] Appellants contend that a dividend, withdrawal or distribution is only unauthorized or improper in the sense of section 1510, Corp.Code, when it is not made out of available surplus or profits as provided for in section 1500, Corp.Code, or when there is reasonable ground to believe that it will endanger the financial position of the corporation as stated in section 1501, Corp.Code. The language of section 1510 is not so restricted. A stockholder will also have to repay a dividend or withdrawal which he received knowing that it violated any other provision of the General Corporation Law, Title I, Div. 1, sections 100–6804 of the Code, especially knowing that it was not legally declared, authorized or ratified. The authority to declare a dividend and to authorize withdrawals or distributions is vested in the Board of Directors, sections 800, 824, Corp.Code, previously sections 305, 363, Civil Code; Meyers v. El Tejon Oil & Refining Co., 29 Cal.2d 184, 174 P.2d 1. In the Meyers case the dividend, although irregularly declared in the absence of a duly held meeting of the Board of Directors, was regarded as authorized and valid because of ratification by all directors. Here absence of authorization or ratification by the Board of Directors is expressly found. Appellant Gray's knowledge of the lack of authorization or ratification is necessarily implied in the findings that he was a director, President and sole stockholder of the corporation, and that he had full knowledge of the withdrawals and of the fact that they were made for the personal use and benefit of appellants and not for the benefit and use of the corporation. These findings support a judgment of restitution under sec. 1510, Corp.Code, in the absence of findings constituting a defense to such action, which findings are not present in this case.

Appellants contend that in a closed corporation, like the one here involved, no formal meetings and resolutions of directors declaring or authorizing dividends or withdrawals are required and that in such corporations any withdrawal made under whatever name without corporate procedure is lawful and proper, unless the corporation or its trustee attacks it on the ground that such withdrawal violates sec. 1500 or sec. 1501, Corp.Code, and proves those allegations. As only California authority appellants cite Brainard v. De La Montanya, 18 Cal.2d 502, 116 P.2d 66, in which case it is said, 18 Cal.2d on page 511, 116 P.2d on page 70: "It is immaterial that no formal directors' meetings were held. While it is true that a corporation ordinarily acts by resolutions which are adopted at formal meetings of its board of directors and are entered in its minutes, it is also true that decisions reached by all the directors and stockholders of a closed corporation at informal conferences will be binding upon the corporation when, by custom and with the consent of all concerned, corporate formalities have been dispensed with and the corporate affairs have been carried on through such informal conferences." It is clear at first sight that the language quoted from the Brainard case is far less drastic than the rule advocated by appellants and that the quoted statement is of no avail to them because in this case there are no findings express or implied that all directors informally agreed to the withdrawals and that such informal treatment had been sanctioned by custom and consent of all concerned. Moreover, it is pointed out in the Brainard case that there was no proof that there were any creditors at the time of the transaction, whereas in this case there is a finding that there were such creditors who were never paid.

[6, 7] We do not agree with the contention that in closed corporations informal withdrawals under whatever name made are presumed to be valid dividends in the sense of authorized distributions of surplus or profits. That contention finds no support in the Corporations Code and as a matter of policy it is objectionable. As section 800 and 824, Corp.Code, require declaration, authorization or ratification of dividends and withdrawals by the Board of Directors, a withdrawal without such authorization is prima facie unlawful and no exception is made in the code for closed corporations. To accept for such corporations that the sole stockholder or the combined stockholders may take funds of the corporation for their private use at whatever time and so often as desired without any corporate formality or classification and that such takings are valid and binding unless the corporation or its trustee alleges

and proves as to each taking a violation of section 1500 or 1501, Corp.Code, would be an invitation to mismanagement. The absence of personal liability of those who are in business as a closed corporation requires special attention to the keeping intact of the assets of the corporation especially when, as here found, there are unpaid creditors. The rule advocated by appellants must impair the attention to and care of the safety of creditors.

[8,9] Although, according to the weight of authority, a certain informality in declaring dividends is excused under certain circumstances in closed corporations when no interests of creditors are involved. See Fletcher, Cyclopedia of Corporations, sec. 5350; 18 C.J.S., Corporations, § 465; 13 Am.Jur., Corporations, sec. 671, it is also stated that the corporation must comply with statutory provisions as to the manner of declaring dividends. 11 Fletcher, supra, p. 879; 18 C.J.S., supra, Corporations, § 465, p. 1106; 13 Am.Jur., supra, p. 666. We do not find authority for any binding rule of common law granting the excessive freedom which appellants claim, extending even to withdrawals which are not made under the guise of distribution of surplus. Wide definitions of the term dividend sometimes found, and urged by appellants, are not decisive. The term dividend is used in different meanings as covering a larger or smaller field. Such different use appears even in our Corporations Code, where, as we have seen, dividend in sec. 1510 includes all withdrawals or distributions whereas in sections 824–827 the words dividends, withdrawals and distributions are found in juxtaposition. What for some purpose or statutory provision (for instance for tax statutes to which many cases cited in the texts relate) is considered a dividend, need not be considered a dividend with respect to the excuse of informality or the presumption of legality. It is our opinion that the presumption of legality which attaches to a declaration of dividend by directors in the manner prescribed by statute, 13 Am.Jur. 665–666, does not attach to an informal taking by stockholders in violation of the manner prescribed by statute and devoid of even the semblance of a distribution of surplus, and that the burden to show circumstances which may excuse the violation and legalize the taking in such case is on those who committed the violation.

It does not seem necessary in this case to decide exactly what circumstances if found would have had such effect because of the total absence of any finding which could be effective for that purpose, combined with the conclusion of law that the takings were "without right, leave or authority." The answers to the complaint in intervention show that neither appellant made any contention that the takings were legal and valid as dividends. Gray denied the taking of the amounts and denied knowledge of where the seven payments of $1,000 made by Sutherland on their contract came from. Sutherland admitted that the payments of $1,000 were made by the corporation to Gray and that it was agreed between him and Gray that the corporation would so pay the price of the stock under their contract, but denied that he caused the payments or that he had knowledge of the illegality of the contract or of the payments made under said contract by the corporation to Gray. Each of the two men tried to put the blame on the other. All the nice legal theories and arguments presented by appellants in this court are belated attempts to cover up the evidently unjustifiable character of the taking, for which the court below found both to be responsible.

[10] Whereas the responsibility of Gray can be based on section 1510, Corp.Code, as we held before, the responsibility of Sutherland, who was not found to be a stockholder, must be based on the general law. Nevertheless the position of the two appellants under the findings is wholly similar. If Gray's responsibility was not specifically covered by sec. 1510 he would at any rate be liable under the general law. Although Gray was the stockholder of record, Gray and Sutherland together had the full ownership rights, Sutherland having a growing, Gray a diminishing equity in the stock. It was found that they, Gray being President and Director, Sutherland, Assistant Secretary and Director, together, pursuant to their agreement, caused the withdrawals of corporate funds to be made

without the required corporate authorization, and for the purpose of using them to their personal advantage. The takings were intended to benefit Sutherland as well as Gray because they would serve as installment payments on the purchase price of the stock which Sutherland had bought from Gray. The fact that Sutherland afterwards chose to attack the validity of the agreement does not change the character of the taking. It was essentially a tortious taking by two joint tort feasors in common agreement and for their common advantage from a corporation to which they stood in a fiduciary relation. There is thus common law liability, both because of tortious acquisition in the manner of conversion, Restatement Torts, sec. 222; Restatement Restitution, sec. 128, and because of a breach of a fiduciary duty, Restatement Restitution, sec. 138. The appellants hold the funds acquired in violation of their fiduciary duty upon a constructive trust, Restatement, Restitution, sec. 190; Abbot Kinney Co. v. Harrah, 84 Cal.App.2d 728, 734, 191 P.2d 761, and the trustee is entitled to recover the trust fund in behalf of all creditors. ("If, after satisfying their claims, any of the fund remains, it will belong to the stockholders.") Dean v. Shingle, 198 Cal. 652, 659, 661, 246 P. 1049, 1053, 46 A.L.R. 1156. As joint tort feasors having acted in concert appellants are equally liable for the entire taking. Reid v. Robinson, 64 Cal.App. 46, 58, 220 P. 676; Prosser, Torts, p. 329.

[11] Appellant Sutherland's inconsistent contentions that there is no finding that he was a director at the time of the withdrawals and that as a director he is only subject to the limited statutory liability of sections 824–827, Corp.Code, for which the findings do not constitute a sufficient basis, are both without merit. The first contention is based on the fact that the finding in question (VII) only states that he became director "after the execution of said agreement." Considering the findings in their entirety, among which the provision of the agreement that upon the execution of the agreement the management of the corporation shall go to the buyer, it is clear that "after" in this finding is used in the meaning of "upon" or "immediately after." Moreover Sutherland's liability as joint tort feasor (in the manner of conversion) is not dependent on his being a director and he can even be liable for breach of fiduciary duty by colluding with a disloyal fiduciary without being a fiduciary himself. Restatement Restitution, sec. 138(2).

[12, 13] Neither is there any merit in the contention that his liability can only be based on the stated statutory provision and not on the common law. The correct rule as to the relation of the common law and the statutory law is stated in part as follows in 15 C.J.S., Common Law, § 12, p. 620: "* * * the common law is not repealed, by implication or otherwise, if there is no repugnancy between it and the statute, and it does not appear that the legislature intended to cover the whole subject." Among the authorities cited in support of the above statement is In re Estate of Elizalde, 182 Cal. 427, 188 P. 560. See also In re Guardianship of Reynolds, 60 Cal.App.2d 669, 674, 141 P.2d 498, 500, where it is said: "Statutes are not presumed to alter the common law otherwise than the act expressly provides".

[14] The provisions of sections 824–827, Corp.Code regulate no more than the liability of directors in so far as based on their authorization or ratification of certain unlawful corporate acts in their capacity as directors and do not regulate torts committed by them in any other manner, whether in their capacity of directors or not. Although these code sections may well be intended to limit and exhaust the liability for these special acts of authorization and ratification, they are not inconsistent with any common law liability for unlawful taking by a director in his own behalf in violation of his fiduciary duty. There is no more reason to consider Sutherland's liability in this case, where he cooperated with the only stockholder in illegal withdrawals to their mutual advantage, as limited by sections 824–827, Corp.Code, than the liability of a director who has simply stolen from his corporation.

The judgment for the trustee both as against Sutherland and against Gray will be affirmed.

[15] In an additional appeal against Gray, Sutherland contends that to avoid a multiplicity of law suits the judgment should have provided for Gray's liability over to Sutherland in case Sutherland should satisfy the judgment. This contention is solely based on sec. 827, Corp.Code, which gives to a director who satisfies a judgment based on violation of sec. 824 a right of reimbursement against the shareholders who actually received the benefits of the violation. As the judgment for the trustee is not based on any authorization or ratification by Sutherland prohibited by sec. 824, but on wrongful taking in his own behalf, Corp.Code, sec. 827, has no application.

Judgment affirmed.

DOOLING, J., and O'DONNELL, J., pro tem., concur.

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124 Cal.App.2d 477

McCREARY et ux.

v.

MERCURY LUMBER DISTRIBUTORS.

Civ. 8361.

District Court of Appeal,
Third District, California.
April 9, 1954.

Suit for judgment determining that a timber contract between plaintiffs and defendants had been rescinded and quieting title in plaintiffs. The defendant filed a cross complaint for declaratory relief in nature of construction of the timber contract. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeals, Schottky, J., held that evidence warranted finding that the timber contract had been rescinded by mutual agreement, upon execution of a new contract.

Judgment affirmed.

1. Appeal and Error 🔑931(1)

On appeal, all conflicts in the evidence must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the findings, if possible.

2. Logs and Logging 🔑3(15)

In action to quiet title and to have declared terminated a contract by which defendant was to remove and buy timber from the land in question, wherein defendant cross complained for declaratory relief in the nature of construction of the timber contract, evidence warranted finding that the timber contract was terminated and canceled by mutual agreement made between plaintiff and the authorized agents of defendant.

3. Corporations 🔑426(10)

Where general manager of corporation had negotiated with plaintiff for original timber removal and purchase contract, and corporation had approved the agency of the general manager and that instance by accepting the contract, the general manager's ostensible authority to negotiate for a new contract was established, and corporation was not entitled to thereafter urge that general manager exceeded his actual authority when he agreed with plaintiff to the termination and cancellation of old timber contract, and execution of a new one.

4. Evidence 🔑442(1)

When parties have not incorporated into an instrument all of the terms of their contract, evidence is admissible to prove the existence of a separate oral agreement as to any matter on which the document itself is silent and which is not inconsistent with its terms.

5. Evidence 🔑442(1)

Where timber purchase and removal contract contained no provision regarding the time within which the removal was to be made by defendant, parol evidence was admissible to establish a separate oral agreement relative to removal time, making the time of the essence, and rendering the contract subject to termination or cancellation because of default.

6. Logs and Logging ⚿3(14)

Where time is of the essence with respect to a contract for sale of timber as and when removed by defendant, a default in removal justifies a rescission.

7. Contracts ⚿254, 256

An abandonment of a contract may be implied from the acts of the parties and this may be accomplished by the repudiation of the contract by one of the parties and the acquiescence of the other party in such repudiation, and words of parties to effect that they mutually rescind the contract are not necessary, but rescission may be proved by other words and acts.

8. Logs and Logging ⚿3(14)

Where a promise of buyer under contract for sale of timber as and when removed, to remove the timber with reasonable dispatch is a material inducement to the sale, and buyer does not conduct the removal operations with reasonable diligence, a unilateral rescission by the seller for material failure of consideration is warranted. Civ.Code, § 1689, subd. 2.

◆

Joseph G. Babich, Sacramento, for appellant.

Spurr & Brunner, Ukiah, for respondents.

SCHOTTKY, Justice.

This is an appeal from a judgment holding that a timber contract between the parties had been rescinded and quieting title to the real property involved.

The appellant is the K. D. Lumber Co., sued as and doing business under the name of Mercury Lumber Distributors. Appellant was the only party defendant to answer or appear at the trial.

Appellant outlines its contentions on appeal as follows:

> "It is appellants' position that the uncontradicted evidence of all parties was that the contract of September 27, 1950 was not terminated and cancelled by mutual agreement, which was the gravamen of the complaint, and that the contract of September 27, 1950 could not be modified, altered, or enlarged by parol evidence so as to create a time limit within which the downed timber had to be removed; and that it was not in default in payments for timber removed and that even if there had been a time limit for the removal of downed timber that any default could be compensated for in damages and did not justify a rescission."

Before discussing these contentions we shall summarize briefly the evidence as shown by the record, bearing in mind the familiar rule that all conflicts in the evidence must be resolved in favor of the prevailing party.

On September 27, 1950, appellant and respondents entered into a written agreement for the purchase, by the former from the latter, of the merchantable fir and pine timber on said lands of respondents. This included, in addition to growing timber, some logs and tops from trees felled during previous logging operations on the land and allowed to remain there. The contract was prepared by appellant and omits provisions usually contained in such contracts for the protection of the seller. The contract provides for the purchase and sale, describes the lands, defines the term "merchantable timber," specifies a purchase price of $2 per thousand board feet "on all logs to be felled," and $1 per thousand for usable timber previously felled (usability to be determined by appellant), provides that a Spaulding's loggers' scale shall be used in making measurements, provides that payments (based on footage determined by mill scale) are to be made by appellant on the 5th and 20th days of each month for timber removed during the preceding half-month, provides for rights-of-way for appellant's operations, and requires appellant to carry workmen's compensation and other insurance on its operations, at no cost to respondents.

The contract is silent regarding the time within which appellant was to remove the timber (either the standing or downed timber), and this time factor provides one of the chief points of contention between the parties. There is the usual conflict in the evidence as to what was said. Mr. McCreary testified that during negotiations for the contract he told appellant's representatives, Mr. Howard and Mr. Olson, that he wanted the downed timber removed as soon as possible because it would "go bad," and that they said they would take it out as soon as they possibly could. His testimony also shows that the removal of the downed timber was one of his main reasons for entering into the contract. Mrs. McCreary was present and heard this conversation and she confirmed her husband's testimony that Howard and Olson promised to get the downed timber out as soon as they could. She testified that respondents understood this to mean that this timber would be removed right away, within the next year (1951) at least, and she also testified that the price for the downed timber was fixed at $1 per thousand because respondents wanted to get rid of it soon. According to Mr. McCreary, the time required to remove the standing timber was also discussed and it was estimated that it would take about two years. Both Howard and Olson testified that they told Mr. McCreary that they had other timber to get out first, and that they would take his out when they could get to it. Both denied that any specific time was agreed upon or even mentioned. Howard admitted that he discussed the matter of spoilage (of the downed timber) with McCreary at the time, but explained that the timber had already been down for two or three years, that the fir would not deteriorate much if it took a little longer to get it out, and that the pine was already blue and unmerchantable. Olson, also, testified that the pine logs had started to blue. This was controverted by Mrs. McCreary who testified that the downed timber had been cut the previous year (1949), and by Vernon Miller who logged part of respondents' land for appellant and who testified that the downed timber was still good in October, 1951, but was unmerchantable in the spring of 1952. Howard was appellant's general manager, and Olson was the manager of appellant's local sawmill at the time.

The record shows that appellant did not commence logging operations under the contract until July, 1951, although operations could have been conducted for thirty to sixty days during the remainder of the 1950 season and although appellant started operations on government land as early as May, 1951. The testimony is not entirely clear, but it appears that this government tract was adjacent to lands covered by the contract and that appellant intended to move from the one tract onto the other, logging as it went. The boundary between the two tracts was in dispute and appellant discontinued operations there, apparently after it had taken approximately 67,000 board feet of logs out of the disputed strip. Appellant did not do the actual logging, but instead had it done by a contract logger. Logging operations under the contract were stopped sometime after their commencement in July, and were not resumed until mid-October, 1951, when Vernon Miller went onto the property and logged it for about three weeks. Guy McCloud, who was appellant's millwright at the mill, testified that Miller took out a total of 288,000 board feet from respondents' property. Inasmuch as Howard estimated that the total amount taken out under the contract was 200,000 to 250,000 board feet, the July operation could not have been very productive. The amount of timber left to be removed was variously estimated at over a million board feet by Howard, and at a million and a half to two million by Miller. Howard thought that it would take appellant two years to remove it.

Miller quit logging, after three weeks, because he was not being paid. It appears from Howard's testimony that appellant's sawmill was being operated by Lou Azrow and that it was Azrow who was supposed to pay Miller for the logging. In any event, the logging operations stopped in early November and Miller's equipment lay idle on the property for five weeks before it was removed. Miller testified that there was good weather for at least thirty days while the equipment was idle and that he could have taken out more than 100,000 board feet of logs each week. Appellant's sawmill had a capacity of between 15,000 and 20,000 feet, log measure, per day.

Respondents became dissatisfied with appellant's performance, and early in December, 1951, they sought to rescind the contract and they also locked the gate across the road leading into the timber land. A letter of rescission, dated December 3, 1951, was prepared by respondents' attorneys, and presumably was mailed to appellant at an Oroville, California, address. A copy of the letter was put into evidence (Plaintiffs' exhibit 2) and it claims, as grounds for rescission, appellant's delay in removing the timber and its failure to make payments as required by the contract. Apparently, appellant did not receive the letter, but Howard and McCloud were told about it, and were shown a copy during a conference held in the office of respondents' attorneys on December 11th. There is evidence that appellant was in default in its payments, and on December 12, 1951, it paid up the unpaid balance of $85.65, taking respondents' receipt showing payment in full (Defendant's exhibit A). There is evidence that appellant made a tender of payment for the timber cut on the disputed strip, but Mr. McCreary refused it. The locking of the gate took place prior to the conference of December 11th.

Sometime prior to the December 11th conference, Howard and McCloud negotiated with Mr. McCreary either for a new contract or a modification of the old one. It is not entirely clear from the record just what was said or done, or when. It appears, however, that Mr. McCreary wanted a time limit for the removal of the timber, and that Howard and McCloud were willing to agree to a two-year limitation, with an option for a third year if necessary. The latter also wanted to purchase an additional forty acres of timber from respondents at a price of $4 per thousand board feet. Howard testified that an agreement was reached and that he made notes of the terms and gave them to Mr. McCreary so that the latter could have a written contract prepared. This was substantially confirmed by McCloud's testimony. Howard's memorandum is in evidence and shows the time limitation and the purchase of timber in section 19 (additional timber) at a price of $4 per thousand. Thereafter, the parties had the conference of December 11th in the office of respondents' attorney, Mr. Spur. Mr. Spur testified that the parties told him, in effect, that they had negotiated a new agreement and wanted it prepared. They had Howard's notes with them, and during the discussion Mr. Spur wrote in the figure "*500*" and the figures and words "4 or 5 culverts," which now appear on the memorandum. Mr. Spur also testified that the parties were not in agreement as to one item, i. e., the amount of the down payment. The attorney prepared a new contract (defendant's exhibit B) which was never executed on behalf of appellant. Howard and McCloud called it unreasonable, unsatisfactory, and "too stiff," and they pointed to the provisions requiring road maintenance and culverts. Apparently they did not object to the recital that the old contract was terminated, nor did they raise any question of lack of authority on their part to negotiate for a new contract.

Respondents filed their complaint on January 24, 1952, seeking a judgment declaring the old contract terminated and also quieting title to the real property involved. Appellant answered and, by way of cross-complaint for declaratory relief, asked the court to construe the old contract.

The case was tried by the court sitting without a jury. The court found that the written contract was executed by the parties; that one of the primary considerations prompting plaintiffs to execute the written agreement was their desire to have the timber on the property felled and removed therefrom as soon as possible; that it was so agreed by the parties; and that time was of the essence of the agreement as regards the falling and removal of the timber.

The court found further that the defendant did not commence any substantial logging operations upon the hereinabove described real property until the month of July, 1951; that thereafter defendant logged spasmodically upon said real property, removing a total of not to exceed 200,000 feet of logs from said real property, until about November 1, 1951, when defendant ceased its logging operations upon said real property; that defendant did not resume logging operations upon said real property after it ceased logging in November, 1951; and that, weather and other conditions were such that defendant could have continued its logging operations upon said real property for four or five weeks after it ceased such operations in November, 1951; and that it was reasonably possible for defendant, by logging with reasonable diligence at all reasonable times with the logging equipment at its disposal, to have logged and removed all, or practically all, of the timber from the hereinabove described premises before December 1, 1951, but that defendant failed so to do.

The court found further that defendant failed to pay plaintiffs as provided in the agreement for all logs removed from the premises and were indebted to plaintiffs in the amount of $97 on December 12, 1951; and the court found finally that sometime between December 1, 1951 and December 11, 1951, plaintiffs, by reason of the failure of defendant to pay said sum of $97 owing by defendant to plaintiffs for logs removed from said real property under and pursuant to the written agreement, and by reason of the failure of defendant to log and remove the timber and logs from the hereinabove described real property as quickly as was reasonably possible after date of execution of said written agreement, repudiated said written agreement, and rescinded the same, and gave to defendant notice of such rescission, and locked the gate in the fence around the real property hereinabove described and denied defendant access to said property and to the logs and timber thereon; that defendant, with full knowledge of said repudiation and rescission of said written agreement by plaintiffs, acquiesced in said repudiation and rescission; and that it was mutually agreed by and between plaintiffs and defendant that said written agreement be rescinded and abandoned.

Judgment was entered in accordance with said finding quieting respondents' title against any claim of appellant in or to said real property and declaring the agreement of September 27, 1950, to be "terminated, cancelled, annulled and rescinded." Appellant's motion for a new trial was denied and this appeal followed.

[1-3] Appellant first contends that the uncontradicted evidence shows that the contract of September 27, 1950, was not terminated and cancelled by mutual agreement, and appellant argues that that was the theory on which the case was tried. Appellant points to testimony of Mr. McCreary, on cross-examination, where he stated that he guessed the old contract would remain in force until the new one was signed, to testimony of Howard that he never agreed to cancel or terminate the old contract, to testimony of McCloud that he never had instructions or authority to terminate the old contract or negotiate a new one, and to the testimony of appellant's president that no one was ever authorized to agree to the termination of the old contract. Howard's and McCloud's testimony, however, shows that they did negotiate with Mr. McCreary for a new contract, and Howard stated specifically that an agreement had been reached and that he made notes covering the terms. At most, appellant's argument points up a conflict in the evidence, which conflict was resolved by the trial court in respondent's favor. On appeal, all conflicts in the evidence must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the findings, if possible. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. Howard was appellant's general manager and had negotiated with Mr. McCreary for the original contract. Appellant approved Howard's agency in that instance by accepting the contract, and thereby established Howard's ostensible authority to negotiate for a new one. County etc. Bk. of Santa Cruz v. Coast Dairies & Lamb Co., 46 Cal.App.2d 355, 366, 115 P.2d 988; Civ.Code, § 2317. Appellant cannot now be heard to say that Howard exceeded his actual authority.

[4, 5] Appellant contends also that the contract of September 27, 1950, was not subject to termination or cancellation even if appellant was in default, because of the absence of provisions in the agreement for forfeiture in the event of default and mak-

ing time of the essence. Appellant cites as error the trial court's acceptance of parol evidence as to representations made on the subject by the negotiating parties. The contract itself is the agreement, says appellant, and is neither uncertain nor ambiguous regarding the removal time because it contains no provision covering it. Appellant concludes that extrinsic evidence is therefore inadmissible to create a removal time. However, there can be no doubt as to the rule that when parties have not incorporated into an instrument all of the terms of their contract, evidence is admissible to prove the existence of a separate oral agreement as to any matter on which the document itself is silent and which is not inconsistent with its terms. McKee v. Lynch, 40 Cal.App.2d 216, 226, 104 P.2d 675; Buckner v. A. Leon & Co., 204 Cal. 225, 227, 267 P. 693. Anderson v. Palladine, 39 Cal.App. 256, 178 P. 553, cited by appellant as authority for its contention that parol evidence was inadmissible to show the intent regarding removal time, is not in point. In the Anderson case the matter in question *was* covered by a provision in the contract, and because the provision was unambiguous the court refused to permit an inquiry into the surrounding circumstances for the purpose of ascertaining its meaning. In the instant case the contract is silent regarding the removal time, and the separate oral agreement is not inconsistent with the terms of the contract.

[6] Appellant next contends that even if the court could properly create a contract clause requiring immediate removal of the downed timber, so as to place appellant in default, such default would not justify rescission, but respondents' remedy would lie in an action for damages. In its reply brief appellant points to Anderson v. Palladine, supra, as determinative of this appeal. The Anderson case involved an absolute conveyance of timber by deed, with the purchase price fully paid. The deed gave the buyer free and undisturbed access to the land, for a period of ten years, for the purpose of cutting and removing the timber. The buyer's successor in interest had not removed any of the timber during the ten year period and the seller brought an action to quiet title and thereby forfeit the buyer's interest in the timber. There was evidence that the timber was inaccessible, being in the mountains some sixty miles from a railroad, and that the buyer's successor had at great cost built a railroad into the area and constructed a mill there, but that it would be a few years before the rail line was extended to the tract in question. Upon appeal the court held that the provision for free access during the ten year period was just that, and not a condition subsequent which operated to forfeit the buyer's interest. Upon expiration of the period the buyer's successor would have to make new arrangements with the landowner for access to the timber. However, in the instant case there was no absolute conveyance of the timber to appellant, but merely a sale of the timber as and when removed by appellant, as is indicated by the payment provision.

[7] As hereinbefore set forth the court found rescission by respondents acquiesced in by appellant and rescission by mutual agreement of the parties. The evidence was highly conflicting but we are satisfied that resolving, as we must, all conflicts in favor of respondents, together with all inferences that may reasonably be drawn from the evidence in support of the judgment, the findings of the trial court are supported by substantial evidence. An abandonment of a contract may be implied from the acts of the parties and this may be accomplished by the repudiation of the contract by one of the parties and by the acquiescence of the other party in such repudiation. Dessert Seed Co. v. Garbus, 66 Cal.App.2d 838, 847, 153 P.2d 184. It is not necessary that the parties say, in so many words, that they do mutually rescind the contract; rescission may be proved by other words and acts. Cincotta v. Catania, 95 Cal.App. 99, 100–101, 272 P. 330. Acquiescence is shown by the negotiations for a new contract, after respondents had locked the gate, and by the absence of a showing that appellant claimed any further rights under the old contract prior to the commencement of the subject action. Appellant does not contend that the old contract could not be abandoned by a sub-

sequent agreement, but denies that a new agreement was made. Furthermore, rescission by mutual agreement may be inferred from Howard's testimony that a new agreement was reached and by his notes covering the principal terms.

[8] The court also found that appellant promised to remove the timber with reasonable dispatch, that this promise was a material inducement to respondents, and that appellant did not conduct the removal operations with reasonable diligence. This would justify unilateral rescission by respondents for material failure of consideration. Civ.Code, § 1689, subd. 2.

No other points raised require discussion.

In view of the foregoing we are satisfied that the findings and judgment are supported by the evidence and the law.

The judgment is affirmed.

PEEK, J., and PAULSEN, Justice pro tem., concur.

124 Cal.App.2d Supp. 879

SINGH v. KASHIAN et al.

C. A. No. 21.

Appellate Department, Superior Court,
Fresno County, California.
March 16, 1954.

Action against bail broker's executor and sureties, who had executed $1,000 property bond used to free third person from custody under federal charge, for return of $1,000 deposit made with broker by plaintiff's predecessor. The Municipal Court of the Fresno Judicial District, George W. Huffman, J., entered judgment against defendants, and sureties appealed. The Superior Court, Conley, J., held that evidence was sufficient to sustain judgment for plaintiff against sureties either under theory of actual authority of broker to act for sureties in accepting money or under theory of estoppel.

Judgment affirmed.

1. Courts 🔑190(6)

Settled statements of fact provided for by Rules on Appeal from Municipal Court in Civil Cases, rule 7, is not a bill of exceptions but a substitute for reporter's transcript, and therefore it is not necessary for an appellant to enumerate his exceptions unless such exceptions actually were taken as part of oral proceedings at trial. Rules on Appeal from Municipal Courts in Civil Cases, rule 7.

2. Courts 🔑190(6)

Where evidentiary record upon appeal consisted of settled statement instead of reporter's transcript, such statement was not ineffective because it did not contain list of points to be based upon appeal from municipal court in civil case. Rules on Appeal from Municipal Courts in Civil Cases, rule 7.

3. Courts 🔑190(6)

Where an appellant proposing a settled statement desires a partially restricted statement of the record, he must enumerate points he desires to raise upon appeal from municipal court in civil case, and, if he does so, he cannot later urge any additional points. Rules on Appeal from Municipal Courts in Civil Cases, rule 7.

4. Courts 🔑190(6)

Where an appellant purports to incorporate an account of all evidence in his proposed settled statement and thus tenders complete record in condensed form, his points, upon appeal from municipal court in a civil case, need not be set forth in the statement. Rules on Appeal from Municipal Courts in Civil Cases, rule 7.

5. Appeal and Error 🔑248

Exceptions, which are orally noted during trial or deemed to have been taken, are essential to successful prosecution of any appeal.

6. Courts 🔑190(3½)

Where appellants did not claim that trial court had erred in ruling upon admissibility of evidence but only that evidence was not sufficient to justify judgment against them, appellants would be entitled to raise only that point upon appeal in civil case from municipal court. Code Civ.Proc. § 647.

7. Evidence ⚷591

Testimony of defendants called under statute providing for examination of adverse party as if under cross-examination was not binding upon plaintiff. Code Civ. Proc. § 2055.

8. Appeal and Error ⚷1010(1)

In order to make good their point upon appeal that evidence was not sufficient to justify judgment against them, appellants would have to show that there was not any substantial evidence in record which would justify such judgment.

9. Partnership ⚷56

If, in action for return of $1,000 deposited by plaintiff's predecessor with bail broker, there were substantial evidence to support either existence of agency between the broker and sureties, who were claimed to be broker's partners, and who had executed $1,000 property bond to free third person from custody under federal charge, or evidence of estoppel to deny such partnership, judgment against sureties would be affirmed. Corporations Code, §§ 15009(1), 15016.

10. Partnership ⚷49

Generally, prima facie proof of existence of partnership must be made before evidence can be admitted concerning alleged extrajudicial statement of one party that other persons were his partners.

11. Trial ⚷105(2)

Where, in action for return of $1,000 deposit made with bail broker, no objection was made at trial to evidence that broker had stated that he was partner of sureties, who had executed $1,000 property bond used to free third person from custody under federal charge, such evidence became competent to support judgment for plaintiff.

12. Partnership ⚷49

Where bail broker's alleged statement that he was partner of sureties, who had executed $1,000 property bond to free third person from custody under federal charge, had been made in presence of sureties, such statement would have still been admissible against sureties, in action for return of $1,000 deposit made with broker, even if an objection had been urged.

13. Estoppel ⚷107, 110

Ordinarily, if an opportunity is afforded to a party to allege estoppel in his pleadings, he must do so.

14. Pleading ⚷428(3)

Failure to object to evidence of estoppel results in waiver, upon appeal, of point that pleadings were not sufficient upon such issue.

15. Courts ⚷190(8)

The Superior Court cannot and does not pass upon credibility of witnesses or waive evidence because trier of fact has sole right to do so.

16. Brokers ⚷106
Estoppel ⚷118

In action against bail broker's executor and sureties, who had executed $1,000 property bond used to free third person from custody under federal charge, for return of $1,000 deposit made with broker by plaintiff's predecessor, evidence was sufficient to sustain judgment for plaintiff against sureties either under theory of actual authority of broker to act for sureties in accepting money or under theory of estoppel. Corporations Code, §§ 15009(1), 15016.

George & Gibbs, Richard D. Love, Fresno, for appellants.

B. W. Gearhart, Fresno, for respondent.

CONLEY, Judge.

This is an appeal by M. Kashian and A. Shuklian from a judgment for $1,000 which the trial court granted to the plaintiff against the two appellants and a third defendant who has not appealed, Aram Joseph, Jr., as executor of the estate of Aram Joseph, also known as Aram Hovsepian.

The evidentiary record on appeal consists of a settled statement, prepared under Rule 7 of the Rules on Appeal from Municipal

Courts in Civil Cases, instead of a reporter's transcript.

At the outset, the respondent moved for a dismissal of the appeal, Rule 4, Revised Appellate Department Rules; Rule 13(c), Rules on Appeal from Municipal Courts in Civil Cases, urging that the settled statement of facts is fatally defective because it does not recite that any exceptions were taken by appellants, and because it does not set forth the "points upon which this appeal is predicated".

[1-4] The settled statement of facts provided for by Rule 7 is not a bill of exceptions, but a substitute for a reporter's transcript; it is not necessary for an appellant to enumerate his exceptions therein, unless such exceptions actually were taken as part of the oral proceedings at the trial. Respondent's claim that the settled statement is ineffective because it does not contain a list of points to be raised on the appeal is equally without merit. Rule 7 is clear: if the settled statement covers all of the proceedings, there is no necessity of stating the points to be raised by appellants. It is only when an appellant proposing a settled statement desires a partial or restricted statement of the record, that he must enumerate the points he desires to raise on the appeal, and if he does so, he cannot later urge any additional points. When an appellant purports to incorporate an account of all of the evidence in his proposed settled statement and thus tenders a complete record in condensed form, there is no requirement that his points on appeal be set forth in the statement.

[5, 6] Exceptions, orally noted during a trial, or deemed to have been taken by virtue of the provisions of Section 647 of the Code of Civil Procedure, are still essential to the successful prosecution of any appeal. In this action the appellants do not claim that the trial court erred in ruling on the admissibility of evidence; they make one point only—that the evidence is not sufficient to justify the judgment. Section 647 of the Code of Civil Procedure reserves an exception to the "final decision in an action", and the appellants are thus entitled to raise the only point urged by them on this appeal.

Turning to the case on its merits, the record shows that one Lahab Singh was arrested by the Federal authorities and charged with being an alien who had illegally entered the United States; his bail was fixed in the sum of $1,000 and through Aram Joseph he arranged to secure a bail bond with the appellants herein as sureties; his friend, B. Ishar Singh, helped him by depositing with Aram Joseph $1,000 in cash as security for the sureties furnishing the bond. Lahab Singh testified that he was present in Aram Joseph's office in Fresno on a later occasion when the plaintiff herein, Samond Singh, paid $1,000 to B. Ishar Singh and became substituted to the rights of B. Ishar Singh to the $1,000 theretofore placed with Mr. Joseph. At that time, Aram Joseph issued a receipt to Samond Singh for $1,000, signing the receipt "Mike Kashian and A. Shuklian by Aram Joseph". The witness testified that two Armenian gentlemen were present in the room at the time; he specifically identified M. Kashian as one of them. The Armenians talked at times in the Armenian language and the witness did not know what they were saying; they talked together but did not talk with him. Bisant Singh, another witness, testified "that the said Aram Joseph mentioned the fact that M. Kashian and A. Shuklian were his partners".

The record shows that Samond Singh deposited the money with Aram Joseph and that he has not been repaid; that while the bail bond was outstanding, three checks were given to Joseph totaling $200 as premiums for the property bond furnished to Lahab Singh. After the charges against Lahab Singh were dismissed, B. W. Gearhart, as attorney for plaintiff, made demand upon Kashian and Shuklian for the return of $1,000; Kashian denied liability, but Shuklian did not answer his letter.

[7] The defendants, Kashian and Shuklian, called as witnesses for the plaintiff under the provisions of Section 2055 of the Code of Civil Procedure, testified that they were landowners and that they had furnished the property bond in question as a favor to their friend, Aram Joseph; that they received no portion of the $1,000 and were not paid any part of the premium

money by Joseph; Shuklian testified that on the date of the alleged meeting he was not in Fresno but was returning from a trip to South America. This latter fact was attested also by Anna Shuklian, his wife. Both of the appellants testified that they had never been partners of Aram Joseph, and that they did not know anything about his receiving money as collateral security for the bail bond or as premiums for the bond. They both denied that they had received any consideration for executing the bond and stated that they had never authorized Joseph to sign their names, and had never issued a power of attorney to him. This testimony of the defendants called under the provisions of Section 2055 of the Code of Civil Procedure is, of course, not binding upon the respondent. Smellie v. Southern Pacific Co., 212 Cal. 540, 555, 299 P. 529.

[8] In order to make good their point on appeal, appellants must show that there is no substantial evidence in the record which would justify the decision against them. Giving the respondent the benefit of all favorable evidence, including inferences that may be reasonably drawn from the testimony, Mastrofini v. Swanson, 114 Cal. App.2d Supp. 848, 850, 250 P.2d 764, we are presented with the following factual situation: a bail broker, Joseph, arranges for the execution of a property bond by Kashian and Shuklian in the sum of $1,000 to free Lahab Singh from custody under a Federal charge; to secure the two sureties on the bail bond, a friend of Lahab Singh, one B. Ishar Singh, deposits $1,000 in cash with the broker; while the charge is still pending and the bond is outstanding, arrangements are proposed for a substitution of Samond Singh's cash for B. Ishar Singh's deposit as the continuing security for the two sureties on the bond; the parties meet at Joseph's office; Joseph states, in the presence of Kashian and Shuklian and the plaintiff and his friends, that he, Kashian and Shuklian are partners; the "partners" make no denial; in the presence of Kashian and Shuklian, Joseph delivers a receipt for $1,000 to Samond Singh signed "Mike Kashian and A. Shuklian by Aram Joseph" (Plaintiff's Exhibit 1); it is a reasonable inference that the plaintiff, having been present where these occurrences happened, relied upon the representations so made and paid over his money to the defendants under the belief that Joseph had authority to act for the appellants, as their partner, or otherwise.

[9] As findings of fact were waived, it is not apparent what the specific view of the trial judge was with respect to the nature of the authorization—whether he was of the opinion that the foregoing facts constituted evidence of agency, which was incidental to the existence of a partnership, Sec. 15009(1), Corporations Code, or evidence of an estoppel to deny a partnership. Sec. 15016, Corporations Code. If there is substantial evidence to support either of these theories, the judgment must be affirmed. Mastrofini v. Swanson, supra.

[10–12] Appellants argue that *prima facie* proof of a partnership must be made before there can be evidence of an extrajudicial statement of one party that other persons were his partners; this is unquestionably the general rule. Milstein v. Sartain, 56 Cal.App.2d 924, 133 P.2d 836. But no objection was made at the trial to the evidence given by the witness, Bisant Singh, that Joseph stated that he was a partner of the appellants, and such evidence became competent to support the judgment when it was admitted without objection. Ingraham v. Smith, 83 Cal.App.2d 807, 189 P.2d 721; Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156. Besides, the statement was made in the presence of the appellants and was, therefore, admissible against them even if an objection had been urged. Blumenthal v. Greenberg, 130 Cal. 384, 388, 62 P. 599.

[13–16] Appellants further contend that estoppel cannot be considered because it was not pleaded. Dodd v. Tebbetts, 198 Cal. 333, 340, 244 P. 1081. Ordinarily, if an opportunity is afforded to a party to allege estoppel in his pleadings, he must do so; but if estoppel, not having been pleaded, is established by the evidence, a failure to object to such evidence results in a waiver on appeal of the point that the pleadings are not sufficient. Flandreau v. Downey, 23 Cal. 354; Chain v. Ehrman, 92 Cal.App.

334, 337, 268 P. 438; Carpy v. Dowdell, 115 Cal. 677, 688, 47 P. 695. We, of course, cannot and do not pass on the credibility of the witnesses or the weight of the evidence; that is the sole right of the trier of fact. But, in our opinion, there is substantial evidence to support the judgment against appellants either on the theory of actual authority or on the theory of estoppel.

The motion to dismiss the appeal is denied. The judgment is affirmed.

SHEPARD, P. J., and KELLAS, J., concur.

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124 Cal.App.2d 466

RIDEAU et al.

v.

LOS ANGELES TRANSIT LINES et al.

Civ. 19828.

District Court of Appeal, Second District,
Division 3, California.

April 8, 1954.

Rehearing Denied May 3, 1954.
Hearing Denied June 3, 1954.

Action for damages arising from head and tail collision between following streetcar and plaintiff's truck. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., rendered judgment for plaintiff and transit company appealed. The District Court of Appeal, Vallée, J., held, inter alia, that where there was no evidence to support transit company's theory that plaintiff suddenly turned in front of the streetcar, refusal to instruct on motorist's duty to refrain from turning vehicle from direct course unless and until such movement can be made with reasonable safety, was not error.

Judgment affirmed.

1. Appeal and Error 🔑206(2)

Where, in action against transit company for damages arising from head and tail collision between streetcar and plaintiff's truck, transit company did not object to revised statement of question posed to witness, objection thereto was waived and could not be raised on appeal.

2. Trial 🔑203(1)

It is the duty of the court to instruct on every theory of the case finding support in the evidence.

3. Trial 🔑252(7)

Where, in action for damages arising from head and tail collision between streetcar and plaintiff's truck, there was no evidence to support streetcar company's theory that plaintiff suddenly turned in front of streetcar, refusal to instruct on motorist's duty to refrain from turning vehicle from direct course unless and until such movement can be made with reasonable safety, was not error. Vehicle Code, § 544.

4. Appeal and Error 🔑1064(4)
Trial 🔑235(1)

Instruction, in action for damages arising from head and tail collision between streetcar and plaintiff's truck, to the effect that the testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony was error, but not prejudicial in absence of showing that a different result would have been probable had this instruction not been given.

5. Trial 🔑260(10)

Failure to give, in action for damages arising from head and tail collision between streetcar and plaintiff's truck, instruction to effect that jury must not consider damages prior to determining liability, was not error where subject matter of the requested instruction was fully covered by other instructions given.

6. Appeal and Error 🔑930(4)

On appeal from judgment in action for damages arising out of head and tail collision between streetcar and plaintiff's truck, it would be assumed that jury awarded damages only for injuries sustained in accident in question, including the aggravation of a previous spondylolisthesis condition, to exclusion of damages for origin of the spondylolisthesis condition in earlier accident.

7. **Damages** ⚷33

A plaintiff is entitled to recover for the aggravation of a physical condition.

8. **Damages** ⚷33

A tort-feasor takes a person he injures as he finds him, and is not exonerated from liability if, by reason of some pre-existing condition, his victim is more susceptible to injury.

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Trippet, Newcomer, Yoakum & Thomas, and Melvin L. R. Harris, Los Angeles, for appellants.

Getz, Aikens & Manning, Thomas C. Murphy and DeWitt Morgan Manning, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendants from an adverse judgment in an action for damages for personal injuries. Plaintiff Lewis W. Rideau will be referred to as "plaintiff."

On January 8, 1952, about 11 a. m., plaintiff drove a small tow truck north on Main Street toward 23rd Street in Los Angeles. The weather was clear and the street dry. Before reaching 23rd Street he had driven for four or five blocks in the lane of traffic next to the center of Main Street, in which lane there were tracks of defendant Los Angeles Transit Lines. When he reached 23rd Street he stopped in obedience to a traffic signal. About 8 or 10 seconds later and before the traffic signal changed from "Stop" to "Go," his truck was struck in the rear by one of the defendant Transit Lines' northbound streetcars operated by defendant Adams. Plaintiff was severely injured, including an aggravation of a previous spondylolisthesis of the fifth lumbar vertebra, a sliding over of the vertebra.

Six weeks before the present accident, in December, 1951, plaintiff was involved in an accident with a Greyhound bus and had suffered injuries to his neck and upper back; the lower back was not injured.

[1] Defendants claim the court erred in permitting a physician to testify that pains which plaintiff suffered in the lower back could be attributed to and caused by the streetcar. Plaintiff's counsel asked the physician: "Then, in your opinion, Doctor, could the pains be attributed and caused by that second accident?" Defendants objected to the question as being too indefinite and vague. The question was reworded: "In your opinion, then, these low back pains which we have mentioned of January, in view of the histories that you have first mention of them being, could you attribute them to this second accident, as being caused by the streetcar accident?" No objection was made to the revised question. The physician answered, "Very much so." Having failed to object to the revised question, defendants waived any objection thereto and are estopped from raising it for the first time on appeal. 3 Cal.Jur.2d 609, § 143.

The trial court refused to give an instruction, requested by defendants, in the language of section 544 of the Vehicle Code, together with an instruction that violation thereof, if found, would constitute negligence as a matter of law.[1] Defendants assert error. There was no error. Defendants say the jury should have been apprised that no person should turn a vehicle from a direct course, or move right or left on a roadway, unless and until such movement can be made with reasonable safety. Such refusal, they assert, prevented the jury's consideration of their theory that plaintiff had turned suddenly in front of the streetcar.

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[1] "You are instructed that Section 544 of the Vehicle Code of the State of California provides as follows:

"Section 544—Turning (and Stopping) Movements and Required Signals.

" '(a) No person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement.

" '(b) Any signal of intention to turn right or left shall be given continuously during the last 50 feet traveled by the vehicle before turning.

" '(c) No persons shall stop or suddenly decrease the speed of a vehicle on a highway without first giving an appropriate signal in the manner provided in this chapter to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.'

"If you should find from the evidence that the plaintiff Lewis Rideau conducted himself in violation of Section 544, you are instructed that such conduct constituted negligence as a matter of law."

[2, 3] It is the duty of the court to instruct on every theory of the case finding support in the evidence. Daniels v. City and County of San Francisco, 40 Cal.2d 614, 623, 255 P.2d 785. However, we find nothing in the evidence, direct or circumstantial, suggestive of the situation described in the requested instruction. The instruction invited the jury to speculate that plaintiff suddenly turned in front of the streetcar. Such a conclusion is unjustified under any possible construction of the evidence. Plaintiff testified that for four or five blocks before reaching 23rd Street he had traveled in the same lane as the streetcar tracks and that he had been stopped 8 or 10 seconds before the streetcar struck him. The motorman testified that when he was 145 feet from the intersection his attention was directed toward a car that was leaving the gas station on the southeast corner, and not until his streetcar struck the tow truck did he see it. A passenger on the streetcar saw the truck when it was standing still for the signal at the intersection; at which time the streetcar was at least 24 feet behind it. The record is void of any evidence, direct or circumstantial, or of any inference, that plaintiff was driving parallel with the streetcar and then suddenly turned in front of the car. Defendants' theory that plaintiff suddenly turned in front of the streetcar finds no support in the evidence.

[4] At the request of plaintiff the court gave an instruction to the effect that the testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony.[2] Defendants claim error. It was error to give this instruction. It is not a correct statement of the law. We condemned it in Long v. Standard Oil Co., 92 Cal.App.2d 455, 462, 207 P.2d 837, and in Ford v. Chesley Transportation Co., 101 Cal.App.2d 548, 554, 225 P.2d 997, and it was condemned by the Supreme Court in People v. Kirkes, 39 Cal.2d 719, 728, 249 P.2d 1. We think, however, that in the present case the giving of the instruction was not prejudicial. The evidence is uncontradicted that the motorman did not see plaintiff or his truck prior to the time the streetcar struck the stopped truck; that before the impact the motorman's head was turned to the right watching something else instead of looking straight ahead. It is undisputed that the truck was stopped at the intersection 8 or 10 seconds before the streetcar ran into it. There is no contention that the implied finding of the jury that the motorman was negligent is without support in the evidence. There is no showing that a different result would have been probable had this instruction not been given. The error in giving the instruction is not, on the facts of this case, sufficient ground for a reversal.

[5] The court refused to give an instruction requested by defendants to the effect that the jury must not consider the questions of injuries or damages prior to determining the question of liability or to allow the questions of injuries or damages to affect their judgment in any way in determining the question of liability.[3] De-

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[2] "The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness."

[3] "I instruct you that it would be a violation of your duty as jurors to consider the question of injuries or damages, if any, prior to determining the issue of liability, or to allow the question of injuries or damages, if any, to affect your judgment in any way in determining the issue of liability. The first question for you to decide is whether or not the plaintiffs are entitled to recover in this action against the defendants Los Angeles Trans-

fendants assert error. There was no error. The subject matter of the instruction was fully covered by the instructions given. The jury was told that the burden was on plaintiff to prove that defendants were negligent and that such negligence was a proximate cause of injuries to plaintiff, and that if plaintiff had not fulfilled this burden the verdict should be for defendants. Ten instructions were given pertaining to negligence and contributory negligence. The jury was also told that they were to award damages only if they found that plaintiff was entitled to a verdict.

[6] Defendants assert the evidence does not support the claim that plaintiff's spondylolisthesis proximately resulted from the streetcar accident. This contention is based on the erroneous premise that plaintiff was awarded damages on the theory that the streetcar accident caused the spondylolisthesis. There was evidence to the effect that the spondylolisthesis had existed prior to the accident; that as a proximate result of the streetcar accident plaintiff suffered severe injuries, including aggravation of the previous spondylolisthesis condition. In support of the judgment we must presume that the jury awarded plaintiff damages for these injuries and not for the previous condition.

[7, 8] A plaintiff is entitled to recover for the aggravation of a physical condition. Campbell v. Los Angeles Traction Co., 137 Cal. 565, 568, 70 P. 624; Smith v. Schumacker, 30 Cal.App.2d 251, 263, 85 P.2d 967. The tort-feasor takes the person he injures as he finds him. If, by reason of some preexisting condition, his victim is more susceptible to injury, the tort-feasor is not thereby exonerated from liability. Jonte v. Key System, 89 Cal.App.2d 654, 660, 201 P.2d 562; Taylor v. Sims, 72 Cal.App.2d 60, 65, 164 P.2d 17. The contention is without merit.

Defendants also appealed from the order denying their motion for a new trial. Since no appeal lies from the order, that appeal will be dismissed.

Appeal from order dismissed. Judgment affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Rehearing denied; SHINN, P. J., dissenting.

124 Cal.App.2d 435

DANELIAN et al. v. McLONEY et al.

Civ. 19876.

District Court of Appeal, Second District,
Division 2, California.
April 8, 1954.

Rehearing Denied April 28, 1954.
Hearing Denied June 3, 1954.

Action for breach of contract to share losses under joint adventure contract for the purchase and sale of lands. The Superior Court, Los Angeles County, J. A. Smith, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that clause of joint adventure contract permitting plaintiffs to pay defaulted payments of defendants and thereby obtain exclusive rights under contract could not be invoked by defendants to avoid payment of their share of losses sustained where plaintiffs did not make such payments for defendants.

Judgment affirmed.

1. Joint Adventures ⚷4(2)

In joint adventure contract for the purchase of lands, clause permitting one party to pay default payments of other party and thereby obtain exclusive rights under contract could not be invoked by defaulting party to avoid payment of share of losses sustained where party did not make payments for defaulting party.

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it Lines, a corporation, and Orville C. Adams. If you find from the evidence that the plaintiffs are not entitled to recover, then it is your duty to immediately return the verdict in favor of the defendants."

2. Joint Adventures ⚷4(2)

Under contract between joint adventurers for the purchase and sale of land, even if a party had made defaulted payments of other party and thereby acquired total interest in the lands involved, defaulting party would not be relieved from obligation under clause requiring that losses be shared equally.

3. Joint Adventures ⚷4(2)

Under joint adventure contract for purchase and sale of lands, clause permitting one party to pay defaulted payments of other party and thereby obtain exclusive rights under contract was not exclusive remedy of non-defaulting party and non-defaulting party could recover under clause requiring equal division of losses. Civ. Code, § 1641.

4. Appeal and Error ⚷1050(1)

In action to recover share of losses sustained under joint adventure contract for the purchase and sale of lands, where parties agreed that contract was unambiguous and certain in its meaning, admission of testimony offered to give setting of contract at time of its execution was not prejudicial, although one of the parties to the contract was deceased. Code Civ.Proc. § 1880.

5. Joint Adventures ⚷5(1)

A joint adventurer has no cause of action for a breach of duty owed to the venture until the firm has been dissolved and an accounting has been had. Code Civ. Proc. § 337.

6. Limitation of Actions ⚷53(2)

The period of limitation does not begin to run against a claim arising out of the operation of a joint adventure until the accounts are settled and the balance is ascertained. Code Civ.Proc. § 337.

7. Limitation of Actions ⚷53(2)

Under joint adventure contract executed in 1946 for the purchase and sale of lands, complaint filed in 1952 and within four months after complaining party had ascertained the loss resulting from the sale of land and had presented its statement of account to other parties, was within four year limitation period. Code Civ.Proc. § 337.

8. Joint Adventures ⚷1.14

Under joint adventure contract for the purchase and sale of lands wherein no definite date was prescribed for a termination of the contract, it would be implied from a reading of the contract that the venture would terminate when the lands had been sold and an account rendered.

9. Joint Adventures ⚷4(3)

In action to recover one-half of losses sustained under joint adventure contract for the purchase and sale of lands, the expense of erecting a sale sign on property offered for sale was properly included as an expense of joint adventure.

10. Joint Adventures ⚷4(3)

In action to recover for one-half of losses sustained under joint adventure contract for the purchase and sale of lands, office and supervisory expense paid to an employee of one of the joint adventurers for his services in the joint venture was properly included as an expense.

11. Appeal and Error ⚷1011(1)

Where the evidence was conflicting on question whether complaining party had used due diligence to minimize his damages, reviewing court would not disturb finding of that question.

12. Joint Adventures ⚷5(2)

In action for one-half of losses sustained under joint adventure contract, where defendants had refused to pay their portion of purchase price of lands and had not contacted complaining parties after they made demands on defendants and where defendants had pleaded no facts in mitigation of damages, defendants could not rely on affirmative defense that complaining parties had not consulted them with reference to sales of the property.

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Harold L. Green, Los Angeles, for appellants.

Irsfeld & Irsfeld, James B. Irsfeld, Jr., Los Angeles, for respondents.

MOORE, Presiding Justice.

Defendants demand reversal of a judgment for damages for breach of a contract of joint venture. They have specified their assignments of error, each of which shall in its turn be answered. The amended complaint alleges two grounds for recovery, to wit, (1) losses sustained as a "result of the sale of the properties" and (2) "damages caused by the refusal of appellants to pay the money required by the agreement to be paid by them."

Liability Established by Fair Construction of Contract.

Prior to October 31, 1946, appellants held options to purchase two contiguous parcels of real property in San Fernando Valley. On that day, they entered into a contract with respondents for the purchase of the acreage on substantially the following terms:

1. Respondents to make the down payments on both parcels, totaling $26,000 plus escrow expenses, and to take title in their names.

2. Appellants to pay taxes, public utility assessments and principal payments on the two trust deeds until appellants have paid a total of $26,000.

3. When appellants have advanced $26,000, respondents are to convey an undivided one-half interest in the properties to appellants.

4. All subsequent payments and expenses to be paid equally by both parties.

"5. Any profits arising from the sale of part or all of the above described property are to be divided equally between parties of the first and second part after deducting from the proceeds of such sale all cash advanced of the first [appellants] and second [respondents] parties."

"6. Any losses arising from the sale of above described property are to be divided equally between parties of the first and second part and party of the first part, both jointly and individually, agree to a prompt settlement with party of the second part for any amounts due hereunder."

7. Sets up procedure when one party desires to sell and the other dissents.

"8. In the event that party of the first part fails to make the payments as called for in this agreement, party of the second part may make such payments in which event party of the second part shall be the sole owner of said property and all right, title and interest of party of the first part shall end and party of the second part shall only be obligated to pay to party of the first part their proportionate share of any profit realized based on their cash contributions to the deal."

Pursuant to the contract, respondents paid the $26,000 as the down payment and took title to the property. Appellants at no subsequent time paid taxes, assessments or installments of principal as required by the agreement, and respondents did not make any additional payments as they were permitted to do by clause 8 of the contract. In December 1948 parcel No. 1 was conveyed by quitclaim, with the loss of the $12,000 down payment plus an operating loss of $11,532.75, making a total net loss on parcel No. 1 of $23,532.75. A net profit was realized on parcel 2 in the sum of $1,990.72. This made the resulting net loss to the venture the sum of $21,542.03. No question is raised as to the fairness of the transfers. On October 30, 1951, respondents delivered a statement of the accounting to appellants and demanded payment of one half of the loss. Following appellants' refusal to pay, on January 29, 1952, the present action was commenced by respondents for breach of contract to share losses in the joint venture.

[1] In support of the thesis that their liability was not established, appellants inveigh mightily against the court's interpretation of the joint adventure contract. They now contend that since they failed to make the payments as required by the contract and respondents elected to pay them, then by virtue of paragraph 8 respondents became owners of the entire interest and appellants have no right in or to the acreage. As there was no profit in the sale, appellants contend that they have no interest in the land and that respondents were its exclusive owners prior to the sale at great loss. But before appellants may invoke support from paragraph 8, respondents must actually have made "the payments as called for in this agreement." Inasmuch as appellants admit that respondents did not

exercise their right to exclude appellants from the venture, and to deal with the acreage to the exclusion of appellants, the latter have no protection in paragraph 8. Despite their arguments that respondents elected to avail themselves of the privileges of paragraph 8, no evidence is cited in support of such contention. It follows that under the circumstances, paragraph 8 does not govern the construction of the contract so as to require a holding that appellants are not bound by the instrument to pay their share of the losses of the joint adventure.

[2] There is more to the contract than clause 8. Even if respondents had made the payments and acquired the total interest in the acreage as appellants vainly contend, the latter still could not prevail. While respondents' payment of the balance of the purchase price might have vested them with total ownership of the land, their interest in the contract for the joint venture and the obligations and benefits thereby imposed, still subsisted. Appellants would have shared in any profits realized from a sale by respondents whensoever it might have been consummated. Also, clause 8 contains no covenant that clause 6 shall not be operative. The latter clause requires appellants to pay their share of any loss sustained by the venture and no other passage in the instrument contradicts its provisions. Clause 5 requires "any profits arising from the sale" of the acreage must be divided equally between the parties. We are not without precedent. In an adjudicated case with a similar contract, paragraph 6 required the parties to share in the profits as their only compensation and that they bear equally the losses. It was the equivalent of clauses 5 and 6 of the contract here involved. But paragraph 8 in the similar contract prescribed the manner in which the proceeds of the sale of the property was to be used and divided. The court held that paragraph 8 pertained to, and provided only for a distribution of, profits and that there was no inconsistency between paragraphs 6 and 8. In the event of loss, paragraph 8 was not controlling while 6 applied precisely. Kirkpatrick v. Smith, 113 Cal.App.2d 409, 412, 248 P.2d 534.

[3] Appellants contend that clause 8 provides respondents' exclusive remedy. They say that it is self-executing upon respondents' election to make the payments provided for in clause 2, in which event respondents alone become owners of the acreage. This is belied by the last words of clause 8, to wit: "and party of the second part shall only be obligated to pay to party of the first part [appellants] their proportionate share of any profit realized based on their cash contribution to the deal." Since clause 6 requires equal division of losses and makes no distinction between the situation where appellants have paid their share of the cash contributions to the enterprise and where they have not paid such share, it cannot be said that clause 8 provides respondents' exclusive remedy. By reason of the presence of clause 6, there could be no justification for the contention that respondents must rely upon clause 8 in case of appellants' default. Effect must be given to every part of a contract if reasonably practicable, "each clause helping to interpret the other." Civ.Code, § 1641. Martin v. Burris, 57 Cal.App. 739, 208 P. 174, 178, is no precedent for appellants' contention. While it affirmed the decision that the interest of the defendant in the property involved was forfeited, it did not hold that the forfeiture was plaintiffs' exclusive remedy. It reversed the case "to try the other issues", one of which was the claim for damages. 57 Cal.App. at page 748, 208 P. at page 178. Because clause 6 is the only one that relates to losses, it must govern the rights of the parties with respect thereto.

Admitting Evidence Subject to Motion to Strike, Not Prejudicial.

[4] Many words are spent in an effort to demonstrate the error of admitting testimony apparently offered to give the setting of the contract at the time of its execution. The objection made to the testimony was on the ground that William J. McLoney was deceased and that it was an effort to vary the terms of the contract. Code Civ.Proc. § 1880. Because the parties agreed that the contract was unambiguous and certain in its meaning, the objection was as useless as

the testimony and neither could have caused prejudice. While the testimony complained of might have been used as a basis for arguing that the parties entered into a joint venture contract and that the gist of it, as declared by appellants, is that "as originally outlined to them was that of a joint adventure or partnership; they were to make the down payment of $26,000 and the McLoneys were to make subsequent payments until their outlay matched that of the the Danelians," there was nothing in their testimony say appellants, "which varies or tends to vary the terms of the written contract." A scrutiny of the testimony of respondents, in the main, discloses an apparent effort to prove fraud as an inducement to make the contract. But nothing was proved. The writing was neither impeached nor impaired nor was it varied by all that was said. Hence, no prejudice was suffered and the testimony does not warrant a reversal. Nulty v. Price, 202 Cal. 279, 284, 260 P. 291; Black v. Black, 91 Cal.App.2d 328, 335, 204 P.2d 950.

The Action Not Barred by the Statute of Limitations.

[5–7] Basing their logic upon the facts that they have paid nothing pursuant to the contract since it was executed in October 1946, and the complaint was filed on January 29, 1952, appellants contend that it is barred by the statute of limitations. Code Civ.Proc. § 337, four years. But they misconceive the nature of the lawsuit. It is predicated on appellants' breach of their agreement promptly to pay respondents for losses incurred on account of the sale of the property, not for failure to make payments on the purchase price. As parties to the contract, appellants might forego participation in the enterprise and permit respondents to pay the total purchase price. They did that very thing. And had the property sold for exactly the amount of its cost, no demand could have been made upon appellants. But because it sold for less than its cost plus expenses of sale, respondents demanded payment by appellants of one half the loss as clause 6 had provided. A joint adventurer has no cause of action for a breach of duty owed to the venture until the firm has been dissolved and an accounting has been had. Stowe v. Matson, 94 Cal. App.2d 678, 683, 211 P.2d 591; Cunningham v. De Mordaigle, 82 Cal.App.2d 620, 621, 186 P.2d 423. The period of limitation does not begin to run against a claim arising out of the operation of the joint venture until the accounts are settled and the balance is ascertained. Hendy v. March, 75 Cal. 566, 570, 17 P. 702; Freeman v. Donohoe, 65 Cal.App. 65, 85, 223 P. 431. In the instant action, the complaint was filed within four months after respondents had ascertained the loss resulting from the sale of the acreage and the expenses suffered therefrom and had presented their statement of the account to appellants.

[8] While no definite date was prescribed for a termination of the contract, an implication arises from a reading of the document that the venture will have terminated when the acreage has been sold and an account rendered. Air Purification v. Carle, 99 Cal.App.2d 258, 265, 221 P.2d 700; San Francisco Iron & Metal Co. v. American Milling & Industrial Co., 115 Cal. App. 238, 248, 1 P.2d 1008.

Amount of Judgment is Correct.

[9] Appellants assign as error the inclusion in the losses sustained of one half of the following items:

1.	Office and supervisory expense paid to B. Ganon, 80 hours at $2.50 per hour....	$200.
2.	Car expense, to B. Ganon..	30.
3.	Erecting for sale sign	60.
		$290.
	one half thereof	$145.

Appellants contend that it is the practice and custom of real estate brokers to provide their own signs on property offered for sale and therefore the $60 expenditure was not chargeable to the joint venture. Appellants offered no evidence to establish, and they do not now contend, that the erection of an eight by fifteen foot billboard by the vendor of property being sold through a broker is unreasonable, an abuse of discretion or a breach of the joint venture agreement. A party hoping to dispose of property is not restricted to the performance of acts customarily done to effect a sale or to the practice of real estate brokers and their clients. The act of the trial court in including the $60 item in the account was not error.

[10] Appellants also argue that the payments to Mr. Ganon were improperly included in the account by reason of the fact that he was a regular employee of respondents in a business separate and apart from the joint venture. They do not contend that the services were not rendered nor that they were not necessary to the furtherance of the joint venture. There is no reason why respondents should bear all the office expenses of the joint venture merely because the person assigned to do the work is a regular employee of respondents in a separate capacity. A denial of judgment for one half of such expenditures in making a sale of the joint venture property would have been unjust. The services were actually performed.

The Finding of Appellants' Debt of $10,771 with Interest from October 31, 1951, is Supported by Evidence.

[11, 12] It is contended that respondents failed to use due diligence to minimize the damages and are therefore liable for the loss. (30 Am.Jur. 702.) On this subject conflicting evidence was admitted; hence the finding on that score cannot be disturbed. Boa v. San Francisco-Oakland Terminal Railways, 182 Cal. 93, 102, 187 P. 2; Dodds v. Stellar, 77 Cal.App.2d 411, 421, 175 P.2d 607. They complain of respondents' not having consulted them with reference to the sale of the acreage. In the first place, appellants by their own voluntary acts escaped from their duties to the joint venture by their refusal to pay their portion of the purchase price; in the second place, neither of the McLoneys contacted respondents after the latter had made their demands in December 1946 on appellants for payment of the latters' share. Moreover, inasmuch as appellants pleaded no facts in mitigation of damages, they are in no position to rely upon this affirmative defense. Vitagraph Inc. v. Liberty Theatres Co., 197 Cal. 694, 699, 242 P. 709; Ramsay v. Rodgers, 60 Cal.App. 781, 785, 214 P. 261.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

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124 Cal.App.2d 229

AUGUSTINE v. TRUCCO et al.

Civ. 19878.

District Court of Appeal, Second District,
Division 3, California.
March 9, 1954.

Hearing Denied May 27, 1954.

Real estate broker brought action against owners of realty and other brokers to recover commissions from owners for procuring purchaser of realty and to recover damages from the other brokers on ground that they induced owners of realty to breach alleged contract with plaintiff broker. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that neither amended complaint nor proposed fifth and sixth counts stated a cause of action.

Judgment affirmed.

Vallée, J., dissented.

1. Pleading 🔑428(4)

Objection to introduction of any evidence, on ground that complaint fails to state cause of action, is in nature of a general demurrer to complaint or motion by defendant for judgment on pleadings.

2. Pleading 🔑428(1)

An objection by defendant to introduction of any evidence may only be sustained when complaint fails to state a cause of action, and that is the sole question presented to court.

3. Pleading ⚷428(6)

On objection by defendant to introduction of any evidence on ground that complaint fails to state a cause of action, nothing dehors complaint and no defense set up in answer may be considered.

4. Pleading ⚷428(6)

On objection by defendant to introduction of any evidence on ground that complaint fails to state a cause of action, truth of allegations of complaint must be assumed.

5. Pleading ⚷428(4)

If complaint states a cause of action, objection by defendant to introduction of any evidence, on ground that complaint fails to state a cause of action, must be overruled.

6. Appeal and Error ⚷917(1)

On appeal from judgment sustaining a demurrer to a complaint, allegations of complaint must be regarded as true.

7. Pleading ⚷34(1)

Pleadings must be reasonably interpreted and must be read as a whole, and each part must be given the meaning that it derives from the context wherein it appears.

8. Pleading ⚷205(1)

All that is necessary as against a general demurrer is to plead facts entitling plaintiff to some relief.

9. Pleading ⚷204(2)

In determining whether complaint is sufficient, as against demurrer, on ground that it does not state facts sufficient to constitute a cause of action, rule is that if, on consideration of all facts stated, it appears that plaintiff is entitled to any relief against defendant, complaint will be held good, though facts may not be clearly stated, or may be intermingled with statement of other facts irrelevant to cause of action shown, or though plaintiff may demand relief to which he is not entitled under facts alleged.

10. Pleading ⚷34(1)

In passing on sufficiency of a pleading, its allegations must be liberally construed with a view to substantial justice between parties.

11. Pleading ⚷1, 34(1)

Though orderly procedure demands reasonable enforcement of rules of pleading, administration of justice should not be embarrassed by technicalities, strict rules of construction, or useless forms.

12. Brokers ⚷49(1), 50

To entitle broker to recover commission, he must show that he performs services required of him in accordance with terms of employment contract and within time limited in contract or within such extension of time as may have been granted by his principal, and if he fails to do so, he is not entitled to commission, even though he made efforts to sell and first caused property to be called to attention of purchaser.

13. Brokers ⚷82(1)

In action by real estate broker to recover commissions, first count of amended complaint alleging that owners of realty gave broker, in writing, exclusive right to sell realty for $72,500, and that contract expired on December 1, 1949, and that in July, 1950, owners orally modified agreement to continue broker's employment, but making broker's right to sell nonexclusive and reducing selling price to $65,000, and that on November 25, 1950, broker procured written offer from prospective purchaser to purchase realty for $65,000, and that on February 5, 1952, owners consummated sale of realty to such prospective purchaser for $65,000 failed to allege a cause of action because services of broker were not rendered pursuant to written contract. Civ.Code, §§ 1624, 1698.

14. Brokers ⚷43(2)

Unless broker's employment is evidenced by a writing, he cannot recover either under an oral contract or in quantum meruit. Civ.Code, § 1624.

15. Brokers ⚷43(2)

Procurement by broker of purchaser for realty is not such performance of contract to procure purchaser as will entitle broker to recover commission, in absence of compliance with requirements of statute requiring contract employing a broker to sell realty for a commission to be in writing. Civ.Code, § 1624.

16. Brokers 🔑43(1)

An estoppel to assert statute of frauds against claim of real estate broker for commissions cannot be predicated on principal's refusal to comply with oral promise to pay commission made after time limit fixed by contract has expired.

17. Brokers 🔑50

Rule that to entitle real estate broker to recover commission for procuring purchaser, broker must show that he procured a purchaser ready, willing, and able to purchase within time limited in contract is subject to exception that principal may waive time limit.

18. Brokers 🔑82(1)

In action by real estate broker to recover commissions, proposed fifth count of complaint alleging that after contract between owners of realty and broker employing broker exclusively to procure purchaser for realty expired the owners urged and requested broker to continue his efforts to procure a purchaser and that broker, acting pursuant to such request, continued to exert his efforts to find a purchaser, and that broker procured a prospective purchaser to whom owners subsequently sold realty was insufficient to allege a cause of action on ground that owners waived time limit in written contract. Civ.Code, §§ 1624, 1698.

19. Frauds, Statute of 🔑144

In order to create estoppel to assert statute of frauds, party relying on estoppel must be able to show clearly not only terms of contract, but also such acts and conduct of opposite party as amount to representation that he will not avail himself of statute to escape his agreement, and that party asserting estoppel has, in reliance on opposite party's representation and in pursuance of contract, so far altered his position as to incur an unjust and unconscionable injury and loss, if statute be allowed to be set up. Civ.Code, §§ 1624, 1698.

20. Brokers 🔑43(2)

Where real estate broker, who had been employed by owners of realty under written contract to sell realty, did not render any service, which would not have been rendered had price of realty not been reduced by subsequent oral agreement, after written contract expired, and did not suffer any detriment through reliance on alleged oral agreement, owners of realty were not estopped to rely on statute of frauds in action by broker on alleged oral agreement to recover commissions. Civ.Code, §§ 1624, 1698.

21. Brokers 🔑43(2)

Fact that real estate broker, acting under oral contract of employment, renders services to owner of realty in effort to find purchaser, furnishes no basis for estoppel of owner to rely on statute of frauds. Civ. Code, §§ 1624, 1698.

22. Torts 🔑12

One who, without privilege to do so, induces a third person not to perform a contract with another, is liable to the other for harm caused thereby.

23. Torts 🔑12

An action will lie for unjustifiably inducing a breach of contract.

24. Torts 🔑12

A person is free to carry on his business, including reduction of prices, advertising, and solicitation in usual lawful manner, though some third party may be induced thereby to breach his contract with a competitor in favor of dealing with the advertiser.

25. Torts 🔑12

If two persons have separate contracts with a third, each of those two persons may resort to any legitimate means at his disposal to secure performance of his contract, even though necessary result will be to cause a breach of the other contract.

26. Torts 🔑12

One may not, under guise of competition, actively and affirmatively induce the breach of a competitor's contract in order to secure an economic advantage over the competitor.

27. Torts 🔑12

Act of inducing breach of contract must be an intentional one, and if actor had no knowledge of existence of contract, or his actions were not intended to induce a breach, he cannot be held liable, though actual breach results from his lawful and proper acts.

28. Torts ⚷**12**

There is no liability for inducing a breach of contract, if breach is caused by exercise of an absolute right, that is, an act which a person has a definite legal right to do without any qualification.

29. Torts ⚷**26(1)**

One seeking to hold another liable for unjustifiably inducing third person to breach a contract, must allege that contract would otherwise have been performed, and that it was breached and abandoned by reason of the wrongful act of the one inducing the breach, and that such act was the moving cause of the breach.

30. Torts ⚷**15**

Defendant is not liable to plaintiff for unjustifiably inducing third person to breach contract with plaintiff, unless defendant's act was the proximate cause of the injury.

31. Torts ⚷**26(1)**

In action by plaintiff broker against defendant brokers to recover damages, on ground that defendants allegedly induced owners of realty to breach contract employing plaintiff to secure purchaser for realty, proposed sixth count of amended complaint alleging that defendants procured prospective purchasers and that owners of realty sold realty through defendants, but failing to allege that defendants intentionally or actively induced or persuaded owners of realty to breach any contract with plaintiff, and that owners would otherwise have performed alleged contract with plaintiff, failed to state a cause of action.

◆

Maurice Gordon, Los Angeles, for appellant.

Fred W. Chase, Glendale, for respondents Angelo Trucco and Ida Trucco.

Victor Bewley, Los Angeles, for respondents Paul H. Allen and Margaret Dwyer, also known as Mrs. Edward J. Dwyer.

SHINN, Presiding Justice.

Appeal by plaintiff from a judgment of dismissal entered on the sustaining of an objection by defendants to the introduction of any evidence. The cause went to trial on the third amended complaint and the answers thereto. The objection was sustained on the ground no count of the third amended complaint states facts sufficient to constitute a cause of action.

The third amended complaint contains four counts. In the first count, plaintiff seeks to recover a broker's commission from defendants Trucco for the sale of their real property consummated through defendants Allen and Dwyer. In the second count, plaintiff seeks damages against defendants Allen and Dwyer for allegedly inducing defendants Trucco to breach their contract with plaintiff. In the third count, a common count for labor and services is pleaded against defendants Trucco. In the fourth count, a common count for money had and received is pleaded against all the defendants.

The first count of the third amended complaint alleges:

1. Plaintiff is a licensed real estate broker doing business under the name of R. B. Augustine Co. On November 21, 1949, defendants Trucco, husband and wife, were the owners of a parcel of improved realty in Los Angeles. On that date, defendant Angelo Trucco gave plaintiff, in writing, the exclusive right to sell the property for $72,500. Defendant agreed to pay plaintiff a commission of 5 per cent of the sales price. The employment contract expired on December 1, 1949, ten days later. In executing the contract defendant Angelo Trucco acted for himself and as agent for his wife.

2. (Paragraph V) In July, 1950, defendants Trucco orally modified the agreement whereby the employment was continued as nonexclusive and the selling price was reduced to $65,000. On November 25, 1950, plaintiff procured a written offer from Mr. and Mrs. Angeloff to purchase the property for $65,000; the offer was accompanied with a deposit of $5,000. Plaintiff immediately presented the written offer to de-

fendants Trucco. They stated that they would accept the offer upon obtaining a source in which to invest the proceeds from the sale. On several occasions between November 25, 1950, and February 5, 1952, plaintiff presented the offer to defendants Trucco and each time they stated they had not yet obtained a place to invest the money.

3. On February 5, 1952, defendants Trucco consummated a sale of the property to Mr. and Mrs. Angeloff for $65,000.

The second count reiterates the allegations of the first count and alleges:

1. In November, 1950, and for a long period of time prior thereto, defendant Allen was associated with plaintiff as a real estate broker. In December, 1950, he terminated his association with plaintiff and associated himself with defendant Dwyer, also a real estate broker. During Allen's association with plaintiff, he learned of plaintiff's employment by defendants Trucco to procure a buyer for their property and of the written offer for $65,000 obtained by plaintiff on November 25, 1950, from the Angeloffs. Defendant Dwyer acquired knowledge of the employment and the offer immediately after her association with Allen.

2. In the month of January, 1952, Allen and Dwyer procured a listing of the property from defendants Trucco in the name of Dwyer. Thereafter, Allen and Dwyer presented to defendants Trucco an offer from Mr. and Mrs. Angeloff to purchase the property for $65,000. The offer was accepted and the sale was consummated.

3. Plaintiff, by reason of the matters aforesaid, sustained damages in the sum of $3,250.

The prayer was for judgment against defendants jointly and severally in the sum of $3,250.

At the trial, defendants objected to the introduction of any evidence on behalf of plaintiff on the ground that the complaint did not state a cause of action against them. The objection was sustained. Plaintiff made an offer of proof and moved the court to allow the complaint to be amended by the addition of a fifth and a sixth count which were orally stated.

The proposed fifth count was limited to defendants Trucco. It was identical to the first count except that it included in lieu of paragraph V thereof the following, as stated by counsel: "That on or about the 2nd day of December, 1949 and on numerous occasions thereafter during the year 1950 the defendants Trucco urged and requested Plaintiff to continue his efforts to procure a buyer for said real property, and Plaintiff pursuant to said request did continue to exert his efforts in attempting to find a buyer for said real property. Subparagraph, that on or about the month of July, 1950, the defendants Trucco orally authorized Plaintiff to reduce the sale price of said real property from $72,500.00, to $65,000.00, and that they would accept said new price upon the basis of one-half in cash and the remaining half to be represented by a first trust deed to be executed by the buyers. And as a sub-paragraph, still part of Paragraph 5, that pursuant thereto and on the 25th day of November, 1950, plaintiff procured one Dan L. Angeloff and his wife, Sadie Angeloff, to make a written offer of purchase of said real property at the price of $65,000.00, said offer being accompanied with a deposit of $5,000.00 as an evidence of good faith. Sub-paragraph, that Plaintiff immediately presented said written offer of purchase and the said $5,000.00 deposit to defendants Trucco; that said defendants stated that they would accept the offer upon procuring a source in which to invest the proceeds from the sale of their property. Subparagraph, that thereafter on several occasions, between November 25, 1950 and February 5, 1952, plaintiff again presented said offer of purchase to defendants Trucco, and on each occasion said defendants stated that they had not yet obtained a place to invest the proposed sale proceeds." The proposed sixth count was merely a reiteration of the proposed fifth count, but was stated to relate only to defendants Allen and Dwyer.

Defendants objected to the proposed amendments on the grounds that the proposal came too late and that neither the proposed fifth nor sixth count stated a cause of action as against any defendant. The motion was denied. The trial judge expressly stated he did not deny the motion on the ground it came too late, but on the ground that neither the proposed fifth nor sixth count stated facts sufficient to constitute a cause of action.

Plaintiff contends the court erred in sustaining the objections to the reception of any evidence and in denying his motion for leave to amend. He argues that: 1. In July, 1950, there was a valid oral modification extending the time limitation set forth in the written agreement and reducing the sales price of the property, which oral modification became effective upon his executing his part of the oral agreement, bringing the agreement as modified within the purview of section 1698 of the Civil Code.[1] 2. He should have been permitted to introduce evidence to show that after December 1, 1949, and during 1950, defendants Trucco waived the written time limitation in which to procure a purchaser by urging and requesting him to continue his efforts. 3. Defendants Trucco are estopped to assert and rely upon the statute of frauds, having received the fruits of his labors. 4. Defendants Allen and Dwyer are liable in damages for inducing defendants Trucco to breach their contract.

[1–5] "An objection to the introduction of any evidence on the ground that a complaint fails to state a cause of action is in the nature of a general demurrer to the complaint or a motion by a defendant for judgment on the pleadings. * * * An objection by a defendant to the introduction of any evidence may only be sustained where the complaint fails to state a cause of action, and that is the sole question presented to the court. * * * Nothing dehors the complaint may be considered. No defense set up in the answer may be considered. The truth of the allegations of the complaint must be assumed. If the complaint states a cause of action the objection must be overruled." Miller v. McLaglen, 82 Cal.App.2d 219, 223, 186 P.2d 48, 50.

[6–11] "On appeal from a judgment sustaining a demurrer to a complaint the allegations of the complaint must be regarded as true. The court must, in every stage of an action, disregard any defect in the pleadings which does not affect the substantial rights of the parties. Code Civ. Proc., sec. 475. 'Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears.' Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 42, 172 P.2d 867, 872. All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. Tristam v. Marques, 117 Cal.App. 393, 397, 3 P.2d 947. 'In determining whether or not the complaint is sufficient, as against the demurrer upon the ground that it does not state facts sufficient to constitute a cause of action, the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged.' Matteson v. Wagoner, 147 Cal. 739, 742, 82 P. 436, 438. In passing upon the sufficiency of a pleading, its allegations must be liberally construed with a view to substantial justice between the parties. Buxbom v. Smith, 23 Cal.2d 535, 542, 145 P.2d 305; Gerritt v. Fullerton U. H. School Dist., 24 Cal.App.2d 482, 486, 75 P.2d 627. 'While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic principle of the code system in this state is that the administration of justice shall not be embarrassed by technicalities, strict rules of construction, or useless forms.' Buxbom v. Smith, 23 Cal.2d 535, 542, 145 P.2d 305, 308." Hardy v. San Fernando Valley C. of C., 99 Cal.App.2d 572, 577–578, 222 P.2d 314, 317.

The Case Against Defendants Trucco.

[12] To entitle a broker to recover a commission, he must show that he per-

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[1] Section 1698 reads: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

formed the services required of him in accordance with the terms of his employment contract and within the time limited in the contract, or within such extension of time as may have been granted by his principal. If he fails to do so, he is not entitled to the commission even though he made efforts to sell and first caused the property to be called to the attention of the person who subsequently made the purchase. Baker v. Curtis, 105 Cal.App.2d 663, 667, 234 P.2d 153; Ford v. Palisades Corp., 101 Cal.App. 2d 491, 498, 225 P.2d 545; Lisle v. E. B. & A. L. Stone Co., 103 Cal.App. 409, 284 P. 680.

[13–16] The first count does not state facts sufficient to constitute a cause of action against defendants Trucco. After December 1, 1949, plaintiff's services were not rendered pursuant to any contract or memorandum in writing authorizing him to sell the property. He was acting as a mere volunteer. During the ten days that plaintiff's contract was in effect, he did not find a purchaser ready, willing, and able to buy according to the terms of the contract. When the contract expired on December 1, 1949, the relations between plaintiff and defendants Trucco were as though the contract had never been executed. Such being the case there was no contract in existence, and the complaint pleaded only an oral contract of employment for an indefinite time, and upon different terms, although it was called a modification. The oral contract was, therefore, an original agreement governed by the provisions of section 1624 of the Civil Code which requires a contract employing a broker to sell real estate for a commission to be in writing. Fogg v. McAdam, 25 Cal.App. 522, 144 P. 296. Unless a broker's employment is evidenced by a writing, he cannot recover either under an oral contract or in quantum meruit. Ford v. Palisades Corp., supra, 101 Cal.App.2d 491, 225 P.2d 545; Jamison v. Hyde, 141 Cal. 109, 74 P. 695; McPhail v. Buell, 87 Cal. 115, 25 P. 266; White v. Hirschman, 54 Cal.App.2d 573, 129 P.2d 430. The procurement of a purchaser is not such performance as will entitle a broker to recover a commission in the absence of a compliance with the requirements of section 1624. Herzog v. Blatt, 80 Cal.App.2d 340, 343, 180 P.2d 30. An estoppel to assert the statute of frauds cannot be predicated on the principal's refusal to comply with an oral promise to pay a commission made after the time limit fixed by the contract has expired. Herzog v Blatt, supra, 80 Cal.App.2d 340, 180 P. 2d 30. The oral contract of July, 1950, was void. Fogg v. McAdam, supra, 25 Cal.App. 522, 144 P. 296.

Since, under the allegations of the first count, plaintiff did not procure a buyer within the time limit fixed in his contract, that count does not state facts sufficient to constitute a cause of action.

We next consider the motion to amend by adding a fifth count as against defendants Trucco. As we have said, this motion was denied solely on the ground that the proposed fifth count does not state facts sufficient to constitute a cause of action. Had the motion been denied on the ground the proposal came too late, a different question would be presented. The proposed fifth count alleges in substance that on November 21, 1949, defendants Trucco, in writing, employed plaintiff to sell the property and agreed to pay him a commission; the time limit specified in the contract expired on December 1, 1949; on December 2, 1949, and on numerous occasions during 1950, defendants Trucco urged and requested plaintiff to continue his efforts to procure a buyer for the property; pursuant to the requests, plaintiff did continue to exert such efforts; on November 25, 1950, plaintiff procured a buyer, the Angeloffs, who were ready, willing, and able to buy the property on the terms proposed by defendants Trucco; defendants Trucco refused to accept the offer; plaintiff presented the offer to them on several occasions between November 25, 1950, and February 5, 1952; on each occasion they refused to accept the offer; on February 5, 1952, defendants Trucco sold the property to the Angeloffs, through defendants Allen and Dwyer, on the terms contained in the offer presented by plaintiff on November 25, 1950.

[17] The rule that to entitle a broker to recover a commission he must show that

he procured a buyer ready, willing, and able to buy within the time limited in his contract is subject to the exception that the principal may waive the time limit. 9 Cal. Jur.2d 258, sec. 89. The rule of extension of a broker's contract is dependent on a waiver. Love v. Gulyas, 87 Cal.App.2d 608, 615, 197 P.2d 405.

Baker v. Curtis, 105 Cal.App.2d 663, 234 P.2d 153, is cited by plaintiff as a case precisely in point. The case is authority for the proposition that the time element may be waived and for the further proposition that if, while his employment agreement is in force, a broker produces a buyer with whom the owner negotiates a sale he has earned his commission. In that case Baker produced the buyer and Curtis, ignoring his broker, sold to the prospect directly. This is not such a case. The difference between the two cases is that in the Baker case the sale was made to Baker's customer while Baker's commission contract was in force. Baker was properly held to have been the inducing cause of the sale. No facts were alleged in the present complaint to show that Augustine's authorization was in force after November 1950, when the $65,000 offer by Angeloff was refused. It may be granted that the time limitation had been waived by the Truccos up to that time by their requests that plaintiff continue his efforts to find a buyer, but it was not alleged that the Truccos thereafter either requested or authorized him to do anything further. Neither was it alleged that he did anything further except to resubmit the same offer, which was consistently refused. Waiver of the time granted plaintiff to find a buyer might last as long as the Truccos were encouraging him to render his services and he was diligently complying with their requests, but it could not last longer than that, or forever, as plaintiff apparently contends. Some fourteen months elapsed after the offer was rejected before it was made again through other brokers. It appears that the Truccos were through with plaintiff as early as November 1950. Angeloff also considered himself through with plaintiff before he submitted his offer through Allen and Dwyer. It could not be denied that these brokers were the inducing cause of the sale and that they earned a commission. They succeeded where plaintiff had failed, and unlike the actions of Curtis in the Baker case in selling directly to Baker's customer, the Truccos did not contact Angeloff nor endeavor in any manner to take advantage of the offer which plaintiff presented. It must be presumed, in the absence of allegation to the contrary, that the Truccos acted in good faith in declining the first offer and that they had no intention of selling to Angeloff for $65,000 until they had received and considered his second offer. Many things could have happened in 14 months to cause them to change their minds, such as changes in their circumstances or in market conditions. For these reasons the eventual sale to Angeloff furnished no basis whatever for plaintiff's claim to a commission.

[18] If plaintiff earned a commission it was by reason of the offer submitted in November, 1950. In two respects he failed to comply with the terms of the written agreement. He did not produce a buyer within 10 days nor a buyer at $72,500. There was a waiver as to the time element. As to the price it was alleged that a price of $65,000 was agreed upon orally. Plaintiff relies upon the oral contract, claiming that it was valid as a modification of the written contract because he performed all that was required of him. He relies upon D. L. Godbey & Sons Const. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946, for the proposition that if an oral modification of a written contract is supported by a consideration it becomes an executed oral agreement within the meaning of section 1698 of the Civil Code if one party performs whatever is required of him, although the other party fails or refuses to perform. The court in that case emphasized the consideration that was alleged, holding it to be sufficient to support the oral modification. In order to bring his complaint within the rule of the cited case it was necessary for plaintiff to plead facts constituting a consideration to the Truccos for the alleged oral modification. If reliance is placed upon facts which would give validity to an otherwise invalid contract they must be pleaded. We turn to the complaint here to see what

was alleged. We find no allegation of a consideration by the pleading of facts, or otherwise. The Truccos merely named a lower price for their property. Augustine agreed to nothing although he continued to look for a buyer until he found Angeloff, but it was not alleged that he would not have done so had the price not been reduced. He did not increase his efforts, did not spend any money, nor suffer any disadvantage He merely had a better opportunity at no cost to himself. The Truccos received no benefit from the reduction in price nor through any promise of plaintiff to put forth any additional effort. He made no such promise. It therefore appears from the terms of the alleged oral modification that it was without consideration moving to the Truccos and created no duty on their part to accept the offer of $65,000. Plaintiff failed to produce a buyer at the price stipulated in his contract of employment and did not earn a commission.

[19, 20] It is suggested that defendants are estopped to rely on the statute of frauds by claiming invalidity of the oral agreement to accept a lower price for the property. The facts we have related do not contain the elements of estoppel. The general rule as to estoppel to rely upon the statute of frauds is stated in 12 Cal.Jur. p. 934 et seq.[2] It was not alleged that plaintiff rendered any service to the Truccos that would not have been rendered had the price not been reduced, or that he suffered detriment of any sort through reliance upon the alleged oral agreement. Neither did the Truccos benefit in any manner which would unjustly enrich them or be of any benefit to them. Their refusal to comply with the alleged modification would no more work a fraud upon plaintiff than would reliance upon the statute of frauds in any other case of a broker endeavoring to enforce an invalid agreement. Estoppel by conduct is not based upon trivialities. The facts justifying application of the doctrine must be pleaded, and they must have strong appeal to the court's sense of justice. Every real estate broker knows that his commission contract must be in writing. If he operates without one he assumes the risk and has no cause for complaint if his efforts are unrewarded.

[21] In calling attention to the absence of any allegation that plaintiff made no promise to put forth effort to find a buyer at the reduced price, or that he put forth any additional effort, expended any money or suffered any detriment, we do not imply that the complaint would have been good had such allegations been made. The fact that a broker, acting under an oral contract of employment, renders services to an owner in an effort to find a buyer furnishes no basis for an estoppel of the owner to rely upon the statute of frauds. It was said in Hicks v. Post, 154 Cal. 22, 28, 96 P. 878, 880: "The fact that, acting under an invalid agreement, he made efforts to find purchasers, cannot, of course, operate to prevent the other party from asserting the invalidity of the contract. To hold the contrary would be to abrogate the statute of frauds. Shanklin v. Hall, 100 Cal. 26, 34 Pac. 636; Dolan v. O'Toole, 129 Cal. 488, 62 Pac. 92."

In Kroger v. Baur, 46 Cal.App.2d 801, 803–804, 117 P.2d 50, 52, a broker endeavored to recover a commission upon the theory that he had been defrauded by the oral promise of the owner made without intention to perform it. He alleged the making of the promise, the rendering of services upon his part, and he contended that the owner should be held estopped to assert that the oral agreement was invalid. In holding that the complaint failed to state a cause of action the court said:

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[2] "Equity is bound by the statute of frauds, and, in general, will give relief against it only in two classes of cases; first, where to allow the statute to be set up would be to secure to the party relying upon it the fruits of actual fraud; and, second, where to allow the statute to be set up would place the party resisting it in an inequitable position, it appearing further that there is evidence just as good as a writing of the agreement between the parties. To create an estoppel to assert the statute, the party relying on it must be able to show clearly, not only the terms of the contract, but also such acts and conduct of the opposite party as amount to a representation that he will not avail himself of the statute to escape his agreement, and, further, that the party asserting the estoppel has, in reliance on such representation and in pursuance of the contract, so far altered his position as to incur an unjust and unconscionable injury and loss, if the statute be allowed to be set up. If no such loss or injury is shown the reason for the estoppel fails."

"Assuming, as we must, that the allegations of the complaint are true, nevertheless the hardship thus falling upon the plaintiff must be borne by him, as this situation is precisely that which the statute of frauds was designed to prevent. Without the protection of the statute, the defendant is called upon to meet the bald assertion of a promise to which he can interpose nothing but his simple denial. The various authorities cited by appellant do not support his position. They involve situations where, for equitable considerations wholly absent from the case at bar, it was held that a party had waived the statute or was estopped to set it up. In Albany Peanut Co. v. Euclid Candy Co. 30 Cal.App.2d 35, at page 38, 85 P.2d 471, at page 472, the elements of such estoppel are set forth. It is there said: 'Before such an estoppel can arise the essential terms of the contract must be shown with reasonable certainty, and that representations were made by the opposite party that the invalidity of the contract under the statute would not be asserted, together with the fact that the party urging the estoppel has, pursuant to the terms of the contract, and induced by the representations and in reliance thereupon, changed his position to his detriment, the intention to make such change being known at the time to the one making the representations. The circumstances must clearly indicate that it would be a fraud for the party offering the inducements to assert the invalidity of the contract under the statute, and, unless the words and conduct of the party sought to be held amount to an inducement to the other to waive a written contract in reliance upon the representation that the person promising will not avail himself of the statute of frauds, there is an absence of fraud which is requisite to an estoppel. * * *'

"Neither the complaint nor the offer of proof made by counsel for plaintiff at the trial present any facts warranting a conclusion that the plaintiff was fraudulently induced to alter his position or to suffer an unjust and unconscionable injury and loss. As pointed out by the trial judge, the situation between a licensed real estate broker and his alleged client is altogether different from that between persons who are unfamiliar with the statute of frauds or the law relating to such contracts. A real estate broker must be deemed to know that the agreement for his commission must be in writing."

In Sweeley v. Gordon, 47 Cal.App.2d 381, 383–384, 118 P.2d 14, 15, the court said: "It is conceded that Gordon did not sign any authorization employing plaintiff to sell the property but it is argued by plaintiff that since Gordon knew of plaintiff's activities, orally promised him to pay the commission and accepted the fruits of his labor, he is now estopped from taking advantage of the statute of frauds. * * *

"The only claim now made by plaintiff is that the judgment should be reversed under the doctrine of estoppel. A plea of this kind is directed to the equity power of the court. Plaintiff is a real estate broker and as such is presumed to know that contracts made by brokers for commissions for the sale of real estate are declared to be invalid by the code and are unenforceable in the courts unless they are put in writing and subscribed by the owners of the property. He nevertheless failed to secure proper written authorization but relied upon the oral promise of defendant. The equitable powers of the court may not be invoked by one in his position. Subdivision 5 of section 1624 was placed in the Civil Code for the protection of owners of real estate and also for the protection of real estate brokers. As pointed out in Hicks v. Post, supra, a ruling that plaintiff could recover under the allegations of his complaint would be tantamount to an abrogation of the section of the statute of frauds applicable to sales of real estate by brokers."

Although we have already devoted more attention to the claim of estoppel than it deserves, further support for our views will be found in Colburn v. Sessin, 94 Cal.App. 2d 4, 209 P.2d 989; White v. Hirschman, supra, 54 Cal.App.2d 573, 129 P.2d 430 and in Young v. Bank of California, 88 Cal. App.2d 184, pages 186 and 187, 198 P.2d 543, and the cases cited.

It must be presumed that plaintiff stated all the facts which were favorable to his claim and that he would be able to prove no more than he alleged. Nothing may be supplied by inference, for as stated in General Motors Accept. Corp. v. Gandy, 200 Cal. 284, 297, 253 P. 137, 142, "The estoppel must be so established as to leave nothing to surmise or questionable inference". The facts alleged were clearly insufficient to estop the Truccos from denying the validity of the alleged oral agreement.

We are well satisfied to come to these conclusions. Anyone with even a casual acquaintance with the field of real estate operations will realize the disasterous consequences that would follow the abandonment of the legal principles here involved, which have been understood and observed in this field from the beginning of the state's history. No more backward step could be taken by the courts than to countenance an action for a broker's commission founded on an alleged statement of an owner, perhaps over the telephone, that he would accept less for his property than the price stipulated in the broker's written contract of employment. The security which the writing affords the parties would be taken from the very heart of the agreement, and there would be no protection against fraud and perjury.

It is unnecessary to consider the further contention of defendants that there cannot be a valid oral modification of a contract that is required to be in writing without full performance of the modified agreement by both parties.

The Case Against Defendants Allen and Dwyer

[22, 23] One who, without a privilege to do so, induces a third person not to perform a contract with another is liable to the other for the harm caused thereby. Restat. Torts, sec. 766; Annotation 26 A.L.R.2d 1227. In California, an action will lie for unjustifiably inducing a breach of contract. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 39, 112 P.2d 631.

[24–27] The principles governing an action for unjustifiably inducing a breach of contract are stated in Imperial Ice Co. v. Rossier, supra, 18 Cal.2d at page 36, 112 P. 2d at page 631, 633:

"A person is likewise free to carry on his business, including reduction of prices, advertising, and solicitation in the usual lawful manner although some third party may be induced thereby to breach his contract with a competitor in favor of dealing with the advertiser. [Citations.] Again, if two parties have separate contracts with a third, each may resort to any legitimate means at his disposal to secure performance of his contract even though the necessary result will be to cause a breach of the other contract. [Citations.] A party may not, however, under the guise of competition actively and affirmatively induce the breach of a competitor's contract in order to secure an economic advantage over that competitor. The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach he cannot be held liable though an actual breach results from his lawful and proper acts. * * *

"The complaint in the present case alleges that defendants *actively induced* Coker to violate his contract with plaintiffs so that they might sell ice to him. The contract gave to plaintiff the right to sell ice in the stated territory free from the competition of Coker. The defendants, by virtue of their interest in the sale of ice in that territory, were in effect competing with plaintiff. By inducing Coker to violate his contract, as alleged in the complaint, they sought to further their own economic advantage at plaintiff's expense. Such conduct is not justified. *Had defendants merely sold ice to Coker without actively inducing him to violate his contract, his distribution of the ice in the forbidden territory in violation of his contract would not then have rendered defendants liable. They may carry on their business of selling ice as usual without incurring liability for* *breaches of contract by their customers. It is necessary to prove that they intentionally and actively induced the breach."* (Italics added.) See, also, Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 39–40, 172 P.2d 867; Remillard-Dandini Co. v. Dandini, 46 Cal.App.2d 678, 680, 116 P.2d 641; H. G. Fenton Material Co. v. Challet, 49 Cal.App.2d 410, 415–417, 121 P.2d 788; Blender v. Superior Court, 55 Cal.App.2d 24, 26, 130 P.2d 179; Elsbach v. Mulligan, 58 Cal.App.2d 354, 366, 136 P.2d 651; Baker v. Kale, 83 Cal.App.2d 89, 92, 189 P.2d 57; Roberts v. Wachter, 104 Cal.App.2d 281, 287, 289–290, 231 P.2d 540.

[28] There is no liability for inducing a breach of contract where the breach is caused by the exercise of an absolute right —that is, an act which a person has a definite legal right to do without any qualification. Sweeley v. Gordon, 47 Cal.App.2d 385, 118 P.2d 842; Caldwell v. Gem Packing Co., 52 Cal.App.2d 80, 125 P.2d 901; Annotation 26 A.L.R.2d 1227, 1259.

[29, 30] A plaintiff, seeking to hold one liable for unjustifiably inducing another to breach a contract, must allege that the contract would otherwise have been performed, and that it was breached and abandoned by reason of the defendant's wrongful act and that such act was the moving cause thereof. Unless the act complained of was the proximate cause of the injury, there is no liability. Hill v. Progress Co., 79 Cal.App.2d 771, 780, 180 P.2d 956; 30 Am.Jur. 82, sec. 32. See Krigbaum v. Sbarbaro, 23 Cal.App. 427, 138 P. 364, an action by a real estate broker for unjustifiably inducing a breach of his contract with the principal, in which the complaint alleged that the defendant "intimidated and coerced" the principal to breach the contract. In Welch v. Campbell, 197 Misc. 165, 94 N.Y.S.2d 860, affirmed 278 App.Div. 605, 102 N.Y.S.2d 51, citing Hornstein v. Podwitz, 254 N.Y. 443, 173 N.E. 674, 84 A.L.R. 1, it is said that the essential allegations to be pleaded in order to recover damages for wrongfully inducing a breach of contract are the existence of a legal contract, the alleged wrongdoer's knowledge of the existence thereof, his intentional inducing of a breach thereof without justification, and damages resulting therefrom. In Sweeney v. Gleason, 31 Pa.D. & Co.R. 577, it was held that a complaint in an action against a third person for having induced the plaintiff's discharge, which merely alleged that the defendant unlawfully, wantonly, maliciously, and without justifiable cause, advised, requested, and persuaded the employer to discharge plaintiff and then set forth the damages alleged to have been sustained by such action, without alleging any unlawful means resorted to by the defendant or intentional or wilful acts committed by him, was insufficient, requiring judgment for the defendant. See 30 Am.Jur. 97, sec. 52.

[31] We have already seen that after November 1950 plaintiff had no contract with the Truccos, but in addition to that fatal fact, there is no allegation in the complaint or in the proposed sixth count that Allen or Dwyer intentionally or actively induced or persuaded the Truccos to breach any contract with plaintiff. There is no allegation that the Truccos would otherwise have performed any contract with plaintiff, or that it was breached or abandoned by any wrongful act of Allen or Dwyer, or that any act of Allen or Dwyer was the moving cause of the Truccos breaching the contract. Plaintiff alleges that after July, 1950, his contract was nonexclusive. It was not until about a year and two months after it is alleged Allen learned that plaintiff had procured the Angeloffs as buyers that the Truccos sold through Allen and Dwyer. The proposed sixth count added nothing to the third amended complaint as against Allen and Dwyer and it stated no cause of action against them.

For the reasons stated, the complaint as amended failed to state a cause of action against any of the defendants and their motion to exclude evidence was properly granted.

The judgment is affirmed.

PARKER WOOD, J., concurs.

VALLÉE, Justice.

I agree that neither the third amended complaint nor the proposed sixth count states facts sufficient to constitute a cause of action. I am of the opinion that the proposed fifth count states a cause of action against the Truccos. They employed plaintiff in writing. They waived the time limitation and the price fixed in the writing. Within the extended time and while the contract was in force, it never having been abandoned by plaintiff nor rescinded by the Truccos, plaintiff, on November 25, 1950, produced a buyer who was ready, willing, and able to buy on the terms and for the price specified by the Truccos. Under such facts plaintiff is entitled to a commission. In the absence of a specific agreement to the contrary, a broker employed to sell property has earned his commission when, within the life of his contract, or any extension thereof, he has produced a person who is ready, willing, and able to buy on the vendor's terms. See Twogood v. Monnette, 191 Cal. 103, 107, 215 P. 542; Moore v. Borgfeldt, 96 Cal.App. 306, 273 P. 1114. I would reverse the judgment as to defendants Trucco with directions to permit plaintiff to amend the third amended complaint by adding thereto the proposed fifth count.

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124 Cal.App.2d 334

ALDERSON et al.
v.
SANTA CLARA COUNTY et al.

ALDERSON
v.
SANTA CLARA COUNTY et al.

Civ. 15799.

District Court of Appeal, First District, Division 1, California.

April 1, 1954.

Rehearing Denied April 30, 1954.

Hearing Denied May 27, 1954.

Action by minors through their guardian ad litem for injuries received by them and by mother for medical expenses incurred in behalf of minors and action by driver of automobile against county were consolidated for trial. The injuries were sustained when driver of automobile, in order to avoid oncoming vehicle, drove off pavement onto shoulder and struck large rock not visible because of tall grass. The Superior Court, County of Santa Clara, James J. Scoppettone, J., entered judgments for defendant after defendant was granted nonsuits in both cases and plaintiffs appealed. The District Court of Appeal, Bray, J., held, inter alia, that whether 16 foot pavement left sufficient space for vehicles to pass so that county would be justified in leaving a two to three inch drop at edge of pavement and then a shoulder or sloping bank so covered with weeds that one could not see that at point of intersection with a driveway there were large rocks, was for jury.

Judgments reversed.

1. Automobiles 🔑252, 264

A county is liable for injuries resulting from obstructions or defects outside the travelled portion of a highway if the circumstances show that the driver of the automobile was not negligent in departing from the travelled area, and if the defects or obstructions are in close proximity to the travelled area and are hidden from ordinary view. Government Code, §§ 53051, 53052.

2. Automobiles 🔑308(4)

In action for injuries sustained when automobile driver drove onto shoulder to avoid oncoming automobile and struck rock, whether 16 foot pavement left sufficient width for vehicles to pass so that county would be justified in leaving a two or three inch drop at edge of pavement and then a shoulder or sloping bank so covered with weeds that one could not see that at its intersection with a driveway there were large rocks, was for jury. Government Code, §§ 53051, 53052.

3. Municipal Corporations 🔑821(5)

Whether or not a condition in a public street is actually dangerous and a menace to safety of travelling public is usually one of fact addressed to the triers of fact.

4. Automobiles 🔑308(11)

In action against county for injuries sustained when in an effort to avoid oncoming vehicle, automobile driver drove onto shoulder and struck large rock not visible because of tall grass, whether it was reasonably necessary for automobile driver to leave travelled portion of highway was for jury. Government Code, §§ 53051, 53052.

5. Counties 🔑213

Unless a claimant files a claim for damages with county as prescribed by statute, claimant would have no right of action. Government Code, § 53052.

6. Counties 🔑213

The purpose of requiring the filing of a claim as a condition precedent to bringing suit against public entities, boards and commissions is simply to enable such public officials to make proper investigation concerning merits of the claim and to settle it without expense of law suit, if settlement should be shown to be proper. Government Code, § 53052.

7. Counties 🔑213

Where a mother filed with county a claim on behalf of her minor children for general damages but filed no separate claim on behalf of herself for medical expenses incurred in behalf of the minors, there was a substantial compliance with claim statute and mother could maintain her action to recover medical expenses. Government Code, § 53052; Civ.Code, § 3333.

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Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for appellants.

Howard W. Campen, County Counsel of Santa Clara County, Spencer M. Williams, Deputy County Counsel, San Jose, for respondents.

BRAY, Justice.

Two actions against the defendant County of Santa Clara were consolidated for trial. One action is by the minors Gerald and Jack Alderson through their guardian ad litem Phyllis Alderson, their mother, for injuries received by them, and by Phyllis Alderson for hospital fees, etc., paid by her for their care and treatment. The other action is by Dorothy Alderson against the county for her injuries. A jury trial was commenced but at the end of plaintiffs' cases, defendant was granted nonsuits in both cases. From the judgments after denial of motions for new trial thereon, all plaintiffs appeal.

Questions Presented.

1. Is a county's liability for a dangerous and defective condition limited to the improved portion of a roadway? 2. Was plaintiff Dorothy Alderson guilty of contributory negligence as a matter of law? 3. Did the claim filed by the minors cover plaintiff Phyllis Alderson's cause of action?

Evidence.

The actions were based upon the contention that defendant county knowingly maintained Redmond Road, a public highway of the County of Santa Clara, in a dangerous and defective condition in that it permitted rocks and boulders to stand on the north shoulder hidden in a growth of tall weeds, and in that it permitted said shoulder to become hollowed by deep depressions and to become improperly graded, constituting a hazard to vehicles using it. There is practically no dispute as to the facts. One Sunday morning plaintiff Dorothy Alderson drove an automobile along Redmond Road. Riding with her were plaintiffs Gerald Alderson, aged 4, and Jack Alderson, aged 2. At the point of the accident Redmond Road is generally straight and level. The asphaltic pavement varied slightly as to width, being from 15 feet 10 inches to 16 feet. The county right of way is 40 feet wide. The car was 6 feet 2 inches wide. In front of the Cecala property there is a graveled driveway or entrance to that property. This extends from the asphaltic pavement 10 to 12 feet to the property line, and is about the height of the paved portion of the roadway. The west border of this driveway (the near side as Dorothy Alderson approached it) is outlined by rocks extending from a point 8 to 10 inches from the north edge of the pavement into the

Cecala property.[1] These rocks are imbedded in the ground and stand 5 to 7 inches above the surface of the driveway. Approaching the driveway there was grass 12 to 20 inches in height at the north edge of the pavement obscuring to some extent the bank leading down from the pavement to the orchard level. Grass was growing also between the rocks bordering the driveway, obscuring the rocks. Dorothy did not see these rocks as she approached although she did see the grass. The general width of the shoulders of Redmond Road was 4 feet. However, where the car left the pavement there was very little, if any, level shoulder. There was a rut or drop-off 2 to 3 inches in depth at the north edge of the pavement and then the ground sloped off at about a 45 degree angle for a distance of 3 or 4 feet to the orchard level which was from 18 to 20 inches below the pavement level.

As Dorothy proceeded along Redmond Road she observed another vehicle approaching from the opposite direction. As the cars drew closer together she gradually pulled over to the right hand side of the pavement. When the cars were but a short distance apart she judged that there was not sufficient space on the pavement for the two cars to pass (although she testified that at no time did the approaching car come on her half of the pavement, its left wheels being near the middle of the pavement). It was approaching at a reasonable speed. She was going approximately 30 to 35 miles per hour. Her right front wheel left the pavement, dropping 2 to 3 inches. It pulled the car to the right. The car proceeded about a car's length while off the pavement and then either the right front wheel or some part of the right front struck with a terrific jolt the rock at the east edge of the driveway 8 to 10 inches from the pavement. The automobile bounced into the air, crossed the driveway, turned slightly north and then struck head on into a tree which stood about 100 feet from the east line of the driveway and about 20 feet from the north edge of Redmond Road. All in the car were injured. Knowledge by the county of the condition of the roadway was not an issue.

1. County's Duty.

The situation was one where the county maintained only the paved portion of the highway (and some shoulder) and permitted rocks obscured by grass to remain on the right of way within 10 to 12 inches of the pavement. This could constitute a dangerous or defective condition to which Government Code sections 53051 and 53052 would apply, if the county is under any duty concerning the area outside the improved portion of the highway.

There is a conflict in the authorities as to the width of the highway, to which the duty of the county to use reasonable care to keep safe extends. See McQuillen, Municipal Corporations, vol. 19, § 54.34; Dillingham v. Department of Highways, Ky., 253 S.W.2d 256. There are cases to the effect that the public agency is not required to maintain the shoulders of a highway. See Collins v. State Highway Commission, 134 Kan. 278, 5 P.2d 1106, 80 A.L.R. 494. This rule, however, does not apply in California, where it seems now fairly well established that a county would be liable for defects in the shoulders provided that the shoulders were customarily traveled. See the following cases for the rule that the county is required to maintain the customarily traveled portions of the highway: Prescott v. City of Orange, 56 Cal.App.2d 144, 132 P.2d 523; Murphy v. County of Lake, 106 Cal.App.2d 61, 234 P.2d 712; Anderson v. County of San Joaquin, 110 Cal.App.2d 703, 244 P.2d 75.

However, in our case there was no evidence that the shoulder where the accident occurred was customarily traveled. The question here is whether the county was under any duty to maintain the portion of the shoulder in close proximity to the pavement free from obstructions not visible because of the tall grass. 25 Am.Jur., section 526, page 807, discusses the situation. "There is considerable conflict of authority as to the liability of municipal and quasi-municipal corporations for injuries sustained by travelers as a result of defects and obstructions within the limits of a street or highway, but outside the traveled or improved portion thereof. They are, however, generally held to be liable for injuries resulting from such defects or obstructions where they are in such proximity to, or so connected with, the traveled portion of the way as to render it unsafe to those traveling thereon, or where the danger is hidden, and the defect or obstruction amounts to a trap or a snare. A number of cases lay down the rule that it is the duty of the traveler to remain within the wrought and traveled portion of the way, and that the corporation is not liable for injuries sustained by him if he departs therefrom voluntarily and without good cause, or for some independent purpose. Such rule of nonliability has been applied in a number of instances in the case of injuries resulting from the collision of vehicular traffic with defects or obstructions within a park strip or parkway within the limits of the street or highway. Furthermore, the view has been taken that *where there is no hidden danger, or any peculiar situation which renders the construction dangerous*, one who mistakenly leaves or, by some emergency, is formed [forced] from the beaten track cannot recover. * * * On the other hand, there is authority to the effect that although the public authorities are not obliged to prepare the highway for travel to its full width, and although only a portion of its width has been so prepared, the public, nevertheless, has a right to travel over the whole width of the way as laid out, without being subjected to other or greater dangers than may be presented by natural obstacles, or those occasioned by making and repairing the traveled path, and that it is not necessarily a good defense to a claim for damages that they were incurred by reason of an obstruction upon the margin of the way. This line of authorities takes the view that the corporation still has a right to control the whole width of the highway, is subject to a corresponding duty with respect to it, and must see that those portions outside the traveled track are in such condition that a traveler using due care may pass without danger of accident. * * * With respect to injuries resulting from the condition of the shoulder of a hard-surfaced road, some courts have applied the rule of liability, while others have applied the rule of nonliability upon the theory that the shoulder of a highway is not constructed for the purpose of being traveled over." (Emphasis added.)

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[1] It should be noted that these rocks are on the very edge of the driveway into the Cecala property and hence do not form an obstruction to one making the turn from the pavement into the driveway.

[1] As the question has not been determined heretofore in this state, it would seem reasonable to apply the above-mentioned rule of liability outside the traveled portion of the highway if the circumstances show that the driver was not negligent in departing from the traveled area, and if the defects or obstructions are in close proximity to the traveled area and are hidden from ordinary view. The trend of the California decisions in this direction is shown by Dalzell v. County of Los Angeles, 88 Cal.App.2d 271, 198 P.2d 554, and Murphy v. County of Lake, supra, 106 Cal.App.2d 61, 234 P.2d 712. In the Dalzell case the plaintiff drove into an unmarked storm drain off the paved portion of the highway, which apparently was hidden by grass. (It is not clear from the opinion whether the drain was outside the traveled portion of the highway. However, the court several times refers to the fact that the plaintiff was "off the highway.") [88 Cal.App. 271, 198 P.2d 557.] Although the trial court's finding that the plaintiff was guilty of contributory negligence was upheld, the reviewing court stated that the evidence showed that the storm drain constituted a dangerous or defective condition of the highway. The Murphy case involved a narrow winding mountain road, with a 12-foot pavement and an 18-inch shoulder on the bank side and a 3-foot shoulder on the abrupt drop side. In passing an approaching vehicle the plaintiff's truck went off the shoulder. There was evidence that the type of construction of the shoulder created an inherently dangerous condition. The court said "in view of the narrowness of the road, there can be no question but that the unpaved shoulder necessarily would have to be traveled on by larger ve-

hicles when passing other cars." 106 Cal. App.2d at page 67, 234 P.2d at page 716. In Scalf v. Eicher, 11 Cal.App.2d 44, 45, 50, 53 P.2d 368, it is held that in many instances a shoulder is necessarily a portion of the highway.

[2] As we have shown, a county may be liable for the dangerous or defective condition even though that condition exists off the traveled portion of the highway. Whether the situation requires the application of that rule is a question for the jury. Thus, here, whether a 16-foot pavement in view of the width of cars today (plaintiff's was 6 feet 2 inches) left sufficient width for cars to pass so that the county would be justified in leaving a 2 to 3 inch drop at the edge of the pavement and then a shoulder or sloping bank so covered with weeds that one could not see that where it intersected a driveway there were large rocks, was a question for the jury. In Frates v. Ghirardi, 48 Cal.App.2d 596, 120 P.2d 82, 85, it was held that it was for the jury to determine whether a tow-car parked within the right of way but 8 feet off the paved portion was obstructing "'a way or place * * * open to the use of the public for purposes of vehicular travel'" as referred to in section 586.5, Vehicle Code. As said in Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118, concerning cases based upon the public liability statutes, "Each case must depend upon its own state of facts, and so varying are the factors which contribute to produce a result that no hard and fast rule may find practical application in the great majority of cases." 207 Cal. at page 661, 280 P. at page 120.

[3] "The question of whether or not a condition in a public street is actually dangerous and a menace to the safety of the traveling public is usually one of fact which is addressed to the triers of facts." Bigelow v. City of Ontario, 37 Cal.App.2d 198, 204, 99 P.2d 298, 301; to the same effect, Murphy v. County of Lake, supra, 106 Cal. App.2d 61, 67, 234 P.2d 712; Rowland v. City of Pomona, 82 Cal.App.2d 622, 186 P. 2d 447.

In Sher v. State, 194 Misc. 172, 86 N.Y.S. 2d 266, at page 269, the court said: "As the Court said in Hadley v. Taylor, L.R., 1 C.P. 53, 55, in approving damages where the hole was 14 inches from the side of the road 'It is extremely difficult to draw the line between what is and what is not such a proximity to the highway as to constitute an actionable nuisance.' We think it makes no difference here, whether the depression was immediately adjacent to the paved portion of the highway, if it was so situated that a person lawfully and reasonably using the thoroughfare was liable to fall into it. * * * 'The State is obligated to maintain its highways in a safe condition for travel, not only with regard to obstructions and defects in the travelled portion of the road, but also with regard to conditions adjacent to and above the highway which might reasonably be anticipated to result in injury and damage to the users thereof.'"

In Scalf v. Eicher, supra, 11 Cal.App.2d 44, 53 P.2d 368, in discussing the portion of the highway available for pedestrians the court refers to Silvey v. Harm, 120 Cal. App. 561, 8 P.2d 570, which held that the shoulders were not part of the "'main traveled portion of a public highway'", 11 Cal. App.2d at page 51, 53 P.2d at page 371, mentioned in section 136, Vehicle Code, and then points out that "The word 'highway' as used in various statutes and ordinances may have a meaning somewhat different, depending upon the purpose of the provision of the law." 11 Cal.App.2d at page 50, 53 P.2d at page 371. As to cities, "The obligation to exercise reasonable care to keep streets and sidewalks in proper repair is not confined to defects existing within the limits of the public way. Dangerous or unsafe ditches, excavations, walls or obstructions by the side thereof are included within the rule fixing municipal liability. A city 'must not create or suffer any pitfall within the traveled portion, or so near to it that a traveler upon the portion customarily used for travel may, although in the exercise of due care, fall therein.'" McQuillin, Municipal Corporations, vol. 19, 3rd ed., § 54.69, p. 216.

In Galiano v. Pacific Gas & Electric Co., 20 Cal.App.2d 534, 544, 67 P.2d 388, 393, the court quoted with approval: "In 13

Ruling Case Law, § 311, page 381, the rule as to liability for obstructions outside of the traveled portion, but within the side lines of the highway, is thus stated: 'There seems to be considerable conflict of authority as to the liability of municipal and quasi-municipal corporations for injuries sustained by travelers as a result of defects and obstructions within the limits of a street or highway, but outside the traveled portion thereof. They are, however, generally held to be liable for injuries resulting from such defects or obstructions which are in such proximity to, or so connected with the traveled portion of the way as to render it unsafe to those traveling thereon, or where the danger is hidden and the defect or obstruction amounts to a trap or a snare.'" To the same effect, McQuillin, Municipal Corporations, vol. 19, 3rd ed., § 54.34, p. 120.

"The question as to whether the condition in a public street is dangerous and a menace to those travelling upon it is usually one of fact for the determination of the trier of fact, whose conclusion, if supported by any substantial evidence, will not be disturbed on appeal." Barker v. City of Los Angeles, 57 Cal.App.2d 742, 747, 135 P.2d 573, 576; see also Prescott v. City of Orange, supra, 56 Cal.App.2d 144, 132 P.2d 523.

2. Contributory Negligence.

Defendant contends that in driving off the paved portion of the highway Dorothy Alderson was guilty of negligence as a matter of law. In determining whether as a matter of law a person is negligent in driving off a 16-foot pavement, the following language in a case holding the State Highway Commission of Kansas liable for injuries caused by ruts in a dirt shoulder, is significant. "The present statute contemplates liability for defects in highways improved by hard surfacing, and the liability is not limited to defects in the hard surface, as for example the concrete slab on U. S. 40. There was testimony that the purpose of shoulders is to support the concrete slab, and not to provide a way for travel, which is true in a sense. But a hard-surface highway may be defective because it has no shoulders. Lack of any shoulder for a concrete slab 18 feet wide, 18 inches above the surface, and a mile long, would manifestly render the highway defective for purposes of travel. Of course the slab is intended to be and is the traveled way; *but it is a matter of common knowledge that careful automobile drivers not only may on occasion, but frequently must, use the shoulders to some extent as a part of the highway, and a pitfall in a shoulder, adjoining or even adjacent to the slab, may constitute a defect in the highway.*" Collins v. State Highway Commission, 134 Kan. 278, 5 P.2d 1106, 1109, 80 A.L.R. 488, 493; emphasis added. "It often happens that the driver of a vehicle in an emergency, *or in passing other vehicles,* and while exercising ordinary care for his own safety, leaves for a short distance the usually traveled part of the street, and when he does so, if there is no warning of the danger and the physical appearance outside of the traveled part does not give notice that it is unsafe, he cannot be said to be guilty of such contributory negligence as would defeat a recovery if he is injured by dropping into an excavation or coming in contact with a dangerous obstruction in the margin of the beaten path that could not be discovered by the exercise of ordinary care on his part." City of Lancaster v. Broaddus, 186 Ky. 226, 216 S.W. 373, 375; emphasis added.

[4] In Gilly v. State, 202 Misc. 837, 117 N.Y.S.2d 303, it was held that "'* * * the principle that the shoulder of the highway must be maintained in reasonably safe condition for use when occasion requires'", 117 N.Y.S.2d at page 304, did not apply to a motorist who while negotiating a curve in the highway drove his automobile on a soft shoulder, causing him to lose control of the car. That situation is far different from the one here. The width of the highway there was not shown and the court particularly pointed out that there was no traffic in either direction at the time "to cause or require the claimant to leave the pavement." 117 N.Y.S.2d at page 304. In our case it was for the jury to determine whether the approaching of another vehicle on the narrow highway caused plaintiff reasonably to leave the pavement.

This is so even though in actual fact there was room for the two cars to pass on the pavement.

3. Plaintiff Phyllis Alderson's Cause of Action.

[5] While a claim on behalf of the minors was filed with defendant in accordance with section 53052, Government Code, no separate claim was filed on behalf of Phyllis Alderson for medical expenses incurred in behalf of the minors on which her cause of action was based. No right of action exists without such claim. Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185. Because such claim was not filed plaintiff Phyllis was properly nonsuited, Gapin v. City of Los Angeles, 34 Cal.App.2d 660, 94 P.2d 359, unless, as claimed by plaintiff, her claim is an integral part of the claim filed by her on behalf of the minors for general damages. Plaintiff relies on Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29, 33. There a claim was filed by the father setting forth the accident to the son, the loss of his eye, and then the statement "'claim is hereby made for Twenty-five Thousand dollars ($25,000.00) as damages for the loss of an eye by said'" son. It was verified by the father. The court held, 42 Cal.App.2d at page 421, 109 P.2d at page 33, that the "claim itself shows clearly enough that the son is the claimant" and not the father, and that it was a substantial compliance with the statute requiring a claim. In Sullivan v. City and County of San Francisco, 95 Cal.App.2d 745, 214 P. 2d 82, the claim filed with the city was for $50,000 damages. After suit was filed the court permitted the plaintiff to amend his complaint increasing his demand to $150,000. The city contended that the plaintiff was limited to the amount of the claim filed with it. We held that the amount of damages set forth in a claim does not necessarily limit the amount recoverable in an action to enforce the claim; that there was a substantial compliance with the claim statute even though the amount was less than that demanded in the action.

[6, 7] In recent years the interpretation of the claim statute has been greatly liberalized. (See cases cited in Sullivan v. City and County of San Francisco, supra, 95 Cal.App.2d 745, 764, 214 P.2d 82. As said in Kelso v. Board of Education, supra, 42 Cal.App.2d 415, 109 P.2d 29, the purpose of requiring the filing of a claim "as a condition precedent to bringing a suit against public entities, boards, commissions, etc., is simply to enable such public officials to make a proper investigation concerning the merits of the claim and to settle it without the expense of a lawsuit, if settlement should be shown to be proper." 42 Cal. App.2d at page 421, 109 P.2d at page 33. In our case, while no claim for special damages was filed by the mother and none could have been filed on behalf of the minors unless the minors actually incurred or paid such special damages, defendant received from Phyllis as mother of the minors full notice of the accident, the persons injured therein, and the fact that damages were claimed. Paraphrasing the language of the Kelso case, 42 Cal.App.2d at page 421, 109 P.2d at page 33, "It would strain one's imagination to suppose" that the defendant would not know that minors suffering injuries to the extent set forth in the claim would have required medical and hospital attention. Again using the Kelso case language, "It is at once apparent that before the defendants could determine the presence or absence of any liability upon their part to the [injured boys' mother], they would of necessity have to determine the existence of any primary liability to the injured minor." 42 Cal.App.2d at page 421, 109 P.2d at page 33. If defendant owed the minors no obligation, then of course there would be no obligation to the mother for the moneys paid out in their behalf. If it did owe the minors an obligation then the mother's claim for those moneys logically would seem to be an integral part of their claim to be compensated "for all the detriment proximately caused" by the defendant's tort. Civ.Code § 3333. Defendant could not possibly be injured by the failure to file a claim for medical, etc., expenses in a matter so closely related to the claim filed and the persons for whom the claim was filed. "* * * literal compliance with the claim statute is not re-

quired—substantial compliance is sufficient." Sullivan v. City and County of San Francisco, supra, 95 Cal.App.2d 745, 764, 214 P.2d 82, 94. Because of the close relationship of the parties and the subject matter of their causes of action, we are constrained to hold that there was a substantial compliance with the claim statute.

The judgments are reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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124 Cal.App.2d 353

STOCKTON THEATRES, Inc.
v.
PALERMO.

Civ. 8222.

District Court of Appeal, Third District, California.
April 1, 1954.

Hearing Denied May 27, 1954.

Action by tenant against landlord for attorney's fees allegedly due under lease provision that party to lease who, commenced and prevailed in legal proceedings brought against other party because of other party's failure to perform any term, covenant, or condition of lease, would be entitled to attorney's fees. The Superior Court, San Joaquin County, George F. Buck, J., awarded certain attorney's fees to tenant and tenant appealed, and landlord cross-appealed. The District Court of Appeal, Schottky, J., held that, where landlord entered leased premises by virtue of writ of restitution issued following granting of judgment in unlawful detainer action by landlord against tenant, such entry constituted an unjustified taking of possession in view of fact that such judgment was thereafter reversed, and, therefore, tenant, which had filed notice of appeal for judgment in such unlawful detainer action, was entitled to attorney's fees under lease provision that party, who commences and prevails in legal proceedings brought against other party because of other party's failure to perform any term, covenant, or condition of lease, should be entitled to attorney's fees.

See also, 264 P.2d 74.

Judgment affirmed.

1. Landlord and Tenant 🔑**37**

A lease creates two sets of rights and obligations arising from "privity of estate" and "privity of contract", and, therefore, a lease is to be construed according to general rules of interpretation applicable to all contracts.

2. Appeal and Error 🔑**1008(3)**

In absence of extrinsic evidence in aid of construction of written instrument, a reviewing court is not bound by trial court's interpretation and will independently ascertain meaning of instrument from language thereof as a matter of law.

3. Costs 🔑**172**

Generally, attorneys' fees are not recoverable by a successful party to an action either in law or in equity, except where such recovery is expressly provided for by contract.

4. Landlord and Tenant 🔑**48(2), 49(3)**

Language in lease expressing conditions under which parties could obtain attorney's fees in event of commencement of legal proceedings between each other would have to be construed in its ordinary and popular sense.

5. Landlord and Tenant 🔑**48(2)**

Under lease provision that party, who, commences and prevails in legal proceedings brought against other party because of other party's failure to perform any term, covenant, or condition of lease, shall be entitled to attorney's fees, tenant was not entitled to such fees as result of his successful appeal in declaratory judgment action by landlord against tenant seeking judgment declaring lease void under alien land law and restoration of realty to landlord. Civ. Code, § 1644; Code Civ.Proc. § 1861.

6. Landlord and Tenant 🔑**48(2)**

Where landlord entered leased premises by virtue of writ of restitution issued following granting of judgment in unlawful detainer action by landlord against tenant, such entry constituted an unjustified taking of possession in view of fact that such judgment was thereafter reversed, and, therefore, tenant, which had filed notice of appeal from judgment in such unlawful detainer action, was entitled to attorney's fees under lease provision that party, who commences and prevails in legal proceedings brought against other party because of other party's failure to perform any term, covenant, or condition of lease, should be entitled to attorney's fees. Civ. Code, § 1644; Code Civ.Proc. § 1861.

7. Appeal and Error ⚷169

Generally, questions not raised in trial court will not be considered upon appeal.

8. Appeal and Error ⚷172(1)

In action by tenant against landlord for attorney's fees allegedly due under lease provision that party, who commences and prevails in legal proceedings brought against other party to lease because of other party's failure to perform any term, covenant, or condition of lease, shall be entitled to attorney's fees, tenant would not be entitled to raise, for first time upon appeal, contention that he was entitled to attorney's fees as matter of law irrespective of any contract.

9. Landlord and Tenant ⚷48(2)

Where tenant was ultimately successful upon appeals taken in unlawful detainer action by landlord against tenant and in declaratory judgment proceeding by landlord against tenant for judgment declaring lease void and for restoration of leased realty to landlord, but landlord had been in possession of realty by writ of restitution after entry and before reversal of judgment in unlawful detainer action, tenant was not entitled, in subsequent action against landlord, to recover all his attorney's fees incurred by him in such actions irrespective of any contract.

◆

Freed, Gebauer & Freed, San Francisco, for plaintiff and appellant.

Smith & Zeller, Stockton, for defendant-cross-appellant.

SCHOTTKY, Justice.

This is an appeal by plaintiff and a cross-appeal by defendant from a judgment awarding attorney's fees to plaintiff.

On September 13, 1940, defendant's father and plaintiff entered into a written lease for the Star Theatre, to begin on January 1, 1941. Said lease contained the following provision relating to attorney's fees:

> If either party shall commence any legal proceedings against the other for relief because of any default by the other because of failure to perform any term, covenant or condition of this lease and shall prevail in said action, the party who has commenced and prevailed in said legal proceeding shall recover, in addition to all court costs a reasonable attorney's fee to be fixed by the Court."

On October 27, 1941, defendant's father died and defendant became the owner of the leased realty.

On June 5, 1944, defendant commenced an action against plaintiff for declaratory relief, asking the court to declare the lease void under the Alien Land Law, and for restoration of the realty to him. Subsequently the court entered judgment for the defendant declaring the lease to be illegal and void. On July 11, 1945, defendant commenced an action against plaintiff in unlawful detainer to oust plaintiff from possession of the premises pursuant to the declaratory relief judgment. Judgment was entered in favor of defendant and defendant secured possession of the premises by writ of restitution. Appeals were taken from both of these judgments, and were consolidated on appeal. Both trial court judgments were reversed by this court 172 P.2d 103; 172 P.2d 109 and upon a petition for a hearing before the Supreme Court, same was granted and both trial court judgments were also reversed by the Supreme Court. 32 Cal.2d 53, 195 P.2d 1; 32 Cal.2d 889, 195 P.2d 10. On September 11, 1948, plaintiff commenced this action to recover attorney's fees expended in defending and taking the appeal in the declaratory relief and unlawful detainer actions. The action was based on the above quoted portion of the lease providing for attorney's fees.

The law firm of Rutherford, Jacobs, Cavalero & Dietrich represented plaintiff in the action for declaratory relief brought by defendant, and Messrs. Jacobs and Dietrich actually prepared and conducted the trial. Mr. Jacobs testified at the trial of the instant case as to the amount of work involved in preparing and conducting the case, and also that his firm was paid $7,500 legal fee. The law firm of Freed & Freed and its successor, Freed, Gebauer & Freed, prepared and conducted the unlawful detainer trial brought by defendant against plaintiff, and also prepared and conducted the appeals from the declaratory relief judgment and forcible detainer judgment on behalf of plaintiff. Mr. Eli Freed at the trial of the instant case testified to the work involved in connection with the unlawful detainer trial and the two appeals. He also testified that his firm was paid a fee of $12,500 for its representation in the unlawful detainer trial and the two appeals. There was no dispute as to the value of the services rendered by the two firms.

The trial court found that the appeal taken by plaintiff in the unlawful detainer action "constituted legal proceedings commenced by Stockton Theatres, Inc., for relief because of the default by Emil Palermo in ousting Stockton Theatres from the leased premises, for which Stockton Theatres, Inc., is entitled to recover reasonable attorneys' fees pursuant to the provisions of paragraph 16 of said lease," but that none of the other legal proceedings engaged in by plaintiff in said declaratory relief and unlawful detainer actions "were commenced for relief because of any default by Emil Palermo because of any failure as lessor to perform any term, covenant or condition of said lease." The court then went on to find that the value of the legal services rendered on behalf of plaintiff in the appeal in the unlawful detainer action was $2,500, and judgment was entered in favor of plaintiff in that amount. Both plaintiff and defendant have appealed from said judgment, plaintiff contending that it was entitled to a minimum amount of $10,000, and defendant contending that plaintiff was not entitled to recover any amount for attorney's fees.

[1, 2] Plaintiff contends, correctly, that a lease creates two sets of rights and obligations, arising from "privity of estate" and "'privity of contract'", Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, 639; Ellingson v. Walsh, O'Connor & Barneson, 15 Cal.2d 673, 104 P.2d 507, and that, therefore, a lease is to be construed according to the general rules of interpretation applicable to all contracts. 6 Cal.Jur., Contracts, sec. 161; 15 Cal.Jur., Landlord and Tenant, sec. 31; Knox v. Wolfe, 73 Cal.App.2d 494, 167 P.2d 3. Plaintiff correctly states further that in the absence of extrinsic evidence in aid of construction of a written instrument, an appellate court is not bound by the trial court's interpretation and will independently ascertain the meaning of the instrument from the language thereof as a matter of law, Moore v. Wood, 26 Cal.2d 621, 160 P.2d 772; Transport Oil Co. v. Exeter Oil Co., 84 Cal.App.2d 616, 191 P.2d 129; Cash v. Blackett, 87 Cal.App.2d 233, 196 P.2d 585; Fischer v. Means, 88 Cal. App.2d 137, 198 P.2d 389, and that, therefore, notwithstanding the construction placed on the lease provision calling for attorney's fees by the trial court, this court may, by use of the standard accepted rules of contract interpretation independently determine whether or not the provision was to extend to fees as contended by appellant.

Section 1644 of the Civil Code provides:

> "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

Section 1861 of the Code of Civil Procedure provides in part that "The terms of a writing are presumed to have been used in their primary and general acceptation * * *." See, also, 6 Cal.Jur., Contracts, sec. 175.

[3] The general rule is that attorney's fees are not recoverable by a successful party to an action either in law or equity, except in the instances where they are expressly provided for by contract. 7 Cal. Jur., Costs, sec. 27.

[4] In the instant case the parties did contract for the payment of fees under certain conditions. The language expressing these conditions must be construed in its ordinary and popular sense. According to the language of the provision, hereinbefore quoted, two things must exist before one party can recover attorney's fees from the other, and these two things are: He must (1) commence a legal proceeding against the other for relief because of any default by the other because of failure to perform a term, covenant or condition of the lease, and (2) prevail in said action. Then the provision repeats that the party who has "commenced and prevailed in said legal proceedings" shall recover a reasonable attorney's fee to be fixed by the court. Recovery of attorney's fees by the plaintiff in the instant case under this provision is sought for fees incurred in connection with the action for declaratory relief and the appeal therefrom, and the action for unlawful detainer and the appeal therefrom.

[5] Applying the foregoing test to the declaratory relief action, it is clear that it was not commenced by the plaintiff. Thus the first condition is not met. The declaratory suit proceeding did not involve any question of relief for default because of failure to perform a term, covenant or condition of the lease. Thus the second condition for recovery of attorney's fees is not met.

Plaintiff did take an appeal in the declaratory relief action and did prevail, but this would not permit plaintiff to recover its attorney's fees because neither the declaratory relief action nor the appeal therefrom involved any question of relief for default because of a failure to perform any covenant of the lease.

The learned trial judge filed an able and exhaustive memorandum opinion which we believe correctly determines the issues, and because such opinions are always helpful to an appellate court, we quote therefrom as follows:

> "At the outset it should be apparent that this attorney's fee clause by its terms does not provide that attorney's fees may be recovered by a successful litigant in all kinds of legal action between the landlord and tenant. The plaintiff herein can recover attorney's fees only for the nature and kind of litigation which falls within the scope of the agreement. This view of the matter is supported by the following authorities: [Citing Prichard v. Kimball, 190 Cal. 757, 766, 767, 214 P. 863; Farmers & Merchants' Nat. Bank v. Bailie, 138 Cal.App. 143, 150, 32 P.2d 157.]
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> "Among the matters in litigation for which Stockton Theatres claims the recovery of attorney's fees is the action for declaratory relief. That action was brought by Mr. Palermo as plaintiff against Stockton Theatres as defendant. The complaint was filed on June 5, 1944, and marks the inception of the litigation between these parties.
>
> "Mr. Palermo's complaint for declaratory relief alleged that the lease was illegal and void by reason of the Alien Land Law. There has been received in evidence as Plaintiff's Exhibit 2 the official file in this suit for declaratory relief. The answer filed by Stockton Theatres in that action does not allege any 'default' nor 'any failure to perform' the lease. The sole issue upon which the declaratory relief suit was commenced and was defended and was finally adjudicated was the issue concerning the validity of the lease.
>
> "This was not an action in which Stockton Theatres was seeking relief for any 'default' because of failure to perform any term, condition or covenant of the lease.
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> * * * * * *
>
> "* * * To constitute a breach of the covenant of quiet possession or a constructive eviction there must be active interference with the tenant's possession of the premises and a suit brought by the landlord against the tenant does not constitute such a breach nor can it be called a constructive eviction. This is demonstrated by the following authorities.
>
> "Agar v. Winslow, 123 Cal. 587 [56 P. 422]. In this case the landlord had

previously commenced an action for ejectment against the tenant. On page 593 [of 123 Cal., on page 424 of 56 P.] of the opinion the court stated:

" 'In the other cases cited by appellant the interference relied on as constituting an eviction was in every instance of such a character as to interfere with the lessee's enjoyment of the premises by depriving him of his right to collect rent or in some way rendering it inequitable for the landlord to collect rents from his lessee, and in none of them is the lessee freed from his obligation to his landlord where he remains in possession and enjoyment of the premises, either personally or through his subtenants, with the power to collect rent from them. It will be unnecessary to consider respondents' point that the appeal should be dismissed.'

"Black v. Knight, 176 Cal. 722, at page 726 [169 P. 382, L.R.A.1918C, 319]:

" 'In the case at bar, if the tenant had been actually ousted from possession by the landlord under process issued upon the unlawful detainer judgment, it might well be argued that Levitzky v. Canning, supra [33 Cal. 299], required a conclusion, contrary to very respectable authority, that there had been a wrongful deprival of possession by the landlord, constituting a breach of the covenant for quiet enjoyment. But as we have seen, that element must be held to be lacking here.

" 'So long certainly as there is no disturbance of the tenant's beneficial enjoyment of the premises caused thereby, the right of a landlord, acting in perfect good faith and without malice, to prosecute an action in the courts for the purpose of obtaining a determination of the question whether the tenant has not forfeited his term because of violation of some covenant of the lease, without making himself amenable to the tenant in damages, cannot well be disputed. Indeed, there is much authority which goes further in favor of the landlord's rights in this respect. It is substantially said in 2 Tiffany on Landlord and Tenant, section 289, that the general rule is that in order to make one liable for the institution of a civil suit, it must have been with malice and without probable cause, and that, under this rule, a landlord would not be liable to his tenant for damage to the latter arising from his wrongful institution of a summary proceeding to recover possession, unless it was instituted maliciously and without probable cause.'

"Standard Livestock Company v. Pentz, 204 Cal. 618, at page 625 [269 P. 645, 62 A.L.R. 1239]:

" 'It is the respondent's contention that the breach of any of the lessor's obligations, under the provisions of section 1927 of the Civil Code, to insure to the lessee quiet possession of the leased premises during the term thereof against all persons lawfully claiming the same, occurred upon the institution of the foreclosure proceeding wherein the plaintiff in that action asserted a superior right to that of both the lessor and lessee of the premises in question; and that such asserted breach occurred upon the filing of the complaint in the foreclosure action on November 6, 1918, and since the plaintiff herein did not institute the present action until February, 1923, its action was barred by the aforesaid provisions of the Code of Civil Procedure and particularly by section 338, subdivision 1 of said code. There is no merit in this contention, nor do the authorities cited in the respondent's brief sustain it. The law is too well settled to require extensive comment or citation of authority that the covenant of quiet possession in a lease is not breached until there has been an actual or constructive eviction. The rule upon this subject is stated with sufficient citation of authority in the case of McCormick v. Marcy, 165 Cal. 386, 389 (132 P. 449, 450), wherein it is said: "There is no breach of the covenant for quiet and peaceable possession of land until there has been an eviction by the true owner or an assertion by him of his paramount right in such a manner that the holder through the covenator is compelled to yield possession or buy the outstanding superior title."'

"The views expressed in these cases have direct application to the facts of the case at bar. During the pendency of Mr. Palermo's action for declaratory relief in the Superior Court and for some months thereafter, Stockton Theatres remained in possession of the leased premises. Upon July 10, 1945, a judgment was entered in that action declaring the lease void, but it should be noted that the judgment did not by its terms oust the Stockton Theatres from the premises nor did any writ issued under that judgment deprive Stockton Theatres of the possession of the premises. Stockton Theatres filed a notice of appeal from that judgment on July 18, 1945, and at that time was still in possession of the leased premises.

"It is also relevant to mention the practical construction given to an agreement as revealed by the acts and conduct of the parties to the agreement. The attorney's fee clause as above quoted provides that 'either party may recover reasonable attorney's fees.' If the litigation had involved a 'default' of the lease then either party could have sought attorney's fees as part of the relief in that declaratory judgment action. See Huber v. Shedoudy, 180 Cal. 311, at page 314 [181 P. 63], and Code Civ.Proc. § 1060 wherein it is stated: 'He may ask for a declaration of rights or duties either alone or *with other relief*.' However, in this action for declaratory relief neither Mr. Palermo as plaintiff, nor Stockton Theatres, as defendant, sought to recover attorney's fees as part of the relief prayed for. Both parties were represented by able counsel diligent in securing the rights of their clients.

"Stockton Theatres further claims recovery for attorney's fees expended in the defense of the unlawful detainer action. This action was brought by Palermo as plaintiff against Stockton Theatres as defendant for recovery of the possession of the leased premises. This suit was filed on July 11, 1945, the day after the Superior Court rendered judgment in Palermo's favor in the suit for declaratory relief. As appears from the complaint in the unlawful detainer suit, Palermo did not allege a breach or default in the lease but alleged that the lease was invalid for the reason previously stated and that the defendant Stockton Theatres was not entitled to the possession of the premises. On July 26th, 1945, Stockton Theatres, Inc., by their counsel, appeared as defendant and filed a demurrer to the complaint. The complaint was amended and then Stockton Theatres filed an answer to the amended complaint. Thereafter the case proceeded to trial and on December 1st, 1945, the Superior Court rendered judgment for the plaintiff Palermo and on the same day pursuant to a writ of restitution issued pursuant to that judgment, Mr. Palermo entered possession of the leased premises.

"On December 4, 1945, Stockton Theatres as defendant and appellant filed notice of appeal from the judgment in the unlawful detainer action. Thereafter the appeal proceeded in due course through the District Court of Appeal and finally to the Supreme Court of the State of California. On June 15, 1948, the Supreme Court rendered an opinion [195 P.2d 10] and reversed the judgment for plaintiff Palermo in the unlawful detainer action.

"Previously Stockton Theatres, as defendant and appellant, had on July 18th, 1945, filed a notice of appeal from the judgment of the Superior Court in the action for declaratory relief. On June 15, 1948, the Supreme Court rendered an opinion reversing the judgment for plaintiff Palermo in the declaratory judgment action [195 P.2d 1]. Hence, Stockton Theatres, as defendant and appellant, had prevailed in both appeals in both actions.

"We have in an earlier portion of this memorandum reached the conclusion that Stockton Theatres cannot recover fees for attorney's services performed in the declaratory judgment action because in the defense of that action and in the appeal therefrom from the judgment rendered therein Stockton Theatres had not commenced any legal proceedings for relief from any default or failure to perform the lease.

"The problem now arises: Can this same reasoning be applied to the claim for attorney's fees in the defense of the unlawful detainer action? If Stockton Theatres is to recover attorney's fees for the ultimately successful defense of the unlawful detainer action then their claim must rest within the scope of the clause in the lease which defines their right to attorney's fees.

"We agree with plaintiff's contention that this clause in the lease as quoted above may give the right to recover attorney's fees not only to successful plaintiffs but also to successful defendants, but with this proviso: It must be established that the party who claims such fees has commenced a legal proceeding against the other for relief because of a default in the lease and the fee claimed must be for legal services performed in that proceeding.

"The word 'commence' as used in this clause can just as well mean 'commence a successful defense.' It would be a narrow interpretation to declare that the word 'commence' must be given the restricted construction of 'file a complaint as plaintiff.' Nevertheless, the words 'commence any legal proceedings' must be construed with the other words in the same clause.

"Therefore, in saying that attorney's fees under this clause in the lease may be recovered for a successful defense, it must be a proceeding in which the defendant seeks relief for a default by the other because of the failure to perform any term, condition or covenant of the lease. It should seem clear from the authorities already cited that commencing and maintaining an unlawful detainer action against the Stockton Theatres did not constitute a default by Mr. Palermo. (Agar v. Winslow, 123 Cal. 587 [56 P. 422]; Black v. Knight, 176 Cal. 722 [169 P. 382]; Standard Livestock Co. v. Pentz, 204 Cal. 618 [269 P. 645])."

[6] The trial judge then points out that the first default occurred when Palermo entered the premises on December 1, 1945, by virtue of the writ or restitution issued on that date. This was an unjustified taking of possession because the judgment in the unlawful detainer suit was thereafter reversed. When Stockton Theatres on December 4, 1945, filed a notice of appeal from the judgment in the unlawful detainer action they by that act commenced a legal proceeding for relief because of their landlord's unjustified taking of possession of the leased premises on December 1, 1945.

The opinion of the trial judge continues:

"* * * Mr. Palermo's possession of the premises was founded upon the judgment in his favor in the unlawful detainer action and by seeking in their appeal to reverse that judgment, Stockton Theatres had commenced a proceeding as defined by the attorney's fee clause in the lease. It is true that the notice of appeal did not and in fact certainly could not allege in so many words a default by Mr. Palermo, but nevertheless in construing the effect of this attorney's fees clause we must give due regard to the particular facts of the litigation and the practical purpose of the proceeding and determine by what legal act the defendant commenced to seek the relief upon which he bases this claim for attorney's fees.

"Let us suppose that Palermo, after he obtained his judgment as plaintiff in the unlawful detainer action, had remained absent from the leased premises and at no time during the further course of the litigation took possession of the theatre premises and that at all times Stockton Theatres continued in possession of the property and that Stockton Theatres finally prevailed and obtained a reversal of the judgment.

"Under such circumstances Stockton Theatres as the prevailing party would be entitled to recover their statutory court costs as provided by Code Civ. Proc. § 1034 and nothing more.

"Under such circumstances, Stockton Theatres, even though they had conducted a successful defense, would not be entitled to attorney's fees in that action nor in any subsequent action brought for that purpose. There is no rule of law or statute in this State giving a party that remedy in such a case wherein there is no finding of malice, oppression or bad faith on the part of the unsuccessful litigant. Furthermore, Stockton Theatres would not be given the right to recover attorney's fees in such a case by the attorney's fee clause in the lease because under such circumstances there would have been 'no default by the other by reason of failure to perform any term, covenant or condition of the lease.' In the event that Stockton Theatres had remained in possession of the premises during the course of such litigation they could not claim that there was any default in the performance of the lease. Therefore, Stockton Theaters would not be able to allege a cause of action under the provisions of the attorney's fees clause.

"When a landlord commences and maintains against the tenant an unlawful detainer action he does not 'default' or fail to perform any term, covenant or condition of the lease. Even though such litigation may be expensive and annoying to the tenant, there is no 'term, covenant or condition' contained in the lease in the case at bar which forbids the landlord from bringing such an action, and furthermore, the implied covenant of quiet possession has not been violated. (Agar v. Winslow, 123 Cal. 587 [56 P. 422]; Black v. Knight, 176 Cal. 622 [169 P. 382]).

"The foregoing discussion leads to the conclusion that Stockton Theatres cannot recover attorney's fees for any legal services performed in the defense of the unlawful detainer suit before there had been a default in the lease by Palermo. This did not occur until December 1st, 1945, when Palermo entered and took possession of the leased premises pursuant to the writ of restitution in the unlawful detainer suit.

"Beginning on December 4, 1945, on the day the notice of appeal was filed attorney's services were performed for Stockton Theatres in a proceeding within the scope and purview of the attorney's fee clause in the lease. For the attorney's services performed from that date for the prosecution of the appeal in the unlawful detainer case, Cal. App., 172 P.2d 109; 32 Cal.2d 889, 195 P.2d 10, Stockton Theatres is entitled to recover a reasonable attorney's fee. In the concluding portion of this memorandum the amount of this will be determined in accordance with the attorney's fee clause which empowers the court to fix a reasonable attorney's fee.

"It has also been argued on behalf of Defendant Palermo that the attorney's fee clause in the lease by its very terms requires that the attorney's fees must be recovered in the same proceeding in which relief is sought for a default. We have again read the attorney's fees clause in the lease with this particular argument in mind. It does seem to be a severe application of the theory of strict construction. In fairness the most that can be drawn from the language of this clause is that the parties contemplated such a procedure would be followed. It should be apparent that the attorney's fee clause creates a right to recover attorney's fees under certain circumstances and also describes a remedial procedure. The words of the clause do not designate this to be the solitary and exclusive remedy for the enforcement of this contractual right. If the attorney's fee clause were to be so construed then the result would be that under some circumstances a party would have a right without a remedy.

> The practical result of such a construction would be a partial invalidity of the attorney's fee clause. For these reasons this does not seem to be a proper case for the application of the rule 'expressio unius est exclusio alterius.'"

We agree with this analysis.

[7] Plaintiff contends also that its right to recover all attorney's fees claimed herein exists as a matter of law irrespective of any contract. The complaint in the instant case was based upon the attorney's fees provision contained in the lease, and it is clear that the case was tried and determined upon that theory. "It is a general rule of appellate review, early established and long adhered to, that questions not raised in the trial court will not be considered on appeal." 3 Cal.Jur.2d, Appeal and Error, sec. 140.

[8, 9] We, therefore, do not believe that plaintiff is entitled to urge this contention for the first time on appeal, but we have nevertheless considered the point and have concluded that there is no merit in it. In support of this contention plaintiff relies chiefly on the cases of Levitzky v. Canning, 33 Cal. 299, and Standard Livestock Co. v. Pentz, 204 Cal. 618, 269 P. 645.

In Levitzky v. Canning the plaintiff-lessee sued the defendant-lessor for a breach of the lessor's covenant for quiet enjoyment. Besides the eviction, invasion or disturbance of plaintiff by defendant, defendant had publicly slandered plaintiff's possession and brought two actions at law against plaintiff to recover possession, causing plaintiff to defend himself in the two actions, and causing plaintiff's tenants to quit the premises. Of the damages allowed the trial court also awarded to plaintiff the costs of the two actions brought by defendant, and plaintiff's counsel fees incurred therein. In upholding this award of damages the appellate court said, 33 Cal. at page 308:

> "The costs of the two actions and the plaintiff's counsel fees were properly allowed as part damages. Where a covenantee is evicted by a stranger, holding a paramount title, by judgment of law, the measure of damages includes the expenses of the covenantee in defending the suit, including fees paid to counsel. Swett v. Patrick, 12 Me. 9; Pitkin v. Leavitt, 13 Vt. 379. Here the actions did not result in an eviction by a paramount title, for they were brought by the covenantor himself, and did not terminate in an absolute eviction, but they worked a breach of the defendant's covenant, as we have seen, and we are unable, on the score of principle, to distinguish between the cases cited and this."

Factually, this case is not similar to the instant case in that in the instant case we do not have an eviction or breach of the covenant for quiet enjoyment until after the two actions brought by defendant herein against plaintiff herein. In fact, we do not have even an action for a breach of the covenant of quiet enjoyment. Rather, the instant action is one expressly brought upon the clause in the lease providing for attorney's fees. Furthermore, in principle the case is directly in derogation of the settled rule that attorney's fees will not generally be allowed to the prevailing party in the absence of a contract or statute specially providing therefor.

In Standard Livestock Co. v. Pentz the plaintiff lessee sued the lessor for general and special damages for the breach of the covenant of quiet enjoyment in the lease executed by the defendant. At the time of the execution of the lease there were two mortgages outstanding against the property. After plaintiff had taken and held possession for some time, the mortgagee instituted foreclosure proceedings in which plaintiff and defendant were joined. The defendant lessor and others in the foreclosure action cross-complained against plaintiff, attempting to establish a superior right to plaintiff's. Foreclosure was decreed and the purchaser at the foreclosure sale demanded possession of the premises from plaintiff. Upon plaintiff's refusal to give up the premises plaintiff was removed from the premises under a writ of assistance. In the suit for the breach of the covenant for quiet enjoyment, the trial court excluded from the consideration of the jury any evidence relating to plaintiff's expense in defending his interest in and possession of the premises in the foreclosure action and against the cross-complaints. After reciting the efforts expended on the part of plaintiff in defending itself, the court, 204 Cal. at page 632, 269 P. at page 650, stated:

> "* * * It thus sufficiently appears that the plaintiff herein was put to an outlay of expense for counsel fees and costs in defending its possession, not only against the superior right of the plaintiff in said foreclosure proceeding, but also against the asserted superior right and claims of the cross-complainants therein, the defendant Pentz herein being one of these. * * * [T]he plaintiff would be clearly entitled to recoup in damages for its outlays in defending its possession against the assertion of a superior title. 1 Tiffany, Landlord and Tenant, p. 548. It would seem to follow irresistibly that the trial court committed reversible error in its refusal to commit to the jury the right to find some measure of substantial damages as recompense for the plaintiff's outlays in defending its possession, both against the assertion of the superior claims of the plaintiff in the foreclosure proceeding and the asserted superior claims of the cross-complainants therein, of which the defendant herein was himself a direct actor."

The court in the Pentz case relies upon Tiffany as authority for its holding. Tiffany provides that "Expenditures on the tenant's part for costs and counsel fees incurred in defending the title against the *paramount* claimant can be recovered, provided at least he notified the lessor to defend the suit and the latter failed to do so." In the Pentz case the original action against the lessee was by one claiming paramount or superior title. There, too, the court states in 204 Cal. at page 633, 269 P. at page 651:

> "When the foreclosure action was instituted and the plaintiff was made a party thereto, and when the plaintiff's acquired lease and its peaceable possession thereunder were put in peril, the plaintiff herein directed the attention of its lessor, Pentz, to such peril and demanded that its lessor take steps to protect it in its peaceable possession of the premises covered by its said lease; but the undisputed evidence shows, not only that the defendant Pentz took no action looking toward the plaintiff's protection, but that, on the contrary, he actively joined with his employer and codefendant, the Bank of California, in the assertion, by way of cross-action, to which he made the plaintiff herein a party, of a superior claim on the part of the said corporation to which he and it sought to subordinate the rights of the plaintiff herein, derived from the lease which he himself had made."

It will be noted that the cases involving recovery of attorney's fees by a lessee incurred in defending its possession all have to do with defending against one claiming paramount or superior title. Furthermore, the cases all seem to require that the lessee request or notify the lessor to defend the action, and only upon such notification and failure to do so by the lessor do the cases allow recovery of attorney's fees by the lessee. In the instant case the actions were not brought against the plaintiff-lessee by a third person claiming paramount title, rather they were brought by the lessor himself. Furthermore, the lessor in such a case could hardly be called upon by the lessee to defend the action for the lessee when the lessor himself is the plaintiff. Neither factually nor on principle is the Pentz case authority for plaintiff's right to recover his attorney's fees in the instant case.

In view of what we have hereinbefore stated, it is unnecessary to discuss the other points raised in the brief.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

MARDEN et al.

v.

BAILARD et al.

Civ. 19693.

District Court of Appeal, Second District, Division 3, California.

April 8, 1954.

Rehearing Denied May 6, 1954.

Hearing Denied June 3, 1954.

Action for a declaratory judgment, determining that plaintiffs are entitled to construct a motel and store building on a lot conveyed by defendants' grant deed to one of plaintiffs and to recover damages for wrongful injunction against such construction by a judgment for defendants in an action brought by them to reform the deed and enjoin violation of building restrictions in a deed of land including such lot to one of defendants, and for an award of damages in a specified sum. Defendants' demurrer to plaintiffs' third amended complaint was sustained with leave to amend within 20 days, and from a judgment of the Superior Court of Los Angeles County, Stanley N. Barnes, J., dismissing the action after plaintiffs' failure to amend within such time, plaintiffs appealed. The District Court of Appeal, Parker Wood, J., held that the complaint stated a single cause of action for declaratory relief and damages and that the running of the statute of limitations was suspended during the pendency of plaintiffs' appeal from the injunction judgment, which was reversed by the Supreme Court.

Judgment of dismissal reversed with direction.

1. Declaratory Judgment ⟾318

A complaint, alleging purchase of lot from defendants by one of plaintiffs in area wherein construction of motel was permissible, plaintiffs' commencement of construction of motel on lot, defendants' commencement of action to enjoin such construction, judgment granting injunction, reversal thereof by Supreme Court, subsequent dismissal of injunction action without prejudice, and actual controversy between parties as to plaintiffs' right to construct motel, stated cause of action for declaratory judgment that plaintiffs were entitled to construct motel and recover damages for wrongful injunction.

2. Pleading ⟾193(6)

A complaint, praying declaratory judgment determining that plaintiffs were entitled to construct motel and store building on lot purchased by one of them from defendants and recover damages for wrongful injunction obtained by defendants against such construction and award of damages to plaintiffs in specified sum, was not demurrable as alleging two causes of action improperly united or not separately stated, as cause of action for declaratory relief and allegations regarding damages arose from same transaction and such allegations constituted a form of remedy as distinguished from cause of action.

3. Pleading ⟾193(6)

The seeking of different kinds of relief in complaint does not render it demurrable as improperly uniting or failing to state separately different causes of action.

4. Pleading ⟾214(1)

Allegations of complaint must be considered as true in considering demurrer thereto.

5. Injunction ⟾261

In action for damages for wrongful injunction against plaintiffs' construction of motel on lot conveyed to one of them by defendants' grant deed, allegation of complaint that there was no probable cause for defendants' injunction action against plaintiffs was not refuted by allegation that defendants obtained injunction judgment which was affirmed by District Court of Appeal, in view of allegation that such judgment was not sustained by any evidence and that defendants knew there was no evidence of mutual mistake on ground of which they sought reformation of deed in same action.

6. Pleading ⟾192(2)

A demurrer to complaint for uncertainty does not reach plaintiffs' failure to incorporate sufficient facts in pleading, but is directed at uncertainty in allegations actually made.

7. Pleading ⟾192(2)

In action for declaratory judgment and damages for wrongful injunction against plaintiffs' construction of motel on lot conveyed to one of them by defendants, complaint was not demurrable on ground of uncertainty, ambiguity or unintelligibility in that alleged facts supporting certain conclusions or allegations, such as want of probable cause for injunction suit, could not be ascertained from complaint.

8. Declaratory Judgment ⚷45

Declaratory relief is unavailable for determination of issues involved in already pending action.

9. Limitation of Actions ⚷104½

The running of statute of limitations is suspended during any period in which plaintiff is legally prevented from taking action to protect his rights.

10. Limitation of Actions ⚷105(2)

The running of statute of limitations against action for declaratory judgment and damages for wrongful injunction against plaintiffs' construction of motel on lot conveyed to one of them by defendants was suspended during pendency of plaintiffs' appeal from judgment granting injunction, which was reversed by Supreme Court, as plaintiffs were not required to commence declaratory relief action pending injunction action involving same issue regarding building restrictions in deed conveying land of which lot was part to defendants. Code Civ.Proc. §§ 337, subd. 1, 340, subd. 3, 343.

◆

Hiram T. Kellogg and L. M. Cahill, Los Angeles, for appellants.

Howard D. Hanson, Los Angeles, for respondents.

PARKER WOOD, Justice.

Defendants' demurrer to plaintiffs' third amended complaint was sustained with leave to amend within twenty days. Plaintiffs appeal from a judgment of dismissal entered after they failed to amend within that time.

Said complaint alleged:

On December 4, 1941 defendants recorded, in the map records of Los Angeles County, a map of a subdivision known as Tract 12971. A map of said subdivision had been filed with the real estate commissioner on or about said date. Said map and the documents recorded with the commissioner stated that the tract was to be sold to the public subject to all conditions and restrictions as set forth in a certain grant deed from Marblehead Land Company to Willis R. Bailard, which appears of record in the office of the Los Angeles County Recorder. On December 16, 1941 defendants entered into a written agreement with plaintiff Muriel Marden wherein defendants agreed to sell to said plaintiff Lot 21 in said Tract 12971 for $850. Said agreement stated that the deed by the sellers to the buyer would be subject to conditions and restrictions set forth in said deed from Marblehead to Bailard. Upon the payment of the purchase price of the lot the defendants Bailard executed a grant deed conveying the lot to plaintiff Muriel Marden which deed was subject to conditions and restrictions as set forth in the deed from Marblehead to Bailard. Thereafter Muriel conveyed an undivided one-fourth interest in the lot to each of her three children, who are the other plaintiffs herein, and for six years last past each plaintiff has owned an undivided one-fourth of the lot. There was a restriction in said deed from Marblehead requiring "the owner" to file with the architectural committee appointed by Marblehead 2 sets of building plans for approval of the committee. Said deed from Marblehead recited further that it was subject to "the following covenants, conditions and restrictions imposed upon * * * the lands herein conveyed and which shall run with said lands. * * * 2. Subject to the exception as to that part of the lands * * * which may be used for * * * motel purposes, all said lands shall be used only for private single-family residence dwelling purposes. * * * 10. Notwithstanding the restriction as set forth in paragraph 2 above [regarding motel purposes], that part of the lands herein conveyed extending" 3,000 feet westerly from the east line of said property along the northerly boundary of the highway "and from the northerly boundary" of said highway northerly 1,300 feet "may be used for private single-family dwellings for residence income property, including the right to construct and maintain one motel. In connection with said motel, light commercial businesses may be maintained. * * * [A]ll said restrictions shall terminate January 1, 1970." Said lot 21 lies within that part of the lands described as "extending 3,000 feet from the Easterly line of said property along the Northerly boundary of State Highway; thence from the Northerly boundary of said State Highway Northerly 1300 feet and was within the area within which rental income property and one motel was permitted to be erected."

It was alleged in the complaint, from paragraph XXIII to paragraph XXIX inclusive, that: In November, 1946 plaintiff Muriel Marden presented plans for a motel and store to said committee. About December 1, 1946 plans of plaintiffs for construction of motel and store buildings upon lot 21 were approved by said committee, and the plaintiffs proceeded with the construction of said buildings. On December 5, 1946 the defendants, acting through Willis R. Bailard and Eleanor F. Bailard, as plaintiffs, commenced an action in the superior court, and the plaintiffs in this action appear as some of the defendants, which action was upon a complaint entitled "Complaint by Grantor to Reform Deed, and as so Reformed to Enjoin Violation of Building Restrictions." After the trial of said action, judgment was given to plaintiffs therein. The said judgment provided that the deed (from Bailards to Marden) be and it is reformed so that it should read that no part of defendants' property, lot 21, shall be improved for use as a motel or any kind of business except that it may be improved for use as a single residence; and that the defendants and their agents are perpetually enjoined during the term of the restrictions from using the lot other than as a single residence. Plaintiffs herein, who were defendants in that case, appealed from that judgment to the District Court of Appeal, Bailard v. Marden, 219 P.2d 806, where the judgment was modified and affirmed (modified to provide that the buyer could retain the property as residential property or reconvey title to seller and recover money paid). Thereafter, on March 12, 1951 the Supreme Court reversed the judgment. Bailard v. Marden, 36 Cal.2d 703, 227 P.2d 10. On July 12, 1951 the Bailards, as plaintiffs in that case, filed a voluntary dismissal of said action, without prejudice, prior to the time defendants therein "remitted" the cause for a retrial. The plaintiffs herein did not consent to said dismissal and so advised the court.

It was alleged, from paragraph XXX to paragraph XXXV inclusive, that: From the entry of that judgment on February 4, 1949 to the reversal thereof on March 16, 1951 the plaintiffs herein were enjoined from constructing the motel and store building on said lot. Said judgment was secured maliciously and without probable cause. The judgment was not sustained by any evidence. The defendants herein knew that said action was prosecuted without probable cause, well knowing there had not been any agreement between them and any of these plaintiffs relative to any restrictions upon said lot, and they (defendants herein) prosecuted said action well knowing there was no evidence to sustain the action. That action, which was maintained upon ground of a mutual mistake, was prosecuted by the defendants herein well knowing that the action would cloud and slander the title of these plaintiffs. Each defendant herein well knew that the judgment was obtained without any evidence to sustain it and without any evidence upon which a mutual mistake could be based. No security was required to indemnify the plaintiffs herein from the effects of the injunction. Defendant herein well knew that no mistake had occurred entitling them to reformation of the grant deed. The judgment was reversed upon the ground that there was no evidence to sustain it, and that there was no evidence of any discussion or transaction regarding restrictions upon which a claim of mutual mistake could be claimed by the Bailards as plaintiffs in that action.

It was alleged, from paragraphs XXXVI to XLII inclusive, that: By reason of the prosecution of said action the plaintiffs herein were forced to incur expenses in the sum of $6,000 for services of attorneys. As a proximate result of securing the wrongful injunction, the plaintiffs herein did not continue the construction of the motel and store building which was under construction at the time the injunction was secured. The plaintiffs sustained additional damages in the sum of $40,300, being the increase in the cost of construction from the time that action was commenced to the time the present action was commenced. By reason of the prosecution of that action the plaintiffs herein were deprived of the use of said lot for motel and store purposes for a period of 50 months to the damage of plaintiffs in the sum of $50,000, being the net rental value reasonably to be anticipated by the plaintiffs for said period. The difference between the reasonable market value of construction materials, which plaintiffs had purchased prior to the time the injunction was obtained, and the reasonable value of those materials after the reversal of the judgment was $2,500.

It was alleged in paragraph XLIII that by reason of the dismissal of said action without prejudice there has been no final determination of the rights of the parties, and it is necessary that a decree be entered establishing plaintiffs' right to construct the motel and store building upon the lot.

It was alleged in paragraph XLIV that an actual controversy exists between the parties in that plaintiffs contend that they are entitled to construct a motel and store building under the plans presented to the Marblehead Land Company, and in that the defendants contend that plaintiffs are not entitled to proceed therewith. By reason of the controversy it is necessary that a decree be entered. A decree was not entered by reason of the dismissal of the action, leaving the matter uncertain and impeding plaintiffs' efforts to secure finances.

It was alleged in paragraph XLV that an actual controversy also exists between the parties in that plaintiffs contend that the injunction was secured wrongfully, and in that the plaintiffs contend that defendants are liable in damages for wrongfully maintaining said action. Defendants contend that plaintiffs are without a remedy for the acts of defendants in maintaining the action.

The prayer was that the court determine the rights of the parties and make a declaratory judgment: (1) that plaintiffs are entitled to construct a motel and store building on the lot; (2) that plaintiffs are entitled to a judgment for damages; (3) awarding damages to plaintiffs in the sum of $99,150; (4) for general relief.

The demurrer stated that the third amended complaint did not state facts sufficient to constitute a cause of action for declaratory relief, or malicious prosecution, or slandering or disparaging or clouding title; or a cause of action at all. The demurrer also states that the causes of action are barred by the statute of limitations as contained in sections 340(3), 337(1), and 343 of the Code of Civil Procedure. It also states that the complaint is uncertain, ambiguous, and unintelligible in that it cannot be ascertained therefrom upon what facts the following conclusions therein alleged are based: that the judgment was secured maliciously and without probable cause; the title of plaintiffs was clouded, slandered or disparaged; plaintiffs were damaged in the sum of $40,300 for materials, $50,000 for loss of rent, or $2,500 for deterioration of materials; plaintiffs are unable to secure finances; a controversy now exists between the parties.

[1] The allegations preceding paragraph XXX of the complaint, and the allegations in paragraphs XLIII and XLIV, state a cause of action for declaratory relief. The paragraphs preceding paragraph XXX allege the purchase of a lot in an area where it is permissible to construct a motel; the commencement of construction of a motel by plaintiffs; the commencement of an action by defendants for an injunction; a judgment enjoining plaintiffs; the reversal of the judgment; and the subsequent dismissal of the action without prejudice. In paragraphs XLIII and XLIV it is alleged that the dismissal of the former action without prejudice was not a final determination of the rights of the parties, and that an actual controversy exists between them as to whether plaintiffs are entitled to construct a motel on the lot.

[2, 3] The respondents assert that the complaint includes alleged causes of action

which are improperly united or not separately stated. They argue to the effect that the cause of action for damages should be stated separately from the cause of action for declaratory relief. The cause of action for declaratory relief and the allegations regarding damages arise out of the same transaction. The transaction was the purchase of the lot by these plaintiffs and their efforts to build a motel thereon, followed by the litigation which was started and prosecuted by these defendants and discontinued by them without prejudice to their renewal of it. A single cause of action is alleged herein. The allegations regarding damages herein are to be considered as a form of remedy (as distinguished from a cause of action) which might be available to these plaintiffs, depending in part upon whether (in declaring the rights of the parties) it is declared that plaintiffs had a right to build the motel. In Miller v. Dyer, 20 Cal.2d 526, 127 P.2d 901, 141 A.L.R. 1428, general and special demurrers were sustained with leave to amend, and judgments of dismissal were entered upon refusal to amend. In reversing the judgments, the court said, 20 Cal.2d at page 531, 127 P.2d at page 904: "The special demurrer of defendants Dyer on the ground that causes of action for specific performance and for breach of an agreement to convey real property have been united improperly fails to take into account that the repudiation of the contract gave rise to a single cause of action regardless of the remedies available to plaintiffs." In Bacon v. Wahrhaftig, 97 Cal.App.2d 599, at page 604, 218 P.2d 144, at page 148, the court said: "It is claimed that there is a failure to separately state a cause of action to rescind the leases, to quiet title, for damages for breach of the leases, for fraud and for an accounting." In holding that the demurrer therein should not have been sustained, the court said, 97 Cal.App.2d at page 604, 218 P.2d at page 148: "The seeking of different kinds of relief does not establish different causes of action."

[4, 5] Respondents also contend in effect that the allegation of the complaint that there was no probable cause for the former action is refuted by the allegations of the complaint that respondents obtained judgment in the trial court which was affirmed by the District Court of Appeal, Bailard v. Marden, 219 P.2d 806. They argue that the fact that they obtained judgment and that the judgment was so affirmed establishes probable cause. It is to be noted, however, that the complaint also states that the judgment was not sustained by any evidence and that the respondents well knew that there was no evidence of a mutual mistake. Of course, in considering the demurrer, the allegations of the complaint are to be considered as true. If respondents well knew there was no mutual mistake then there was no probable cause. It cannot be said that it would not be possible to prove that the evidence regarding mutual mistake, presented by respondents upon the former trial, was wholly incorrect and unreliable. The allegation in the complaint that there was no probable cause is not refuted by other allegations therein.

[6, 7] The specifications of uncertainty are to the effect, as above indicated, that the facts which support certain conclusions or allegations (such as there was no probable cause) could not be ascertained from the complaint. In Bacon v. Wahrhaftig, 97 Cal.App.2d 599, at page 605, 218 P.2d 144, at page 148, it was said: "Such a demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading, but is directed at the uncertainty existing in the allegations actually made." The allegations did not justify sustaining the demurrer on the ground of uncertainty, ambiguity or unintelligibility.

[8–10] Respondents' contention that the purported causes of action are barred by the statute of limitations is based principally upon the argument that running of the statute was not suspended during the pendency of the appeal in the former action. The former action included the issue involved herein regarding the restrictions on the lot. While that litigation was pending these plaintiffs were not required to commence another action—their declaratory relief action—for the determination of the same issue. In Pacific Electric Ry. Co. v. Dewey, 95 Cal.App.2d 69, at page 73, 212 P.2d 255, at page 257, it was said that "declaratory relief is unavailable for the determination of issues involved in an already pending action". In Dillon v. Board of Pension Com'rs of City of Los Angeles, 18 Cal.2d 427, at page 431, 116 P.2d 37, at page 39, 136 A.L.R. 800, it was said: "It is well recognized that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights." The running of the statute of limitations was suspended during the pendency of the appeal. This action was not barred by the statute of limitations.

The judgment is reversed with the direction to overrule the demurrer.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; EDMONDS, J., dissenting.

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124 Cal.App.2d 301

DEL RICCIO et al.

v.

PHOTOCHART et al.

Civ. 19855.

District Court of Appeal, Second District, Division 1, California.

March 31, 1954.

Hearing Denied May 27, 1954.

Action to recover royalties under 17 year license agreement covering certain camera devices and methods. The Superior Court, Los Angeles County, Allen W. Ashburn, J., rendered judgment for licensor and licensees appealed. The District Court of Appeal, White, P. J., held that evidence sustained finding that principal consideration furnished by licensor was a patented camera, rather than a patented method of photography, and that partial invalidity of method patent did not constitute a substantial failure of consideration.

Judgment affirmed.

1. Judgment 🔑735

Any language of an opinion which goes beyond the exact matter in issue counts for naught in the law of res judicata.

2. Judgment 🔑829(3)

Where litigation in federal court involved only four claims in disputed patent, decree that those claims were invalid was not res judicata as to the validity of remaining claims in subsequent litigation in state court concerning enforceability of license to use patented method.

3. Patents 🔑219(5)

In licensor's action for royalties for licensees' use of patent, evidence sustained finding that licensees made and used camera substantially similar and equivalent to camera described in license agreement.

4. Contracts 🔑83

Failure of consideration is never a good defense when due to the act of the party claiming the defense.

5. Contracts 🔑83

To constitute a defense to action on contract, failure of consideration must relate either to a basic consideration to be rendered at the time of the agreement or to failure to perform some of its expressed or implied promises.

6. Contracts 🔑83

It is what both parties may be found to have considered to be material that is determinative of whether a failure of consideration is substantial.

7. Patents 🔑219(5)

In licensor's action for royalties due under license to use patents, evidence sustained findings that principal consideration furnished by licensor was a patented camera, rather than a patented method of photography, and that partial invalidity of method patent did not constitute a substantial failure of consideration.

8. Contracts 🔑83

Where there is a failure of a part of a lawful consideration, the part which failed is simply a nullity and imparts no taint to the residue, and if there is a substantial consideration left, it will still be sufficient to sustain contract.

9. Patents 🔑219(2)

Where an exclusive license is granted and the patent is held invalid by the court, the licensee may successfully claim an eviction, but this argument is inapplicable where the license is non-exclusive.

10. Patents 🔑219(6)

Findings, in licensor's action for royalties due under license to use patent, were not subject to claimed infirmities of failing to include specific findings on issue of amount of royalties due, of confusion and uncertainty in computation of amount due.

11. Trial 🔑395(3)

Whether findings are or are not conclusions depends on the nature of the evidence.

12. Appeal and Error 🔑931(1)

Findings must be liberally construed and resolved in favor of upholding rather than defeating the judgment, even though they contain minor inconsistencies, legal conclusions, and evidentiary matters.

13. Trial 🔑394(3)

Findings, in licensor's action for royalties under license to use patents, were not subject to claimed infirmity of containing conclusions of law improperly designated as findings of fact.

14. Patents 🔑219(6)

Finding, in licensor's action for royalties under license to use patent, that licensees were not excused from performance of a license agreement, was not subject to claimed infirmity of being unsupported by evidence or made on issue not raised by pleadings.

15. Evidence 🔑397(1), 461(1)

Parol evidence may not be received to vary, add to, or subtract from terms of a written contract, but it is admissible to explain what parties meant by what they said.

16. Evidence 🔑419(1)

Except where it may tend to contradict contractual consideration, parol evidence may always be used to show true consideration.

17. Evidence 🔑419(11)

Where license agreement involved, in licensor's action for royalties due under license to use patent, did not specify the consideration exchanged, parol evidence of dissolution of partnership among licensor and licensees was admissible to show consideration.

18. Patents 🔑218(3)

Licensees' failure to pay royalties under license to use patent did not, ipso facto, amount to breach such as would terminate licensees' obligation to pay further royalties.

19. Patents 🔑214

Licensor's institution of action for royalties due under license to use patent did not constitute an election to terminate license agreement.

20. Patents 🔑219(1)

Where licensor sought accounting for any and all royalties due or payable under license to use patent, trial court, after determination on merits, properly awarded royalties accruing between institution of action and date of judgment.

21. Equity 🔑39(1)

One of the attributes of equity is its power to do complete justice.

22. Patents 🔑209(1)

License agreement, whereunder licensees were to use a patented camera and patented method of photography was not rendered illegal by adjudication that some claims in method patent were invalid.

23. Patents 🔑129(3)

Licensees were estopped to deny the validity of patent or to assert that license agreement, whereunder licensees were to use patented camera and method of photography, was illegal as restraining the use of an unpatented technique, even though method patent was declared partially invalid.

24. Monopolies 🔑12(15)

License, whereunder licensees were permitted to use patented camera and a method of photography, but the use thereof was limited to determination of race finishes, was not a means of using a patent to obtain a limited monopoly of unpatented devices, thereby becoming an instrument for restraining trade or commerce, even though method patent was partially invalid.

25. Patents ⚷211(2)

Where license agreement covered use of camera and method of photography for 17 years after issuance of patents thereon, expressly referring to patent on method, agreement would be effective for such time, even though some claims of method patent were declared invalid.

26. Patents ⚷219(5)

Where it appeared, in licensor's action for royalties under license to use patent, that licensees were in accord with theory that award of royalties, if found due, should include accruals during trial, denial of licensees' motion, which objected to this method of accounting and which was made after decision on merits, was not an abuse of discretion.

27. Statutes ⚷223.2(1)

Federal statutes providing for filing of disclaimers of claims in patent and for actions for infringement of patents which include unpatentable claims, should be read together. 35 U.S.C.A. §§ 253, 288.

28. Patents ⚷219(2)

Licensees' motion, which was made after determination on merits in licensor's action for royalties, and which asserted that license agreement was illegal by reason of licensor's failure to file disclaimer of invalid claims in patent, was untimely. 35 U.S.C.A. §§ 253, 288.

◆

Patrick D. McGee, Los Angeles, for appellants.

Chas. L. Nichols, Beverly Hills, Ivan Miller, Los Angeles, Anthony T. Carsola, Beverly Hills, for respondents.

WHITE, Presiding Justice.

This is an action to recover royalties under a seventeen year license agreement covering certain camera devices and methods.

Plaintiff Del Riccio is an inventor and met defendant Bogart Rogers, the prime figure in defendant partnership and corporation, in 1937, at a motion picture studio in Hollywood. Del Riccio had been experimenting with a camera especially adapted to photographing moving objects. Rogers had been active in organizing Del Mar Race Track, and plaintiff Del Riccio told him that the latter's new camera would improve photo-finish photographing. Later, plaintiff Del Riccio and the individuals named in the complaint herein as defendants, formed a partnership to exploit Del Riccio's invention of an open-slit camera for photographing race finishes. Plaintiff Del Riccio owned a one-half interest in the partnership.

The original camera used at Del Mar Race Track in 1937 had a slit with parallel sides. All interested in the venture recognized that this type of photography was an old art.

When this demonstration in 1937 disclosed that the parallel slit did not produce accurate results, plaintiff Del Riccio set about to solve the problem through the use of a tapered or angular slit, known as the V-slit. Following the completion of the first camera with parallel slit, four additional cameras were built, each provided with the V-slit.

Plaintiff Del Riccio believed that the V-slit was a new invention and patentable. The inventor also invented and introduced into the four later cameras a special control or timer and a film carrier.

On March 20, 1939 (prior to making the license agreement on June 25, 1941), an application for a patent on each of said inventions was made by respondent Del Riccio. However, before a patent issued on the first application, Del Riccio was advised by the Patent Office that his application would have to be divided because it contained an application for both a patent on a *camera* and a patent on a *method* of photographically recording the order of passage of moving objects. The division was made and resulted in the issuance of two patents, one entitled the "Camera", and the other entitled "A method of photographically recording the order of passage of moving objects". The *method* patent was reissued with the same title on

May 20, 1947, and is the patent which was the subject of litigation in the federal courts in 1950, to be hereinafter referred to.

As heretofore noted, prior to the execution of the license agreement, plaintiff Del Riccio and the other persons interested in the above mentioned partnership known as The Photochart (which was the predecessor of defendant corporation) had banded together and pooled their efforts and money toward perfecting and promoting the Del Riccio camera and its use. In that venture they were co-partners, Del Riccio owning a one-half interest.

Prior to the making of the licensing agreement differences had arisen and existed among the partners. In order to compose and compromise these differences, a license agreement was entered into on June 25, 1941. The pertinent parts of said agreement, insofar as this litigation is concerned, are:

1. Included in the benefits which accrued to the licensee partnership were,

(a) License for seventeen years to use the camera with angular slit, the speed control and the film carrier described therein, including the five cameras then in use.

(b) Acquired the 50% proprietary interest of respondent Del Riccio in the extant partnership and thereafter the remaining partners comprising the partnership owned the entire proprietorship, and respondent Del Riccio owned and had only the reserved royalty.

(c) Acquired all cameras, good will, technical knowhow, engineering drawings and data, all existing patent protection and some fixtures and parts.

(d) Acquired obligation of respondent Del Riccio as adviser, consultant and as director of any succeeding corporation.

(e) Eliminated competition of respondent Del Riccio for the period of five years, together with right to use any future improvements of respondent Del Riccio.

2. Plaintiff Del Riccio suffered the following correlative detriments,

(a) Surrendered right to license others han licensee;

(b) Surrendered 50% partnership interest and accepted royalty position instead;

(c) Surrendered management to partnership licensee and set about other business activities;

(d) Obligated self to serve licensee as adviser, consultant and possible director;

(e) Agreed to forego competition with licensee for said period of five years.

The partnership operated under this 1941 agreement until April 23, 1946, when they executed a supplemental agreement which compromised litigation then pending between them and specifically incorporated United States Patent No. 2382617 (hereinafter referred to as Patent No. 617), the *method* of photographically recording the order of passage of moving objects. The parties continued to operate under this agreement until 1949, when, in an action in the superior court of Los Angeles County, it was held that under the licensing agreements plaintiff Del Riccio could compete with his licensee, and that defendant licensee was not obligated to use the patented camera.

On September 16, 1947, defendant Photochart and plaintiff Del Riccio joined as plaintiffs in a patent infringement action against Photo Patrol, Inc., and others, brought in the United States District Court for the Northern District of California. Tendered as an issue in the original complaint filed in the federal court were all patents mentioned in the original license agreement as well as *method* patent No. 617, and reissue patent No. 22,881 (hereinafter referred to as Patent No. 881). By the time of trial all issues as to all patents had been withdrawn except those involving claims, 1, 2, 7 and 8 of No. 881 (the reissue patent). The findings in that case described the disputed *method* in paragraph XII as follows:

"Reissue patent No. 22,881 relates to a method of photographing the finishes of races by positioning a camera above and to one side of a finish line or other given line of a race track and the photographing of the contestants as they pass said line upon a continuously moving strip of film positioned behind a narrow aperture";

and in paragraph XVIII: "The precise method patented involves positioning the optical axis of the lens of the camera in alignment with one edge of the slit and with the finish line or some other given line."

In its ruling the federal court held: "Reissue patent No. 22,881 is invalid because the subject-matter of said patent does not constitute invention and the subject-matter of said patent was old in the art more than one year before the Del Riccio patent application was filed.

"The method patents, Reissue patent No. 22,881 and original patent No. 2,382,617, involve nothing more than the normal expected and only use of the camera covered by camera patent No. 2,320,350."

By amendment of April 14, 1950, paragraph XXIII was changed to read:

"The patents, other than Claims 1, 2, 7 and 8 of Reissue Patent No. 22,881, in suit as set forth in Finding IX hereof, were withdrawn by the Plaintiffs, and hence it is not necessary to pass upon the validity thereof."

The final judgment and the amended judgment are to the same effect as the findings. This decree was affirmed on June 11, 1951, by the Ninth Circuit Court of Appeals, Photochart v. Photo Patrol, Inc., 189 F.2d 625, certiorari denied by the Supreme Court on November 5, 1951, 342 U.S. 867, 72 S.Ct. 107, 96 L.Ed. 652, and rehearing denied on January 2, 1952, 342 U.S. 907, 72 S.Ct. 290, 96 L.Ed. 679. The narrow scope of the ruling of the Circuit Court of Appeals appears at page 627 of 189 F.2d, thereof, supra, as follows:

"In the posture the case reaches us we are concerned only with claims 1, 2, 7 and 8 of Reissue Patent No. 22,881, and with the appeal by the defendants from the order of the district court denying attorneys' fees."

[1] As observed by the trial judge in the instant proceeding, "Of course, any language of the opinion which goes beyond the exact matter in issue counts for naught in the law of res judicata. (So[uthern] Pac. Co. v. Edmunds, 168 Cal. 415, 418 [143 P. 597]; 15 Cal.Jur., Sec. 197, p. 150; 50 C.J.S. [Judgments], § 726, p. 215.)"

Defendant Photochart, Inc., paid the agreed royalties, with slight exceptions, until the month of October, 1951, some three months after the affirming decision by the Court of Appeals in the action discussed above, and some two months before certiorari was denied by the U. S. Supreme Court. Under date of December 11, 1951, plaintiffs notified defendant Photochart of its failure to pay and thereafter, on February 1, 1952, commenced this action. Plaintiffs' complaint embraced three causes of action: (1) action at law for royalties due and unpaid; (2) suit in equity to determine whether all past royalties had been duly reported for payment and to embrace royalties accruing after the commencement of the action; and (3) suit in equity for declaratory relief to the effect that the license agreement, as amended, was and is a valid, subsisting contractual obligation between defendant and plaintiffs. Other than tendering general issues, defendant's Answer set forth two primary defenses, as follows:

1. The original license agreement and the supplemental agreement were executed "without any consideration whatever";

2. The only valuable consideration moving appellant's predecessor to enter into the license agreement, as amended, were the four claims in the reissue patent invalidated by the Federal decision; also, that such sole consideration encompassed freedom and clearance from competition of any persons; and that by reason of the failure of such consideration, defendant's further performance is excused.

Following trial before the court sitting without a jury, judgment was rendered as follows:

"(1) That Plaintiffs do have and recover of and from the Defendant Photochart, a corporation, the sum of seven thousand seven hundred ninety-three dollars and seventy-five cents ($7,793.75), together with interest on the sum of two thousand two hundred forty-seven dollars and ninety-nine cents ($2,247.99) thereof since January 1, 1952.

"(2) That Plaintiffs are entitled to declaratory relief and judgment, as follows:

"(a) That the license agreement dated June 25, 1941 and the supplemental agreement dated April 23, 1946, and each of them are valid and subsisting contractual obligations between Plaintiffs and Defendant Photochart.

"(b) That Defendant Photochart is obligated to pay any and all royalties therein provided to be paid by it to Plaintiffs in the same manner as heretofore paid by it prior to October 1, 1951.

"(c) That Defendant Photochart is obligated to use its best efforts to perfect, publicize and perpetuate the business of the photochart camera described in said agreements in the United States of America and through the world upon the best possible terms which are available.

"(d) That Plaintiff Del Riccio has heretofore performed all and every of the obligations on his part to be performed in respect of said license agreement and said supplemental agreement.

"(e) That the term of said license agreement and said supplemental agreement shall continue to and including the 13th. day of August, 1962, being the period of seventeen years from and after the date of said patent No. 2,382,617."

From the foregoing judgment as entered defendant Photochart, Inc., alone prosecutes this appeal.

[2] As a first ground for reversal, appellant contends that the findings are not supported by the evidence. In this regard it is urged that the court erred in finding that only certain claims of Reissue Patent No. 881 were invalidated by the federal court decision. With this claim of appellant we cannot agree. While the original complaint in the federal court case tendered an issue as to all patents which had grown out of the applications mentioned in the original license agreement, as well as method patent No. 617 and Reissue Patent No. 881, nevertheless, when the time for trial arrived all the issues as to all patents had been withdrawn except those involving claims 1, 2, 7 and 8 of Reissue Patent No. 881. By the amendment of April 14, 1950, all claims other than 1, 2, 7 and 8 were withdrawn by plaintiffs and as the federal court said, "* * * hence it is not necessary to pass upon the validity thereof". The narrow scope of the ruling of the U. S. Circuit Court of Appeals is shown by the preceding quotation from its opinion.

As was said by the learned trial judge in the instant case in his Memorandum of Ruling, after an exhaustive review of pertinent federal cases, "Factually, defendant's position is not sustained. The argument involves the method of use of a parallel slit and an angular or V-slit in photographing the finish of a race. The evidence shows that the claims which were held invalid related to method only and were broad enough to cover the use of a parallel slit, though not necessarily excluding the use of the V-slit. The parties, the District Court and the Circuit Court of Appeals had no trouble in severing the invalid method claims from the other portions of the patent. Indeed defendants brief repeatedly refers to all portions of the patents, other than claims 1, 2, 7 and 8 of No. 22881, as valid (see page 16, line 8; page 27, line 5; page 27, line 32; page 30, line 4); and at page 30, line 26, counsel say that the method patent 'was invalidated in all respects except where used in conjunction with the additional limited step of the V-slit.'"

Appellant next attacks finding XII, which reads:

"Defendant Photochart has made and used and continues to make and use photochart cameras which are substantially similar and equivalent to the camera described in said license agreement and said supplemental agreement used by the predecessors of Defendant Photochart following the making of said agreements."

Appellant insists that this finding is contrary to the only evidence in the record relative to the camera which it claims shows that since World War II appellant has not used the Del Riccio camera. In its brief appellant asserts that the evidence clearly shows that since the end of the war it has not used any of the patented devices enumerated in the contract, but admits that it "has at all times since the contract was signed, used the *method* patent", but contends that it was this *method* patent that was invalidated by the aforesaid federal court decision.

[3] We are persuaded that a complete answer to appellant's claim is contained in the Memorandum of Ruling rendered in the court below, wherein it is said:

[4, 5] "Concerning the contention of nonuse it must be remembered that we are discussing a question of failure of consideration, and that defense is never good when due to the act of the party claiming the defense; also that the failure must relate either to a basic consideration to be rendered at the time of the agreement or to failure to perform some of its expressed or implied promises. Adjustment of existing differences between plaintiff and the other partners and relinquishment of plaintiff's interest in the partnership assets furnished substantial initial consideration for the original license agreement; and the supplemental agreement was a compromise of existing litigation between the parties, thus affording new and additional consideration for the entire amended agreement.

"The right to use was granted on June 25, 1941, and exercised until 1946 or 1947. The implied promise of a continued right to use was never breached unless a loss of patent upon method of application of the parallel slit worked that result. Inherent in the license was a promise of use of that method without an ouster or eviction from other persons having lawful right (Ellis on Patent Assignments and Licenses, Sec. 810, p. 813; Walker on Patents, Sec. 384, p. 1494; Drackett Chemical Co. v. Chamberlain Co. [6 Cir., 63 F.2d 853], supra), but whether the particular promise constituted a major, a material or an inconsequential consideration is another question.

"The original license agreement covered this method only by implication; indeed, the fact cannot be gathered from the document, which refers only to the camera in paragraph (1) on page 1; and there were two other devices included, the speed control and the film carrier; also the contemplated British patents upon 'the devices indicated above'. It does not appear that the present point was ever raised until after the patent suit was lost. On March 26, 1941, Mr. Rogers in a letter to Mr. Swarts and Mr. Del Riccio (Ex. 14) said: 'The Photochart's single asset is the camera, and its source of income is the camera.'"

After quoting from a certain report rendered by a consulting physicist of the Massachusetts Institute of Technology and correspondence as well as statements of Rogers, president of appellant corporation (all of which were introduced into evidence), the trial judge continued as follows in his Memorandum of Ruling,

"The emphasis, it will be observed, is upon the camera, not the method. * * *

"In none of this is there any emphasis upon or reference to, importance of a method patent, and especially no reference to any value in a patent upon method of use of the parallel slit.

"When patent 2,382,617, the method patent, was incorporated into the supplemental agreement of April 23, 1946, it was for the expressed purpose of making certain that the term of the license would extend for 17 years from the date of that patent. In their conversations on the subject the parties did not mention any special value inhering in the method. From the beginning defendant and its predecessors were cognizant of the fact that slit photography is an old art, that its ordinary practice had involved the parallel slit, which was of doubtful patentability. There is nothing in the record to suggest that they ever attached any importance to the method of its adjustment with the finish line and the optical axis of the camera until the trial of the infringement action and later when called upon to resume payment of royalties. On the contrary, Mr. Rogers testified that the original camera had only the parallel slit, that it and the later cameras, having the V-slit, were used up to the time of the license agreement, and that there was no appreciable difference in the results obtained through use of the different types of slit. He also said that Del Riccio told him after the first Del Mar season, that the parallel slit was not accurate or satisfactory. Plaintiff Del Riccio testified that he never told Rogers that the parallel slit was the important part of the invention or patent, and this Mr. Rogers did not deny.

[6] "Moreover, it is what both parties may be found to have considered to be material that is determinative. The court in Automatic R[adio] Mfg. Co. v. Hazeltine Research [1 Cir.], 176 F.2d [799] at 807, said in this regard:

"'Although Automatic did not in this court rely on a defense of fraud or misrepresentation, Automatic does claim that the aforesaid ten patents litigated adversely to Hazeltine were the ones in which Automatic had been chiefly interested; that the judgments against Hazeltine demonstrate the worthlessness of these patents, and that consequently there has been a failure of consideration relieving Automatic of its obligations under the license agreement.

* * * * * *

"'The mere fact that Automatic may have regarded ten particular patents, out of the more than 700 patents and patent applications covered by the license agreement, as the most important ones licensed, in no sense means that *both* parties regarded those patents as the "substance" of the agreement and contracted accordingly.'

[7] "This court must hold that the failure of consideration, if any at bar, was only partial and involved but a relatively immaterial phase of the entire consideration. This, of course, disposes of the argument that there cannot be any severance or allocation within the rule suggested in Ross v. Fuller & Warren Co. [C.C. 105 F. 510], supra. And the general rule as to partial failure of consideration becomes applicable.

"17 C.J.S. [Contracts], § 130, p. 477:

[8] "'When there is a failure of a part of a lawful consideration the part which failed is simply a nullity and imparts no taint to the residue. In such a case, as no particular amount of consideration is required, the promise may be enforced. In other words, if there is a substantial consideration left it will still be sufficient to sustain the contract.'

"To the same effect, see King v. Moreland, 116 Cal.App. 356, 358 [2 P.2d 576]; Restatement of Law of Contracts, Sec. 275, p. 402. In any event the heart of the contract at bar did not fail and therefore the defense under discussion cannot prevail."

Appellant next assails subdivision (g) of finding XII which is as follows:

[9] "* * * and further, that Defendant Photochart has not suffered any substantial eviction of the rights promised or granted to it in or by said agreements." Appellant argues that this finding is directly contrary to the only evidence in the record relative to eviction, and which, it is contended, shows conclusively that after the aforesaid federal court decision, appellant's licensees refused to make payments for use of an invalidated patent, and that competitors were invading the field formerly denied to them. While it appears to be the law that where an *exclusive* license is granted and the patent is held invalid by the courts, the licensee may successfully claim an eviction, the argument is inapplicable where as here, the license is non-exclusive. The futility of the claim here advanced by appellant is clearly shown in the portion of the trial court's Memorandum of Ruling hereinbefore quoted.

[10] We find no merit in appellant's argument that the amounts of royalty found to be due and payable from it to respondents were erroneous. The claim that the court made no findings on the issues presented in this regard other than the general findings numbered VII and VIII is answered by reference to Finding V in which the court found that from and after October 1, 1951, appellant failed and refused to make further payments of royalties or to furnish the royalty statements required by the agreement. Finding VI reflects that the amounts determined upon as to royalties due were arrived at through an accounting, while Finding VII sets forth the accounting for the period from January 1, 1952 to the date of judgment, and Finding VIII shows the sum total of the items set forth in Findings VI and VII. It necessarily follows that there was no failure to find on any material issue, nor does any confusion or uncertainty appear in the method of computation or the accuracy of the results.

[11–13] Appellant sets forth six findings and urges that they are clearly conclusions of law, that they are improperly designated as findings of fact, and should be disregarded in determining whether the findings are supported by the evidence. Whether the findings mentioned are or are not conclusions depends on the nature of the evidence, Wendt v. Gates, 102 Cal.App. 342, 343, 283 P. 312. Applying the rule that although minor inconsistencies, *legal conclusions* and evidentiary matters appear in the findings, they must be liberally construed and resolved in favor of upholding rather than defeating the judgment, Woodbine v. Van Horn, 29 Cal.2d 95, 109, 173 P.2d 17, we are constrained to hold, from a consideration of the evidence herein that appellant's contention in this regard lacks substantiality.

[14] Appellant's next contention is that Finding XII(d) is erroneous because it finds, in effect, that the evidence disclosed no grounds whatever whereby appellant should be or is excused from performance of the license agreement, and the supplemental agreement, including the obligation to pay royalties. By its answer appellant admitted that respondents were asserting, "that there is *no proper or valid cause or reason of any kind, including the decision invalidating said patent, or any other cause*, why appellant should not perform under said agreement and pay plaintiffs the sums of royalties therein provided." (Emphasis added.) Since this was an issue raised by the pleadings and was part of the controversy to be settled by the court, we perceive no error in the fact that the court found thereon.

[15, 16] Appellant insists that the court erred in permitting respondents to introduce evidence of the existence and dissolution of the partnership before or at the time of making the agreements here under consideration. It is, of course, axiomatic that parol evidence may not be received to vary, add to or subtract from the terms of a written agreement, but it is admissible to explain what the parties meant by what they said. This is true because the very purpose of all interpretations is to try to find the true intent of the contracting parties. And except where it may tend to contradict the contractual considerations, true consideration may always be shown by parol evidence, Simmons v. California Institute of Technology, 34 Cal.2d 264, 272, 209 P.2d 581. In the instant case, as pointed out by respondents, other than the mutual promises implicit in it, the license agreement does not mention the consideration supporting it except by a passing reference in paragraph 4, as follows:

> "The parties to this agreement recognize that this agreement is made because of *considerations* existing between Licensor and the persons composing Licensee." (Emphasis added).

[17] It was, therefore, proper to show that if and when respondent Del Riccio yielded up in favor of the licensee partnership (appellant's predecessor) the 50% proprietary partnership interest, such detriment to him in promise of the royalty payments would constitute the consideration referred to in the above quoted paragraph 4, and that the corresponding benefit to the licensee partnership would likewise comprise such consideration. The admission of this proof cannot be held to be reversible error.

Appellant urges that the court erred in giving judgment for royalties accruing after December 1, 1951. It is contended that the agreements terminated and ceased to have any binding effect on appellant for either or both of the following reasons:

(1) Upon the failure of appellant licensee to pay to the respondents licensor the royalties due for the months of October, November and December, 1951, or

(2) Ten days after the respondents gave notices to appellant Licensee of this failure to pay said royalties due, which notices were given on November 21, 1951, and on December 11, 1951.

[18, 19] We are persuaded that appellant's breach did not *ipso facto* terminate the contract. True, under it respondents were given the right to terminate the contract. However, in the case now before us, the pleadings reflect that by their first cause of action respondents sought recov-

ery of the past due royalties, alleged prior demand therefor and refusal by appellant to pay. The latter's answer admitted such non-payment. We cannot agree with appellant that when respondents alleged non-payment and prayed the court to enforce such payment, they thereby elected to terminate the license. And nowhere in the answer of appellant do we find any allegation that such non-payment or demand for payment by respondents constituted any election by the latter to terminate the agreement. The case of Fageol & Tate v. Baird, etc. Co., 138 Cal.App. 1, 5 P.2d 75, 76, relied upon by appellant does not aid it. In the cited case the notice of default sent by the licensor to licensee definitely stated, " 'Unless you do pay all royalties due and owing * * * the undersigned *will consider the said contract as being, and having been, violated and terminated by you.'* " (Emphasis added.) That the licensor in the case just cited thereby elected to *terminate* is manifest. In the case at bar, however, respondents elected not to terminate but to sue for the defaulted royalties.

Appellant's next complaint is that it was error for the court to award judgment for royalties accruing after December 31, 1951. In this regard it is urged that the trial court was without authority to take the accounting beyond the date of the commencement of the present action. As the basis for the accounting respondents alleged:

"* * * defendants have failed and neglected fully and truly to account to plaintiffs for the gross revenues received by defendants for the use of said license device and to account to plaintiffs for the full amounts of royalties due and payable to plaintiffs by reason of such gross revenues."

And in the prayer, after asking that defendants make discovery and disclosure of all gross revenues derived by them "and the royalties payable by defendants to plaintiffs in accordance with said license agreement and said supplemental agreement," respondents then prayed that:

"Defendants, and each of them, make true accounting to plaintiffs for *any and all royalties due or payable* by defendants to plaintiffs." (Emphasis added.)

[20, 21] Under the pleadings herein and without the necessity of filing supplemental pleadings it was the duty of the trial court, under the circumstances here presented, to adjust the rights of the parties up to the time of the entry of judgment and to leave nothing open to further litigation. One of the attributes of equity is its power to do complete justice. Kohn v. Kohn, 95 Cal. App.2d 708, 710, 716, 717, 214 P.2d 71; Union Oil Co. v. Mutual Oil Co., 19 Cal. App.2d 409, 412, 65 P.2d 896; Rhodes v. Ashurst, 176 Ill. 351, 52 N.E. 118, 120. We find no error in the scope of the accounting.

It is further contended by appellant that the court erred in failing to declare the contract sued upon illegal and withholding all relief to respondents. Appellant insists that the action of the federal court in declaring invalid Reissue Patent No. 881 created a supervening illegality in that the respondents' basis for demanding the payment of royalties after such decision was predicated on the remaining valid patent claims covered by the license agreement, as well as upon the invalid claims.

It is argued that the established public policy of our patent laws dictates a refusal to enforce the provisions of a royalty agreement covering both patentable and non-patentable inventions, methods or products, because to do so would extend the monopoly of the patented product to create another monopoly or restraint of competition on the unpatented products not within the patent law.

[22, 23] It would unduly prolong this already lengthy opinion to discuss in detail the cases cited by appellant in support of its contention. All of these authorities were considered by the United States Supreme Court in the case of Automatic Radio Mfg. Co. v. Hazeltine Research, 339 U.S. 827, 830, 834, 70 S.Ct. 894, 94 L.Ed. 1312, wherein it was held that there is no objection to a license which bases royalty upon patented or unpatented devices if it stops there, as it did in the case at bar. The case just cited also holds that a licensee under a patent license agreement may

not challenge the validity of a licensed patent in a suit for royalties due under the contract. See, also, Bettis Rubber Co. v. Kleaver, 104 Cal.App.2d 821, 826, 233 P.2d 82. Furthermore, the federal decision in question here invalidated only four of the twelve claims in the aforesaid Reissue Patent No. 881 and did not allude to the valid patents described and embraced in the original license agreement. Therefore, we are not confronted with a situation where either of the patents has been adjudicated to be invalid, but only a portion of one of them has been invalidated. Under such circumstances, when appellant argues that the effect of the federal decision was to inject illegality into the license agreements, it runs afoul of the rule announced in the case of Automatic Radio Mfg. Co. v. Hazeltine Research, supra. The claim of illegality in the contract sued upon herein cannot be sustained.

[24] Much of what we have said in the preceding discussion of illegality is applicable to appellant's claim of illegality based on the contention that the contracts are in restraint of trade, and establishes that such claim is unavailing. Appellant's claim in that regard is based upon the following language appearing in the agreement: "that it (licensee) will not sell, license, manufacture or otherwise exploit photographic equipment based on the principle of slit photography except for use in determining the results or finishes of horse and other forms of racing."

As pointed out by respondent, "* * this language was calculated to, and it did, provide, in essence, that appellant was granted right of use of the V-slit camera for race finishes and for no other purposes and the licensor, who admittedly had other inventions and other uses in mind, reserved to himself the right to use even the V-slit camera in all other adaptations than race finishes."

Appellant argues that the foregoing provisions in the contract are invalid because they attempt to secure for the licensor a limited monopoly in the unpatentable field of open slit photography, but as the trial court observed in its Memorandum of Ruling, the licensee simply agreed to use and promote the Del Riccio V-slit camera and not to use any other or different camera in race finishes. We find nothing in the agreement that seeks to use the patent as a means of obtaining a limited monopoly of unpatented devices and thereby becoming an instrument for restraining trade or commerce.

[25] Appellant next charges that the court erred in extending the agreements to August 13, 1962, to-wit, seventeen years from the date of issuance of Patent No. 617 (August 14, 1945).

The original license provided a term of seventeen years "after the issuance of patents upon the devices hereinabove referred to". As noted above, Patent No. 617 was issued August 14, 1945, and about eight months thereafter (April 23, 1946), the supplemental agreement was made. The latter instrument expressly included Patent 617 within its provisions and did not undertake to provide any different term or expiration date than that set forth in the original license.

As the trial judge pointed out in his Memorandum of Ruling, when Patent 617, the method patent, was incorporated into the supplemental agreement of April 23, 1946, "it was for the expressed purpose of making certain that the term of the license would extend for 17 years from the date of that patent". And, as pointed out by respondents, "Still later (May 20, 1947) appellant procured issuance of the reissue patent but so far as the record shows, this reissue did not affect the expiration date of the license; and if it had any effect, the term of the license would have been extended to May 19, 1964, and it is obvious appellant will not be inclined to urge this conclusion."

With regard to this assignment of error, appellant's argument is predicated upon the proposition that under the aforementioned federal court decision patent 617 was entirely invalidated and that consequently, it was error for the court to fix the term of the license by that patent. True, the first six claims in the reissue patent were the same as in patent 617, but neither the reissue patent nor all of the six claims in patent 617 were adjudicated to be invalid. As hereinabove set forth, only claims 1, 2, 7 and 8 of the reissue patent and only claims 1 and 2 of patent 617 were invalidated. The federal court decision did not affect or adjudicate the remaining claims in both patents. As set forth by respondents, "The only cases cited by appellant pertain to agreements to extend royalties beyond the term of patents. Since we are not concerned with this situation, it would appear to be supererogatory to discuss or analyze these cases at length."

On the other hand, the cases of Ross v. Fuller & Warren Co., C.C., 105 F. 510, 512, and Automatic, etc., Co. v. Hazeltine Research, supra, sustain the holding of the trial court extending the terms of the license and the obligation to pay royalties to seventeen years from the date of issuance of patent 617.

Appellant insists that the denial by the court of its motion to file an amended and supplemental answer to respondents' complaint constituted an abuse of discretion. It is argued that appellant could not have anticipated that the court would decree an accounting for the period subsequent to the filing of the complaint and to the date of judgment, since the allegations in respondents' complaint referred to the royalties due during the months of October, November and December, 1951, and months prior thereto.

Appellant concedes that while the amendment of a pleading may be made at any time before judgment, permission to file such amendment rests in the sound discretion of the court, citing Feigin v. Kutchor, 105 Cal.App.2d 744, 748, 234 P.2d 264, 267, wherein it is said, "this discretion will not be interfered with upon appeal except in cases of its manifest abuse."

[26] In the instant case the record reflects that appellant was apparently in accord with the theory of the extended accounting at the trial, and even stipulated up to the time the issue was submitted to the court to fix the amount, that the accounting would extend through July, 1952. It was only when after an adjournment, the court reconvened to fix the amount, that appellant attempted by amendment to lay the groundwork for an objection to the accounting for any period after the action was commenced. Under these conditions, we are not disposed to say that the ruling of the court amounted to a clear abuse of discretion, and therefore, we cannot disturb such ruling on appeal, National Gypsum Products Co. v. Buttonlath Mfg. Co., 128 Cal.App. 500, 504, 17 P.2d 1012.

Following a denial of the motion to amend its answer, appellant made an offer to prove by documentary evidence the termination of the agreements by the act of the respondents, and further offered to prove that respondents had failed to file a timely disclaimer notice with the United States Patent Office, thereby invalidating reissue patent No. 881 in its entirety, and further offered to prove that the contract was illegal. The proffered evidence was refused admission by the court. Appellant next asserts that respondents did not file a disclaimer until six months after the present action was commenced and that therefore, the filing thereof could not have been known to appellant until that time. In the language of appellant's brief, "Broadly speaking, a statutory disclaimer is for the purpose of striking something from a patent, either in the text of the specification or in the claims. The simplest use of a disclaimer is bodily to strike out a claim or claims of a patent, whether the latter is an original or a reissued patent.

[27] "Revised Statutes, Sections 4917 and 4922 [35 U.S.C.A. §§ 253, 288] provide for the filing of disclaimers, and they should be read together as covering the same subject. Section 4917 provides that whenever a patentee has claimed more than that of which he was the original inventor, his patent shall be valid for the part that was his own, and that he may make disclaimer of such parts as do not belong to him. It is provided that the disclaimer shall be in writing and shall be recorded in the Patent Office upon payment of a fee, and thereupon the disclaimer shall be part of the original specification."

It is appellant's contention that when the patentee has met with a final court adjudication that decrees one of his claims invalid, it is necessary for such patentee to file a statutory disclaimer with reasonable diligence, Ensten v. Simon Ascher & Co., 282 U.S. 445, 51 S.Ct. 207, 75 L.Ed. 453, 457. And that it has been held that the disclaimer must be filed within thirty days after finality of court litigation, Herman v. Youngstown Car Mfg. Co., 6 Cir., 191 F. 579; Bassick Mfg. Co. v. Adams Grease Gun Corp., 2 Cir., 52 F.2d 36, 40; R. Hoe & Co. v. Goss Printing Press Co., 2 Cir., 31 F.2d 565.

[28] Appellant insists that the failure of respondents to file such disclaimer invalidated patent No. 881 in its entirety. However, this motion, like the one preceding it, was a belated one. It came after the court had announced its decision on the merits and the cause was continued for the sole purpose of ascertaining the proper amount due respondents as shown by the respective audit reports. Furthermore, insofar as the disclaimer is concerned as bearing upon the patents, it would offend against the rule heretofore discussed, that a licensee cannot defend against the payment of royalties by challenging the validity of the licensor's patents. Insofar as termination of the license is concerned, what we have heretofore said on that subject indicates no merit in appellant's claim of termination. Its claim of illegality has heretofore been shown to be without merit. As to non-user, that issue was in our opinion, correctly determined by the trial court for the reasons given and hereinbefore set forth in our quotations from the Memorandum of Ruling prepared by the trial judge when this cause was before him. Manifestly, appellant suffered no prejudice and there was no abuse of discretion on the part of the court in denying admission into evidence of the proof sought to be presented by appellant.

In the light of what we have herein said, it follows that appellant's final contention that the judgment is against law and the facts adduced cannot be sustained.

For the foregoing reasons the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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124 Cal.App.2d 329

ZANOTTO v. MAROGNA et al.

Civ. 8371.

District Court of Appeal,
Third District, California.
March 31, 1954.

Action to recover damages for alleged assault and battery. The Superior Court, El Dorado County, Thomas Maul, J., entered judgment on verdict for plaintiff and denied defendants' motion for new trial on ground of newly discovered evidence. Defendants appealed. The District Court of Appeal, Paulsen, J. pro tem., held that denial of defendants' motion for new trial was not an abuse of court's discretion.

Affirmed.

1. Assault and Battery ⚿35

In action to recover damages for alleged assault and battery, implied findings, that a defendant had made an unprovoked attack on plaintiff, and that second defendant had joined in such attack by kicking plaintiff, were sustained by the evidence.

2. Witnesses ⚿379(7)

The testimony of a party can be impeached by inconsistent statements made in a pleading which has been verified, where the circumstances indicate that the witness is responsible for such inconsistent statements.

3. Witnesses ⚿388(7)

Where there was no showing that plaintiff had ever seen the pleading, or that she had furnished information on which it was based, and where no foundation had been laid for impeachment of plaintiff's testimony as provided by statute, attempted impeachment of plaintiff's testimony, in action to recover damages for alleged assault and battery, by use of her complaint, which had been verified by plaintiff's attorney, and which plaintiff had not personally signed, was improper. Code Civ.Proc. § 2052.

4. Evidence ⚿14

It is a matter of common knowledge that parties injured in accident frequently have no memory of the occurrence.

5. Appeal and Error ⚿1057(1)

Where defendants had testified that plaintiff had said nothing, or had made statements not relevant to issues in case, at meeting of parties at district attorney's office, refusal of court to allow deputy sheriff, called by defendants, to testify as to what district attorney had said at meeting, was not prejudicially erroneous.

6. Evidence ⚿155(1)

Under statute providing that where part of a conversation is given in evidence by one party, the whole conversation on the same subject may be inquired into "by the other", defendants, who had testified that plaintiff had said nothing, or had made statements not relevant to issues in case, at meeting of parties at district attorney's office, did not have right to have entire conversation admitted into evidence. Code Civ.Proc. § 1854.

7. New Trial ⚿150(3)

Denial of defendant's motion for new trial on basis of witness' affidavit that she had lied when she denied that plaintiff had promised witness a trip if she would appear as plaintiff's witness, was not an abuse of court's discretion, where affidavit did not contain any statement that plaintiff had requested defendant to testify falsely or that witness had done so, and where witness had not been present when assault occurred and her testimony had only related to plaintiff's damages, the award of which was not claimed to be excessive.

8. New Trial ⚿108(1)

Determination of whether a different verdict would be rendered upon a new trial because of newly discovered evidence is within the discretion of the trial judge.

9. New Trial ⚿108(4)

Trial court's determination that a different verdict in action to recover damages for alleged assault and battery, would not be rendered upon a new trial because of newly discovered evidence was not an abuse of discretion.

10. Appeal and Error ⚿110

Order denying defendants' motion for a new trial because of newly discovered evidence was not an appealable order. Code Civ.Proc. § 963.

Russell F. Milham, Placerville, Richard J. Lawrence, Sacramento, Joseph W. Grossman, Colfax, for appellants.

Emmett J. Foley, Placerville, for respondent.

PAULSEN, Justice pro tem.

This is an appeal from a judgment entered on a jury's unanimous verdict awarding respondent damages in the amount of $2,300 for injuries inflicted by an assault and battery committed upon her by the appellants, who are husband and wife.

[1] The appellant wife admitted that she struck the respondent several times in the face in the course of an affray which occurred in a small roadside cafe and bar; and it is tacitly conceded that there was sufficient evidence to support the jury's implied findings that the appellant wife made an unprovoked attack on respondent when she was seated at the bar with some friends, and that the appellant husband joined therein by kicking respondent when his wife was dragging her out the door by her hair. Likewise, it is undisputed that as a result of the blows administered by the appellant wife, the respondent's face was badly bruised and swollen, and there was evidence of injuries to her shoulder, back and shins. Therefore, we shall not narrate the details of the episode except such as are necessary to an understanding of the questions of law raised on this appeal.

[2–4] Appellants attempted to impeach respondent by the use of her complaint. The court sustained an objection on the ground that she had not personally signed the complaint and it had been verified by her attorney ordinarily, the testimony of a a party can be impeached by plaintiff's inconsistent statements in a pleading which has been verified. Gajanich v. Gregory, 116 Cal.App. 622, 3 P.2d 389. Where the circumstances indicate that the witness is responsible for such inconsistent statements there appears to be no reason why a pleading signed and verified by her attorney should not be so used. In the instant case, however, there was no showing whatever that the witness had ever seen the pleading or that she had furnished the information on which it was based. Moreover, there was no foundation whatever laid for the asking of such a question as provided in Section 2052 of the Code of Civil Procedure. For these reasons alone, the ruling was correct. In addition thereto the part of the complaint sought to be used was not necessarily inconsistent with the testimony already given by the witness. She had testified that during the affray with Virgia Marogna, she saw Charles Marogna coming towards her but did not see him do anything or touch her as she was rendered unconscious by the blows struck by Virgia Marogna. The allegation of the complaint read: "That defendant, Charles Marogna, was present in the Lone Pine Cafe when defendant Virgia Marogna was assaulting and beating plaintiff as hereinbefore mentioned, and he did then and there wrongfully, unlawfully, violently and maliciously assault and beat the plaintiff." The fact that respondent was incapable of realizing or recalling what transpired after she was first struck is not irreconcilable with the allegation of the complaint that the appellant husband assaulted her. Eye witnesses testified that he did so and respondent could on the basis of knowledge gained from others truthfully believe and allege that the appellant husband assaulted her. It is a matter of common knowledge that parties injured in accidents frequently have no memory of the occurrence. Yet, they are not branded as perjurers when they bring actions to recover damages and allege the facts of the accident of which they have no independent recollection.

[5] Two days after the affray respondent and both appellants appeared before the district attorney. Deputy Sheriff Bert Fry was also present. Fry was called as a witness by appellants and asked to state what the district attorney had said. Complaint is made that the court erroneously sustained an objection to this question. Appellants had both testified to parts of this conversation. The appellant wife testified at first that she could not remember anything said there by respondent, but later related statements of respondent, none of which was relevant to the issues in the case. Appellant husband testified that respondent "never talked". Obviously, under these circumstances, there was nothing in the conduct of respondent that would have been admissible against her and the statements of the district attorney could not be used for that purpose.

[6] Appellants further contend that as they had already testified to parts of the conversation with the district attorney the whole of it should have been admitted under Section 1854 of the Code of Civil Procedure. That section reads in part as follows:

> "When part of an act, declaration, conversation, * * * is given in evidence by one party, the whole on the same subject may be inquired into *by the other,* * * *." (Italics supplied.)

It was not respondent who testified to part of the conversation and appellants were not the other parties referred to in that section.

[7–9] The final assignment of error is claimed abuse of discretion in denying appellants' motion for a new trial which was grounded on newly-discovered evidence. This consisted of an affidavit by one witness that she lied when she denied that the respondent had promised her a trip to New York if she would appear as her witness. However, this affidavit, which is controverted by one by the respondent, does not contain any statement that respondent requested the witness to testify falsely or that she did so. Since the witness knew both parties, it is likely that she wished to remain neutral and that respondent only solicited her to testify truthfully as to what she knew about the matter, although, by so doing, she might engender the hostility of the appellants, who were her landlords. Further, as pointed out by respondent, this witness was not present when the assault occurred and testified only to respondent's subsequent physical condition and appearance. Her testimony was unnecessary to establish the admitted fact that respondent's face was badly swollen and bruised as the result of blows struck by appellant wife. Even if she were biased and, therefore, enlarged upon the seriousness of respondent's injuries, this did not necessitate a new trial as there is no claim that the damages awarded were excessive. We cannot hold, as a matter of law, that respondent was guilty of subornation of perjury when there was no evidence that the alleged promise of a trip to New York was to induce false, rather than truthful, testimony of the witness. It was within the discretion of the trial judge, who presided at the trial, to determine if it were likely that a different verdict would be rendered upon a new trial because of this newly-discovered evidence, and his determination that it would not was not an abuse of discretion.

[10] The purported appeal from the order denying appellants' motion for a new trial is dismissed as it is not an appealable order under Section 963 of the Code of Civil Procedure.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

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124 Cal.App.2d 274

PEOPLE v. NOBLE

Cr. 5111.

District Court of Appeal, Second District, Division 1, California.

March 30, 1954.

Prosecution for grand theft consisting of stealing an automobile. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Drapeau, J., held that the evidence sustained the conviction.

Affirmed.

1. Criminal Law 🔑260(11), 1159(2)

The weight, value and effect of evidence are matters for trial judge to decide, and may not be passed upon by District Court of Appeal once it has been determined that there is substantial evidence to support trial judge's decision. Const. art. 6, §§ 4–4b.

2. Larceny 🔑65

Evidence sustained conviction for grand theft consisting of stealing an automobile.

Archibald Noble, in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

DRAPEAU, Justice.

Archibald Noble was convicted of grand theft (stealing an automobile) with two prior felony convictions for which he served terms of imprisonment. When the case came to trial a jury was waived and the issue submitted to the judge for decision on the evidence taken at the preliminary examination. Defendant did not testify in his own behalf and no witnesses were called in his defense.

The automobile was discovered in a garage in back of defendant's residence. The keys to the automobile, a bill of sale entirely made out to defendant in his own handwriting, and a number of items that were in the car when last seen by the owner were found in defendant's room.

Pursuant to defendant's request for appointment of counsel, this court referred the matter to the committee of the Los Angeles Bar Association that handles such matters. In accordance with this reference Richard E. Erwin, Esquire, made a careful examination of the record. He has filed a letter stating that he finds no errors in the rulings of the trial court, that the decision is supported by substantial evidence, and that there are no grounds on which to base an appeal.

[1] There are also in the file a number of letters from defendant presenting his views and arguments, which have been considered by this court in the nature of a brief. In these letters the weight, value and effect of the evidence are argued at length. Under our law all of these matters were for the trial judge to decide. None of them may be passed upon by this court once it has determined that there is sub-

stantial evidence to support the judge's decision, Const. Art. VI, §§ 4–4b; People v. Henderson, 34 Cal.2d 340, 209 P.2d 785; and see many cases in 17 West's California Digest, Criminal Law, 🔑1159.

[2] This court has also carefully examined the record. There are no errors by the trial judge and the evidence supports his decision.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

124 Cal.App.2d 444

HARVEY et al. v. HARVEY et al.

Civ. 19964.

District Court of Appeal, Second District, Division 2, California.

April 8, 1954.

Rehearing Denied April 27, 1954.

Hearing Denied June 3, 1954.

Action for an accounting and for moneys allegedly misappropriated wherein defendants filed a cross complaint. From an adverse judgment in the Superior Court for Los Angeles County, A. A. Scott, J., the plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that the findings warranted judgment for the defendants and were supported by the record.

Judgment affirmed.

1. Partnership 🔑336(3)

In suit by widow against surviving partners for an accounting and for moneys allegedly misappropriated, evidence sustained finding that there had not been any misappropriation nor mishandling of any sum claimed to be due and that no damage was caused plaintiff by alleged acts of the partners.

2. Partnership 🔑335

In suit by widow of deceased partner for an accounting against the surviving partners and for moneys allegedly misappropriated, in determining an accounting, there was no requirement that the account must be stated in a finding in accepted bookkeeping fashion and any procedure or record, from which it could intelligently be ascertained, what the issues were as to the controverted items and how they were disposed of by the trial court, would suffice.

3. Partnership 🔑342

In suit by widow of deceased partner against surviving partners for an accounting and for moneys allegedly misappropriated, findings of the trial court were adequate to support judgment for defendants.

4. Pleading 🔑427

Where issues are not specifically alleged in complaint but evidence is introduced on those issues without objection, such issues thereupon become properly involved in and are a part of the case.

5. Appeal and Error 🔑197(2)

Objections may not properly be made for the first time on appeal that issues such as estoppel and waiver were not presented by the pleadings.

6. Appeal and Error 🔑901

Burden is on appellants to establish error of the trial court in order to secure a reversal.

7. Appeal and Error 🔑760(2)

Appellants were not entitled to complain of findings respecting estoppel and waiver on the ground they objected to the introduction of evidence tending to show waiver or estoppel where there was no indication in their briefs as to what the evidence consisted of, or where in the transcript the objections were recorded.

8. Partnership 🔑342

In suit by widow of deceased partner for an accounting against the surviving partners, each of whom owned a third of the stock in a corporation, finding was sufficient to support judgment for defendants on count of alleging improper use of corporate funds.

9. Estoppel 🔑112

In action by widow of deceased partner for an accounting against surviving partners, each of whom owned a one-third interest in a corporation, where plaintiffs sought damages for breach of contract to supply clear title to truck bought by plaintiffs from the corporation, wherein defendants answered that the plaintiffs refused to sign an application for a certificate of registration, pleadings were sufficient to raise the question of estoppel so as to authorize a finding thereon.

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John W. Preston and John W. Preston, Jr., Los Angeles, for appellants.

Bridges & Peters, Los Angeles, for respondents.

MOORE, Presiding Justice.

Alice B. Harvey, widow of Frank A. Harvey, deceased, joined by her son, Frank A., Jr., sued the surviving brothers of her husband and their corporation for an accounting and for moneys allegedly misappropriated. Findings against all the claims alleged in the complaint having been made, judgment was entered for defendants.

Prior to December 22, 1946, Frank A. Harvey, Jesse E. Harvey and James E. Harvey, brothers, were co-partners doing business under the name of Harvey Brothers. Each also owned one-third of the stock in Harvey Bros., Inc., a California corporation. On the above mentioned date, Frank died leaving all his property to his widow, and his son. Alice was appointed administratrix of the estate and subsequently its assets were distributed to Alice and Frank, Jr.

After the death of Frank, the business of the partnership and corporation was carried on by Jesse E., James E. and Jesse M. Jr. [sic], the son of Jesse E., as directors and officers. Disputes arose between the widow and the surviving brothers involving their rights in the partnership and the corporation and on September 28, 1949, they executed an agreement attempting to fix a basis for the settlement of all differences and to establish the rights of each and providing for the winding up and dissolution of the corporation and the partnership and a distribution of the assets thereof. Pursuant to the September agreement[1], the partnership was terminated as of its date, and the corporation was dissolved on May 4, 1950. Prior to the latter date, the real property, choses in action and cash of both the partnership and the corporation were distributed to the parties or placed in co-tenancy, while the chattels were sold at auction.

In November 1951 the complaint herein was filed against the partners and the corporation. In fifteen counts it demanded (1) an accounting of funds misappropriated by defendants; (2) a declaration that defendants hold such funds in trust for the shareholders of the corporation; (3) an order to convey the assets held in trust to a receiver who would distribute them to the shareholders; (4) an order specifically to perform that part of the agreement calling for the acquisition of policies of title insurance on the property of the corporation received by stockholders; and (5) damages totaling $6,808.02⅓. A cross-complaint and answer thereto having been filed, the trial resulted in the judgment that neither party recover. Plaintiffs, dissatisfied therewith, now demand a reversal on the grounds that certain findings are erroneous.

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[1] "6. Harvey Bros., Inc., shall be dissolved as promptly as possible and the assets of said corporation delivered to the stockholders thereof, all outstanding just and lawful debts being first paid or adequately provided for as required by law. In event any debts are not paid prior to dissolution, each party agrees to guarantee payment of all just and lawful debts. * * * The officers of Harvey Bros., Inc., shall take all necessary steps as promptly as possible to dissolve said corporation."

"11. The report of Harry T. King, dated May 12, 1949, disclosed that Harvey Bros., a co-partnership, owed to Harvey Bros., Inc., the sum of $5,794.44. Jesse E. Harvey and James E. Harvey agree to pay one-third of said sum, increased or decreased as the case may be, since that date to and including the date of the dissolution of said corporation, to Mrs. Alice B. Harvey. Jesse E. Harvey and James E. Harvey, as officers of Harvey Bros., Inc., shall furnish an account to the administratrix of said estate for all income and disbursements from March 31, 1949, to the date of final dissolution of said corporation. The said account shall contain a list of all income received, including the date of receipt and a description of the items covered and shall include a complete list of all disbursements, stating the date of each disbursement, the person to whom the money was disbursed, and a statement of the purpose for which said moneys were in each case disbursed."

By the first assignment of error, it is asserted that the finding[2] which states that the agreement of September 28, 1949, was intended to and did settle all demands and claims between the parties existing then or before that date is contrary to the evidence and hence is without support. Appellants emphasize that the court's refusal to order an accounting is the portion of the judgment here under attack. To support this contention, paragraph 11, supra, of the agreement is relied upon. In that paragraph, Jesse and James agree to furnish Alice an account of all income and disbursements from March 31, 1949, to the date of final dissolution. Now it is asserted that no such account has been prepared and delivered. Neither the agreement to furnish the account nor the non-compliance therewith is material to the question of misappropriation of property alleged in appellants' complaint. In that pleading, numerous specific items of property are alleged to have been unlawfully, improperly and unjustifiably retained by defendants, James and Jesse. The complaint alleges that Jesse and James withdrew $2,532.34 from January 1947 to September 28, 1949 (and applied it to their personal uses); collected income of the corporation in the sum of $3,522; received a refund of franchise taxes in the sum of $978.93; received from the county of Los Angeles a tax refund in the sum of $995.67; withdrew from the corporation's bank account $13,982.31 and retained same; collected premium refunds on policies of insurance on corporate property in the sum of $500 and applied same to their own use; caused the corporation unlawfully to pay themselves $12,000 in fraud of the corporation (dismissed with prejudice); collected from one Blattenberger, a tenant of appellants, the rentals in the aggregate sum of $105 and hold same in trust for appellants; hold $4,500 due appellants as liquidating dividends as provided by the contract of September 28 in the sum of $125; damaged appellants in the sum of $1,545.84 by virtue of their sale subsequent to September 28 of a truck mounted cement mixer to appellants because of respondents' refusal to supply evidence of title; refused to pay rent on a warehouse assigned to appellants by the contract of September 28 in the aggregate sum of $213.33⅓; damaged appellants in the sum of $318.85 by virtue of respondents' refusal to pay appellants ⅔ of the county taxes advanced by appellant subsequent to September 28 for "certain real property" jointly owned with respondents. Demand was made for payment or an accounting of all such sums.

[1] The court specifically found that there had been neither misappropriation nor mishandling of any sum claimed to be due and no damage caused by any alleged act of respondents. Such findings are adequate support for the judgment, regardless of the intent and effect of the agreement of September 28, 1949. Appellants did not allege a breach of the latter contract to supply an account in the manner specified therein and did not seek such an account in their complaint. At this point it is well to keep in mind that two accountings are

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[2] "That it is true that by agreement dated September 28, 1949, the parties hereto intended to and did include and settle by a full accounting of the partnership existing during the lifetime of Frank Harvey, deceased, Jesse E. Harvey and James E. Harvey and that said agreement was intended to and did fully settle all demands and claims between James E. Harvey and Jesse E. Harvey on the one hand and Alice B. Harvey, individually and as Executrix of the Estate of Frank A. Harvey, deceased, existing at or before September 28, 1949; that it is true that the interests of Frank A. Harvey, Jr., one of the plaintiffs herein, are derived by reason of heirship and under the Will of Frank A. Harvey, deceased, and that at the date of making said agreement Frank A. Harvey, Jr., was a minor and was represented by Alice B. Harvey acting as said Executrix of the Estate of Frank A. Harvey, Deceased."

discussed simultaneously by appellants: the accounting set out in the contract of September 28 and the accounting prayed for in this action for misappropriated property.

[2] Appellants complain of certain findings by which the court determined that specified sums of money had been allegedly received by defendants but that such moneys had been expended properly in the payment of debts and taxes. It is urged that such findings are not sufficiently definite to enable appellants to ascertain whether such findings are supported by the evidence. Sears v. Rule, 27 Cal.2d 131, 149, 163 P.2d 443; Whann v. Doell, 192 Cal. 680, 684, 221 P. 899; Davis v. California Motors, 73 Cal.App.2d 241, 246, 166 P.2d 52, 53, and other opinions are cited which approve this rule: a statement of the balance due, without a reference, and without an account or without exceptions being taken to specific items, is not a proper disposition of an action. However, these same authorities declare also that the contention that an account must be stated in a finding in accepted bookkeeping fashion cannot be maintained; that any procedure or record from which it can be intelligently ascertained what the issues were as to the controverted items and how these issues were disposed of by the trial court will suffice for the purpose.

[3] In the instant case, the findings that each allegedly misappropriated item was in fact used for partnership or corporation debt or expense or was distributed, and that the alleged damage did not occur, are adequate. These findings, based on the testimony of the parties, the testimony of accountants employed by both sides and the reports of such accountants, are amply supported by the record.

Davis v. California Motors, supra, an authority relied upon by appellants, closely parallels the case at bar. Therein the widow of one of three copartners asked for an accounting from the remaining partners. She was furnished with balance sheets and profit and loss statements covering the period in question which showed that the venture had made no profits. Being dissatisfied with these facts, the widow filed suit for an accounting. The court ruled that she was not entitled to relief by reason of the fact that the assets of the business did not exceed its liabilities. On appeal it was held that a finding that "there was no surplus belonging to the joint venture" was amply supported by the record because the court had before it the oral testimony and various financial statements prepared from the books and tax returns, and therefore compliance with the requirements prescribed in Whann v. Doell, supra, were complied with. Id., 73 Cal.App.2d at page 247, 166 P.2d 52. In not a single instance did the court below fail to make a complete finding against the alleged, wrongful act of respondents. By reason of such findings and because they have substantial support, the judgment is a complete answer to the complaint. The contract of September 28, 1949 settled all differences between the parties at that time and such claims as are alleged to have arisen after that contract are completely answered by the findings with reference to them. The purpose of the action was to recover moneys that were claimed, not merely to have accounts prepared after the parties had accounted to themselves by their own contract and after appellants and their auditor had scanned each act and entry to the time the corporation was dissolved and its properties distributed. What could be the virtue of having their discoveries composed in a statement of the facts found? The very findings of the court constitute the most complete and sufficient accounting for the reason that they answer every criticism of the behavior of respondents.

[4-7] As their final argument, appellants contend that the findings which hold that plaintiffs were estopped or had waived their right to maintain their first, third, fourth and thirteenth causes of action are erroneous for the reason that the defenses of estoppel and waiver were not specially pleaded in defendants' answer. No argument is made that the findings are not supported by the evidence. Where issues are not specifically alleged in a complaint or other pleading, but evidence is introduced on those issues without objection, such is-

sues thereupon become properly involved in and are a part of the case. The objection may not properly be made for the first time on appeal that such issues as estoppel and waiver were not presented by the pleadings. Northwestern Mut. Fire Ass'n v. Pacific Wharf & Storage Co., 187 Cal. 38, 40, 200 P. 934; Guay v. American President Lines, 81 Cal.App.2d 495, 515, 184 P.2d 539. While appellants assert that they objected to the introduction of evidence tending to show waiver or estoppel, there is no indication in the briefs as to what this evidence consisted of or where in the transcript the objections are recorded. The burden is on appellants to establish the error of the trial court and their failure to so do is fatal to this ground of the appeal.

But assuming that the objections were made as asserted, the lower court did not err. The findings on counts three and four are based on offset, not estoppel or waiver, and the ultimate facts constituting offset were pleaded in the answer.

[8] The first count alleges an improper use of corporate funds; the answer thereto denies the allegation and further alleges that the funds in question were used for corporate matters. The finding is that there was neither wrongful nor improper act on the part of defendants, no damage to plaintiffs, and by reason of the September contract "all claims and demands of plaintiffs against defendants were fully settled and released." Such finding is sufficient to support the judgment for defendants on this count.

[9] By count thirteen, plaintiffs sought damages for breach of contract to supply clear title to a truck bought by plaintiffs from the corporation. This count was amended after trial to one for rescission. In their answer, respondents alleged that appellants had refused to assist them in obtaining evidence of title and had refused to sign an application for a certificate of registration. Here the estoppel on which the finding is based was placed in issue by the pleadings.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

BABBITT v. BABBITT et al.*

Civ. 19961.

District Court of Appeal, Second District,
Division 1, California.
April 5, 1954.
Rehearing Denied April 26, 1954.
Hearing Granted May 27, 1954.

Divorce proceeding. From adverse judgment of Superior Court, Los Angeles County, Wilbur C. Curtis, J., third party appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that certain real property purchased while husband was residing with another woman, title to which was taken in her name, was purchased solely with community funds and that all of property was community property and other woman had no interest therein.

Judgment affirmed.

Husband and Wife ⟾264

In action by wife for divorce and for recovery of certain real property purchased while husband was living with another woman and title to which was taken in her name, evidence sustained finding that property was purchased solely with community funds, that all of the property was community property and the other woman had no interest therein.

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Benjamin D. Brown and A. James Ayers, Los Angeles, for appellants.

D. Chase Rich, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment.

The action was for divorce and also for the recovery of property from defendant Agnes McGowan. The defendant Douglas B. Babbitt defaulted. Defendant McGowan answered.

The record reveals, as recited by appellant, "Briefly the evidence disclosed that in 1949 the husband and McGowan, while living together at a time when the husband was married to plaintiff, purchased certain real property in Los Angeles County, described as Lot 39, Tract 7890 and that title thereto was put into the name of McGowan. At that time McGowan was known as Agnes M. Hansen. The trial court has made a finding that community funds were solely used to purchase this property and that title to said property was taken in the name of McGowan in order to keep the plaintiff from knowing about the property and for the purpose of defrauding plaintiff and that McGowan agreed to return the property to husband at such time as he made demand therefor. Evidence offered on behalf of appellant indicated that McGowan was gainfully employed for a substantial part of the time that she and husband were living together and that she contributed her earnings for the common benefit of the two people. However, the trial court has chosen to find that none of of these earnings were put into the property in question.

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* Opinion vacated 282 P.2d 1.

"Subsequently, husband demanded of McGowan that she reconvey legal title to the husband, which she refused to do and claimed the property to be her own.

"In September, 1951, McGowan commenced an action against husband for ejectment from said property and that husband contested said action and filed a cross-complaint claiming legal title and that McGowan was holding the said property in trust for husband.

"On or about June 4, 1952, McGowan and husband stipulated for judgment in the action whereby each took an undivided one-half interest in said real property and judgment was made accordingly. Plaintiff was not a party to said action.

"The trial court made judgment decreeing that said property was the community property of plaintiff and husband and awarded all of said property to plaintiff and quieted title to said property in favor of plaintiff as against McGowan.

"Appellant contends that the trial court was in error in making a finding that all of the said property was community property and in awarding and assigning the one-half thereof claimed by appellant to the plaintiff and in decreeing that appellant had no interest therein."

In addition to granting the divorce the property in question was restored to plaintiff.

Both defendants testified.

Appellants' argument that, "There is no evidence to support any findings" and that "The decree herein was not made pursuant to either the allegations of the complaint or the prayer for relief", is without merit. A review of the record reveals that the evidence is abundantly sufficient and that no prejudicial errors appear.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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124 Cal.App.2d 345

LEWIS et ux. v. WAINSCOTT et al.

Civ. 15808.

District Court of Appeal, First District,
Division 1, California.
April 1, 1954.

Action to cancel promissory note, and deed of trust securing the note, which plaintiffs had given defendants in payment for realty. The Superior Court, County of San Mateo, Anthony Brazil, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that since plaintiffs, for purpose of inducing Veterans' Administration to guarantee loan, misrepresented purchase price, and owners did not have knowledge of veteran's loan, and broker, who arranged transaction and who had knowledge that transaction violated Servicemen's Readjustment Act, was not agent of owners, promissory note and deed of trust would not be canceled because of illegality of transaction.

Affirmed.

1. Brokers 🔑8(3)

In action to cancel promissory note, and deed of trust securing the note, on ground that sale price exceeded appraisal under Servicemen's Readjustment Act, evidence supported finding that broker, who arranged the transaction and who knew that amount paid for the property exceeded the valuation, was not agent of defendants who, therefore, were not chargeable with broker's knowledge. Servicemen's Readjustment Act of 1944, § 1 et seq., as amended in 1945, 38 U.S.C.A. § 693 et seq.

2. Brokers 🔑103

Where broker, who arranged sale of property at price which exceeded the appraised value in violation of Servicemen's Readjustment Act of 1944, did not purport to act as owners' agent, and owners did not know veteran's loan was involved, acceptance of benefits of the transaction was not an implied ratification of the broker's illegal act. Servicemen's Readjustment Act of 1944, § 1 et seq., as amended in 1945, 38 U.S.C.A. § 693 et seq.

3. Contracts 🔑123(1)

Where purchasers induced Veterans' Administration to guarantee loan by misrepresenting purchase price, and owners did not have knowledge of veteran's loan, and broker, who arranged transaction and who had knowledge that transaction violated Servicemen's Readjustment Act, was not agent of owners, promissory note, and deed of trust securing the note, given in payment of purchase price would not be canceled because of illegality of transaction. Servicemen's Readjustment Act of 1944, § 1 et seq., as amended in 1945, 38 U.S.C.A. § 693 et seq.

4. Contracts 🔑123(1)

Provision of Servicemen's Readjustment Act of 1944, imposing penalties for making fraudulent declaration concerning any claim for benefits under the act, was intended to proscribe contracts made in violation of the act, such as contracts to pay a sum in excess of reasonable value as determined by designated appraiser, at least to extent of the excess. Servicemen's Readjustment Act of 1944, § 1500, §§ 500–510, 501(3), 510, as amended in 1945, § 503A, as added in 1951, 38 U.S.C.A. § 697, §§ 694, 694a to 694c, 694d, 694e, 694g to 694j, 694a, 694 note, § 694c–1; 38 U.S.C.A. § 715.

5. Contracts 🔑139

Where illegality of bargain is due to facts of which one party is justifiably ignorant and other party is not, the illegality does not preclude recovery by ignorant party of compensation for any performance rendered while he is still justifiably ignorant, or for losses incurred or gains prevented by non-performance of the bargain.

◆

Dolwig & Miller, South San Francisco, for appellants.

R. A. Rapsey, San Bruno, Paul DeMare, San Bruno, of counsel, for respondents.

FRED B. WOOD, Justice.

Plaintiffs Sanford P. Lewis, a veteran, and Marie R. Lewis, his wife, brought this action against Roy Wainscott and Leota Wainscott to cancel a promissory note for $2,263.22 and a deed of trust securing the note, which plaintiffs had given the Wainscotts in part payment of the purchase price of certain real property.

Plaintiffs claim that their contract to pay the amount of this note is illegal and void for the reason, asserted by them, that it was made in violation of the provisions of the Servicemen's Readjustment Act of 1944, as amended, 58 Stat., ch. 268, p. 284, as amended by 59 Stat., ch. 588, p. 623 [38 U.S.C.A. § 693 et seq.].

The applicable provisions of the statute appear in Title III of the act, relative to "Loans for the Purchase or Construction of Homes, Farms, and Business Property", sections 500–510;[1] particularly subdivision (3) of § 501, which declared that a loan to

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[1] The amendatory act amended all of Title III and became effective December 28, 1945. (See 59 Stat. 626–631; 38 U.S.C. §§ 694, and note, 694a–694c, 694d, 694e, 694g–694j [38 U.S.C.A. §§ 694, and note, 694a to 694c, 694d, 694e, 694g to 694h]; § 510 of Title III, effective date of the 1945 amendment, apparently has not been codified in the U.S.C.). The text of § 510 appears in a note appended to 38 U.S.C. § 694.

The transaction here involved occurred in April, 1947. Sec. 503A of said Title III, 38 U.S.C. § 694c–*l* [38 U.S.C.A. § 694c–1] giving the veteran an action for damages against a person who "knowingly a veteran for the purchase of a home would be guaranteed by the government if made pursuant to the provisions of Title III, including the requirement "That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator." 59 Stat. 628.

This and other provisions of the act were implemented by § 1500, 58 Stat. 300, which incorporated by reference certain other statutes, including § 15 of Title I of chapter 3 of an act of March 20, 1933, 48 Stat. 8, 11, 38 U.S.C. § 715 [38 U.S.C.A. § 715]. Section 15 reads as follows: "Sec. 15. Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under this title, shall forfeit all rights, claims, and benefits under this title, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both." 48 Stat. 11. This incorporation by reference is fully effective. Young v. United States, 9 Cir., 178 F.2d 78, 80.

These provisions were violated. The property was appraised at $3,000 by the Veterans' Administration, yet plaintiffs agreed to pay in excess thereof the amount evidenced by the note in suit. Plaintiff Sanford Lewis and one Vern Bybee, a real estate broker or agent with whom plaintiffs dealt, managed the transaction and were well aware of the violation. The defendants had no actual knowledge of any facts which might have informed them or have put them upon notice that the statute was being violated. Plaintiffs claim, however, that Vern Bybee acted as defendants' agent and that his knowledge must be imputed to them. This presents the first question upon this appeal. The second question is whether or not the facts found support the legal conclusion that the plaintiffs are not entitled to relief.

[1] (1) *The evidence amply supports the finding that Vern Bybee was not an agent of the defendants.* The evidence is that plaintiffs, interested in acquiring a home, went to the office of Lester E. Bybee, real estate broker, at Brisbane, California. They talked with his son, Vern Bybee, who showed them several properties including this one. Vern told them that a Mrs. Johnson owned this property, and introduced them to her. They agreed upon a price, $5,250, and paid a deposit of $85. Mrs. Johnson was in possession under a contract of purchase from the defendants. Plaintiffs then made application to a bank for a federally guaranteed loan under the Servicemen's Readjustment Act. The Veterans' Administration appraised the property as reasonably worth $3,000 and the bank informed Vern Bybee that a loan would not be made unless the sale price were reduced to $3,000. Vern then made out a new deposit receipt (showing $3,000 as the full consideration) which plaintiffs signed as purchaser and Mrs. Johnson signed as seller.

Meanwhile, Lester Bybee wrote the defendants, who live at Paradise, Butte County, telling them Mrs. Johnson wished to sell and that he, Bybee, had a party interested in the place and asking defendants' permission to release Johnson's interest to the plaintiffs which consent was given, conditioned upon receiving $2,000 cash and a deed of trust or first mortgage for $2,250. Later, Bybee wrote them he had an assignment from Mrs. Johnson to the defendants and sent them a deed conveying the property to plaintiffs, which they signed and returned to him. In setting up the escrow with a title company, Mrs. Johnson signed as seller and Lester E. Bybee signed for the buyer.

In all of this, plaintiffs had contact only with Vern Bybee and Mrs. Johnson, not

makes, effects, or participates in a sale" for a consideration in excess of the reasonable value of the property as determined by an official appraisal, was not enacted until September 13, 1951. 65 Stat. 320, ch. 381.

with the defendants. Defendant Roy Wainscott testified that he had no participation in the transaction other than as herein stated; that he did not learn that his was a second mortgage until some time after the sale was consummated, he having agreed only to a first mortgage, and having received from Bybee a fire insurance policy insuring the plaintiffs, with a rider, signed by Lester E. Bybee as agent for the insurer, insuring defendants' interest as "first mortgagee"; that Bybee did not represent the defendants in this transaction with the plaintiffs; Bybee did not mention the F. H.A. loan, nor did he discuss a G.I. loan; defendants did not know that plaintiff Sanford Lewis was a veteran; Bybee said nothing about the terms under which plaintiffs could buy the property, he merely said it would take a little time for them to get the necessary down payment; defendants knew nothing of any money being raised to pay Mrs. Johnson, had no knowledge of what the Johnsons and the plaintiffs were doing for themselves, did not know that the bank loaned $3,000; his original sale to Mrs. Johnson was for about $5,000; she had paid $500 down and was paying principal and interest at the rate of $40 a month, was about three months behind at the time of the second sale; Roy knew only that defendants were to get $2,000 cash and a deed of trust or first mortgage for $2,250; did not know whether Mrs. Johnson was to get her money back when she sold out; nor did he know that Mr. Bybee had deducted $262.50 as commission. It appears that Bybee's commission was paid out of the $3,000 bank loan pursuant to the escrow instructions signed by Mrs. Johnson. Her instructions also directed that $2,120 of that loan be paid to the defendants. A statement by the lending bank indicates that the sum of $262.50 was paid or payable to Lester E. Bybee, $2,116.-70 to the defendants, $3.30 for revenue stamps, and $617.50 to Mrs. Johnson.

Plaintiffs, in support of their claim that the evidence shows, as a matter of law, that Bybee acted as defendant's agent in the sale to the plaintiffs, invoke this testimony: Upon the original sale to Johnson, Bybee conducted the negotiations for the defendants; Bybee had been collecting Johnson's installment payments and had notified defendants that Johnson was three months in arrears; that when Bybee told them that plaintiffs were interested, defendants told Bybee they were willing to sell and told him the price; that they never talked with Mrs. Johnson concerning the last transaction; they handled all their transactions relating to the property through Mr. Bybee. This evidence at most produced a conflict on this question of fact, which the trial judge, who saw and heard the witnesses and weighed the evidence, resolved against the plaintiffs and in favor of the defendants.

[2] Plaintiffs further claim that defendants have ratified this illegal transaction by accepting its benefits and taking steps to foreclose the deed of trust given them to secure the note in suit. The answer to this contention is that Bybee was not their agent and did not purport to act as their agent in conducting the questioned transaction. There is, therefore, no basis for an implied ratification of his asserted illegal act. See Watkins v. Clemmer, 129 Cal.App. 567, 570–573, 19 P.2d 303; Jones v. Bank of America Nat. Trust & Savings Ass'n, 49 Cal.App.2d 115, 122, 121 P.2d 94, petition for hearing by Supreme Court denied. Moreover, there were other innocent parties to the transaction, the bank which made the $3,000 loan, secured by a first deed of trust or mortgage given by the plaintiffs upon the very same property, and the governmental agency that guaranteed the loan. As a practical matter, the defendants, likewise innocent parties, had no real power of election between rescinding the sale or retaining plaintiff's note and enforcing the security which was actually furnished them. Under such circumstances, a reviewing court could not hold as a matter of law that the trial court erroneously found that there was no such ratification of the transaction as would convert defendants into participating actors in the violation of the statute.

[3] (2) *The findings support the legal conclusion that plaintiffs are not entitled to relief.*

The court found that, for the sole purpose of inducing a Veterans' Administration guaranteed loan, plaintiffs entered into an instrument in writing for the purchase and sale of the property for the stated sum of

$3,000, that plaintiffs were aware and had knowledge of the illegality of the transaction which gave rise to the note and deed of trust in suit, that defendants did not have any knowledge of a veteran's loan, nor of any transaction under the statute for financing the purchase of the property, and that Vern Bybee was not the agent of the defendants.

The court concluded therefrom that plaintiffs are entitled to no relief. That is the correct conclusion.

It would be strange, indeed, if a willfully deliberate and scheming violator of the statute could cancel his promise to pay the remainder (a very substantial remainder) of the purchase price and retain the property at the expense of an innocent seller who acted in good faith with no knowledge of any fact which could possibly have put him upon inquiry concerning the legality of the transaction.

[4] Congress could not have intended any such untoward and tragic result when it enacted this statute into law for the aid and protection of veterans. It did impose penalties upon any person who "knowingly" makes or causes to be made or aids in or procures the making or presentation of a "false or fraudulent affidavit, declaration, * * * statement, * * * or paper * * concerning any claim for benefits under" the statute. From that there is inferred an intent to proscribe as illegal a contract made in violation of the statute, such as a contract to pay a vendor or builder a sum in excess of the "reasonable value" of the property "as determined by proper appraisal made by an appraiser designated by the Administrator", at least to the extent of the excess. Young v. Hampton, 36 Cal.2d 799, 802–804, 228 P.2d 1, 19 A.L.R.2d 830; Pitts v. Highland Construction Co., 115 Cal. App.2d 206, 209–210, 252 P.2d 14; Sattler v. Van Natta, 120 Cal.App.2d 349, 260 P.2d 982. See also Rosenblum v. Corodas, 119 Cal.App.2d 802, 260 P.2d 151.

In the cases last cited it was also held that although a veteran might be an active participant in knowingly evading and violating the statute, the law would accord him a remedy (such as cancellation of or denial of recovery upon a note evidencing his promise to pay the excess amount), because the statute implements a policy of affording the protection of the law to those whom the federal loan statutes are designed to benefit. However, it also appears in each of those cases that the vendor or the builder against whom such a remedy was accorded the veteran was a "knowing" violator of the statute. In striking contrast, in the instant case, the defendant vendors acted in entire good faith. They were utterly ignorant of any fact indicative of a violation or possible violation of this or any other law. Here, a different principle comes into play.

[5] "Where the illegality of a bargain is due to * * * facts of which one party is justifiably ignorant and the other party is not, * * * the illegality does not preclude recovery by the ignorant party of compensation for any performance rendered while he is still justifiably ignorant, or for losses incurred or gains prevented by non-performance of the bargain." 2 Restatement of the Law of Contracts, § 599. Corbin states it in these words: "If a bargain is illegal only because of the existence of facts of which one of the parties is justifiably ignorant, the innocent party is not deprived of all remedy," citing cases from numerous jurisdictions. 6 Corbin on Contracts, 1066, § 1538. It is a principle recognized in California. See Hilbert v. Kundicoff, 204 Cal. 485, 486, 268 P. 905; Security-First National Bank v. J. G. Ruddle Properties, Inc., 218 Cal. 435, 440–442, 23 P.2d 1016; Hemmeon v. Amalgamated Copper Mines Co., 95 Cal.App. 400, 401–402, 273 P. 74; Garnette v. Mankel, 71 Cal.App. 2d 783, 786–787, 163 P.2d 466; 6 Cal.Jur. 157, Contracts, § 109.

This principle, applied to the facts found by the trial court, calls for legal recognition of the promissory note and the deed of trust given to secure it. No other remedy seems feasible for the defendants. They could not be required to rescind the sale and take their property back. There are two other innocent persons to be protected, the bank that made the $3,000 loan and the governmental agency that guaranteed the loan.

The decisions which plaintiffs invoke are not applicable to the situation which here obtains. For example, Elmers v. Shapiro, 91 Cal.App.2d 741, 205 P.2d 1052, involved a different statute, the Veterans' Emergency Housing Act of 1946 [50 U.S.C.A.Appendix, § 1821 et seq.], which, in giving the veteran a civil remedy to recover the amount paid in excess of the ceiling price, omitted the element of willfulness, in contrast to making willfulness a necessary element when imposing criminal penalties. See page 752 of 91 Cal.App.2d, pages 1058, 1059 of 205 P.2d. Even more significant, the defendant building contractor there involved acted with full knowledge of the ceiling price which the contract exceeded. He was no innocent nonparticipant in the violation as are the defendants in the case now before us. These defendants, like the bondholders mentioned in Security-First National Bank v. J. G. Ruddle Properties, Inc., supra, 218 Cal. 435, 23 P.2d 1016, are "innocent victims" of the plaintiffs herein who are "now seeking to profit" by their "own wrong." 218 Cal. at page 441, 23 P.2d at page 1019.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

124 Cal.App.2d 412

SHAEFFER
v.
LOS ANGELES TRANSIT LINES.

Civ. 20049.

District Court of Appeal, Second District, Division 1, California.

April 5, 1954.

Hearing Denied May 27, 1954.

Passenger's action for injuries sustained as result of alleged negligence of streetcar operator in stopping streetcar with a jerk causing passenger to fall as she was attempting to alight from streetcar. From a judgment of the Superior Court, Los Angeles County, Wilbur C. Curtis, J., plaintiff appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that streetcar operator was not negligent.

Judgment affirmed.

Carriers 🔑318(9)

In passenger's action for injuries sustained as result of alleged negligence of streetcar operator when he stopped streetcar with a jerk causing passenger to fall as she was attempting to alight from streetcar, evidence sustained finding that streetcar operator was not negligent.

◆

N. E. Youngblood, Beverly Hills, for appellant.

Melvin L. R. Harris, George R. Hillsinger, Newell & Chester, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment.

The action was for damages. The complaint alleges that plaintiff was injured while on a streetcar operated by defendant and that the accident was the result of the negligence of the motorman. As recited in appellant's brief, "The motorman brought his car to a halt with a jerk at the intersection; the doors flew open; some of the departing passengers alighted; the doors closed; in the press of passengers who were entering and passengers who were riding in a standing position in the forepart of the car other passengers who so desired had not yet alighted; they, including plaintiff, called "Out" to the motorman; the motorman again jerked the car and opened the door; plaintiff was thrown to her knees and caught in the door, suffering severe injuries; she was then pulled and helped out of the car by strangers; the car sped away immediately. Plaintiff testified that the jerking of the car caused her to fall. Defendant offered no evidence relating to the operation of the car or to any other possible cause of plaintiff's fall." Respondent points out that, "Appellant has prosecuted this appeal upon a partial transcript of the proceedings before the trial court consisting only of appellant's testimony". Respondent's description of the incident, in part, is as follows, "At the time appellant said 'out, please,' the streetcar had just barely started in motion. After it moved not more than a couple of inches, the operator immediately stopped the streetcar in accordance with appellant's request in order that she could leave the car. Indeed, on her *direct* examination, appellant testified that the streetcar had traveled only a couple of inches and stopped with 'just a jar'." (Emphasis included.)

It is contended on appeal that the court's finding, "that defendant's employee was not negligent is not supported by any substantial evidence in this record" and that, "A finding that plaintiff's 'injuries * * * if any, were not proximately caused by reason of negligence on the part of the defendant * * * or its agent or employee' is not supported by substantial evidence in this record."

Respondent, on the other hand, argues that, "Appellant was so thoroughly impeached on a material point that the trial court was justified in disregarding all of her testimony." In this connection the record reveals that plaintiff was still suffering from injuries received in a previous accident with relation to which respondent points out that, "appellant was treated at the General Hospital on January 4, 1952, four days prior to the accident and the entries of the attending physician afford some insight into the credibility of appellant:

> "'January 4, 1952. STR and mobilization to entire spine. Pt. states she has no complaints and feels wonderful today but for me not to put this on chart for if I do they will stop treatments.'
>
> "Furthermore, the clinical notes for appellant following the accident lists exactly the same complaints that she had prior to the accident and could be the basis for an inference that she suffered no new injuries on January 8, 1952."

The foregoing, although not a complete summary, is sufficient to indicate the record as presented to the trial judge.

As a matter of law the evidence is sufficient to support the findings in every respect.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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124 Cal.App.2d Supp. 875

KINDSVATER

v.

FIREMAN'S FUND INDEMNITY CO.

C. A. 20.

Appellate Department, Superior Court,
Fresno County, California.

March 16, 1954.

Action on an accident policy with a medical rider. Judgment for plaintiff in the Municipal Court, Fresno Judicial District, Frederick E. Butler, Acting Municipal Court Judge, and the defendant appeals. The Superior Court, Appellate Department, Kellas, J., held that under the terms of the policy the plaintiff was entitled to recover two weeks indemnity plus medical expenses which were less than the policy limits.

Judgment modified and as modified affirmed.

1. Insurance 🔑527

Under accident policy with medical rider where insuring cause expressly limited liability of insurer for hernia to two weekly disability payments and further disability benefits therefor were expressly excluded and by the rider insurer agreed to pay medical expenses for treatment of an injury arising from an insured risk if occurring within a specified period up to $500, insured disabled by hernia was entitled to recover the specified two weeks indemnity plus medical expenses incurred which were less than the policy limits.

2. Costs ⟹234

Where judgment for plaintiff in action on a policy was modified as to the amount recovered in a substantial amount, the appellant was entitled to recover its costs of the appeal.

Hal Johnson, Fresno, for appellant.

John J. Gallagher, Fresno, for respondent.

KELLAS, Judge.

Facts

On or about February 25, 1950, defendant insurance company entered into an accident insurance policy agreement with plaintiff, with a medical rider attached thereto. While said policy with said rider attached was in full force and effect, plaintiff sustained a hernia resulting directly and independently from all other causes, from accidental injuries. Plaintiff was disabled thereby for a period of 29 weeks and incurred medical expenses in the treatment of his injuries in the sum of $474.80. Judgment was rendered by the lower court for the plaintiff in the sum of $1,199.80, and defendant appeals.

Appellant contends that its liability to the respondent is limited, by the provisions of Paragraph IV of the policy, to two weekly disability payments, as therein set out, and nothing more. Respondent contends that the policy is ambiguous and, therefore, appellant's liability cannot be restricted in any regard.

The policy agreement in question provides that appellant

> "does hereby insure Manuel Kindsvater * * * in consideration of the premium of Eighty-Nine and 55/100 Dollars for the term of twelve months from the Twenty-Fifth day of February, 1950, beginning and ending at 12:01 A. M., standard time at the place where the Insured resides, subject to the provisions and limitations contained herein or endorsed hereon, against loss, as herein defined, resulting directly and independently of all other causes, from accidental bodily injuries sustained during the term hereof, referred to hereinafter as "such injuries", as follows:
>
> "Principal Sum—Two Thousand and no/100 Dollars ($2,000.00)
>
> "Weekly Indemnity—Twenty-Five and no/100 Dollars ($25.00)
>
> "Issued with: MR Medical Expense Rider—Limit: ($500.00)"

[1] Part I provides that "if such injuries shall cause continuous total disability, as defined in Part II * * * the Company will pay * * *".

Part II provides that:

> "if such injuries shall, within thirty days after the date of accident * * * the Company will pay weekly indemnity at the rate hereinbefore specified for the period of such continuous total disability, but for not exceeding fifty-two consecutive weeks * * *".
>
> "No payment of weekly indemnity shall be made in case of any loss enumerated in Part I, except as therein provided."

In Part III "the insured may elect to take, in lieu of the weekly indemnity provided in Part II * * *".

Part IV provides:

> "Hernia Indemnity—If such injury shall result in hernia, however sustained, the Company will pay the weekly indemnity for a period of disability not exceeding two weeks."

Thereafter, under the paragraph entitled "Exclusions", it is provided that "the insurance under this Policy shall not cover hernia, however sustained, except as provided in Part IV * * *".

The Medical Expense Rider, designated "Form MR", attached, provides as follows:

> "This rider shall form a part of and be subject to all the terms, conditions and agreements of Policy No. BA 1-2019 * * *.
>
> "In consideration of an additional premium of *Included in policy premium* Dollars ($32.00) it is hereby agreed that, effective on the 25th day of Feb-

ruary, 1950, beginning and ending at 12:01 A. M., Standard time at the place where the Insured resides and terminating simultaneously with this Policy, the aforesaid Policy is extended to include the following:

> "Hospital, Nurses, Medical and Surgical Expense—If such injuries shall require, within twenty-six weeks after the date of accident, treatment by a physician or surgeon, hospital confinement or the employment of a trained nurse, the Company will pay, in addition to any other indemnity to which the Insured may be entitled, the actual expense of such treatment, hospital charges and nurses fees, up to an amount not exceeding Five Hundred and No/100 Dollars ($500.00)."

We fail to see any ambiguity in the policy of insurance. The plain wording of the agreement entitles respondent to two weeks disability at $25 per week. The Medical Rider attached and made a part of the original agreement, for an additional premium, extends the benefits of said rider to the insured up to the sum of $500. The claim here is for less than that amount.

The case of Pendell v. Westland Life Insurance Co., 95 Cal.App.2d 766, 214 P.2d 392, is not in point. The case of Provident Life and Accident Insurance Company v. Sims, Tex.Civ.App., 149 S.W.2d 281, is readily distinguishable.

In the latter case, as the Court points out, there was an attempt to withdraw liability undertaken by the insurer in the insuring clause. The resulting ambiguity was properly resolved against the insurer and in favor of the insured. In the case before us, the insuring clause expressly limits the liability of the insurer in the case of hernia to two weekly disability payments of $25 each. As an additional precaution, further disability benefits for hernia are expressly excluded under the "Exclusion" paragraph. Respondent's "loss", as referred to in the insuring clause and as defined thereafter in the policy, is two weeks disability or $50.

For an additional premium appellant engaged itself to pay medical expenses incurred for treatment of an injury arising from an insured risk if occurring within twenty-six weeks after the date of accident, this being the only limitation or condition in the rider agreement. Respondent incurred expenses in the sum of $474.80 for an insured risk within the time stated and is, therefore, entitled to the benefits of said rider, or $474.80.

It is, therefore, the order of this Court that the judgment of the lower court be modified as follows:

> "That the plaintiff do have and recover of and from defendant the sum of $524.80, with interest thereon at the rate of 7% per annum from November 1st, 1951, until paid, together with plaintiff's costs and disbursements incurred in said action."

As modified, the said judgment is affirmed.

[2] Appellant to recover its costs of appeal.

SHEPARD, P. J., and CONLEY, J., concur.

42 Cal.2d 682

BURR et al.
v.
SHERWIN WILLIAMS CO.

L. A. 22868.

Supreme Court of California.
In Bank.
April 16, 1954.

Action against manufacture of insecticide, and others, for crop damage allegedly resulting from use of insecticide. The Superior Court, Kings County, W. G. Machetanz, J., entered judgment against the manufacturer, and the manufacturer appealed. The Supreme Court, Gibson, C. J., held, inter alia, that the court erred in giving instructions which set forth doctrine of res ipsa loquitur without mentioning plaintiffs' burden of negativing the possibility that third persons might have been responsible for what happened, in view of evidence that several persons had control of the insecticide at different times before crop was sprayed therewith.

Judgment reversed.

Prior opinion, 258 P.2d 58.

1. Negligence 🔑121(2)

Fact that an accident occurs after defendant relinquishes control of instrumentality which causes accident does not preclude application of doctrine of res ipsa loquitur provided there is evidence that the instrumentality had not been improperly handled or its condition otherwise changed after control was relinquished by defendant.

2. Negligence 🔑138(2)

In action against manufacturer of insecticide for crop damage, evidence, which warranted conclusion that damage to crop was probably due to some negligent conduct on part of manufacturer in allowing its product to become contaminated or in failing to discover contamination before it relinquished control of the product, justified the giving of instructions on doctrine of res ipsa loquitur.

3. Negligence 🔑121(2)

Res ipsa loquitur raises an inference, not a presumption, but may give rise to special kind of inference which defendant must rebut, although effect of such inference is somewhat akin to that of a presumption. Code Civ.Proc. §§ 1958, 1959.

4. Negligence 🔑136(6)

In res ipsa loquitur case, whether a particular inference shall be drawn is generally a question of fact for jury, even in absence of evidence to contrary. Code Civ. Proc. §§ 1958, 1959.

5. Negligence 🔑121(2), 138(2)

In all res ipsa loquitur situations, defendant must present evidence sufficient to meet or balance the inference of negligence, and jurors should be instructed that, if defendant fails to do so, they should find for plaintiff.

6. Negligence 🔑138(2)

In giving instructions which define res ipsa loquitur, the court, where there is evidence that several persons had control of the instrumentality which caused the damage at different times before the accident, must ordinarily inform jury that plaintiffs must show that the instrumentality was not mishandled or its condition otherwise changed after control was relinquished by the person against whom the doctrine is to be applied.

7. Negligence 🔑138(2)

In action against manufacturer of insecticide, and others, for damage to crop caused by use of insecticide thereon, court erred in giving instructions which set forth the doctrine of res ipsa loquitur without mentioning plaintiffs' burden of negativing the possibility that third persons might have been responsible for what happened, in view of evidence that several persons had control of the insecticide at different times before the crop was sprayed therewith.

8. Sales 🔑267

The statutory implied warranties of quality can be disclaimed by seller, provided buyer has knowledge or is chargeable with notice of disclaimer before bargain is complete. Civ.Code, §§ 1735(1, 2), 1791.

9. Sales 🔑267

Notice of seller's disclaimer of statutory implied warranties of quality can be conveyed to the buyer by means of printed notices on letterheads, labels and the like. Civ.Code, §§ 1735(1, 2), 1791.

10. Principal and Agent 🔑177(3)

Where buyers of insecticide did not themselves see the drums of insecticide prior to time their crop was sprayed therewith, buyers were nevertheless chargeable with notice of contents of labels, including the disclaimer of statutory implied warranties contained therein, in view of fact that those to whom the insecticide was delivered were agents of buyers for purposes of spraying operation. Civ.Code, §§ 1735 (1, 2), 1791.

11. Sales 🔑262½

In determining whether an effective disclaimer of statutory warranties has been made by printed notice in label, court must look to label as a whole, and, generally, disclaimer is to be strictly construed against the seller. Civ.Code, §§ 1735(1, 2), 1791.

12. Sales 🔑267, 446(5)

Concluding statement in insecticide label, that "seller makes no warranty of any kind, express or implied, concerning the use of this product", and that "buyer assumes all risk in use or handling, whether in accordance with directions or not", was sufficient to exclude the statutory implied warranty that goods shall be reasonably fit for the buyer's particular purpose, and the giving of an instruction in the terms of the statutory implied warranty, in action for crop damage resulting from use of insecticide, was error. Civ.Code, § 1735(1).

13. Sales 🔑279

In statute giving rise to implied warranty of "merchantable quality", quoted words refer to goods which are reasonably suitable for the ordinary uses and purposes of goods of the general type described by terms of sale and which are capable of passing in the market under the name or description by which they were sold. Civ. Code, § 1735(2).

See publication Words and Phrases, for other judicial constructions and definitions of "Merchantable Quality".

14. Sales 🔑284(1)

The statutory implied warranty of merchantable quality is sufficiently broad to impose liability, in absence of disclaimer, if the goods contain an impurity of such a nature as to render them unusable, and therefore unsalable, for general uses and purposes of goods of the kind described. Civ.Code, § 1735(2).

15. Sales 🔑267, 446(5)

Seller's disclaimer, contained in insecticide label, that "seller makes no warranty of any kind, express or implied, concerning the use of this product", and that "buyer assumes all risk in use or handling, whether in accordance with directions or not", was insufficient to exclude statutory implied warranty of merchantable quality, and hence the giving of an instruction upon such implied warranty, in action for crop damage allegedly resulting from use of insecticide, was not error. Civ.Code, §§ 1735(2), 1791.

16. Sales 🔑255

Generally, privity of contract is required in an action for breach of either express or implied warranty, and there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale. Civ.Code § 1735 (1, 2).

17. Sales 🔑255

An implied warranty of fitness for human consumption runs from manufacturer to ultimate consumer regardless of privity of contract. Civ.Code, § 1735(1, 2).

18. Sales 🔑255

Where purchaser of a product relies on representations made by manufacturer in labels or advertising material, recovery from manufacturer may be allowed on theory of express warranty without a showing of privity.

19. Sales 🔑255, 446(1)

In action against manufacturer of insecticide for damage to crop allegedly resulting from use of insecticide, privity of contract between plaintiffs and the manufacturer was required before it could be found that manufacturer was bound by statutory implied warranties, and instruction to effect that privity was not essential, was error. Civ.Code, § 1735(1, 2).

20. Sales ⚿441(2)

In action against manufacturer of insecticide for damage to crop allegedly resulting from use of insecticide, evidence was sufficient to show that there were representations which could form the basis of an express warranty. Civ.Code, § 1732.

21. Sales ⚿260

Principal elements of an "express warranty" are an affirmation of fact or promise by the seller and reliance thereon by the buyer. Civ.Code, § 1732.

See publication Words and Phrases, for other judicial constructions and definitions of "Express Warranty"

22. Sales ⚿260

Seller's disclaimer, contained in insecticide label, that "seller makes no warranty of any kind, express or implied, concerning the use of this product", and that "buyer assumes all risk in use of handling, whether in accordance with directions or not", related only to use, and did not exclude an express warranty of chemical content of the insecticide. Civ.Code, § 1732.

◆

Ray W. Hays, James N. Hays, Fresno, for appellant.

W. R. Bailey, Visalia, Wingrove & Brown, Meredith Wingrove and Lee G. Brown, Hanford, for respondents.

GIBSON, Chief Justice.

In July 1949 plaintiffs, Robert Burr and his wife, owned approximately 135 acres which were planted in cotton. At Burr's request, defendant Patton, a field man for defendant Central Valley Cooperative, hereinafter referred to as the cooperative, inspected the crop, found insects known as cotton daubers and advised plaintiffs to use a spray containing DDT, which is an insecticide. Burr agreed to have the cotton sprayed in accordance with Patton's recommendations and authorized him to make the necessary arrangements for obtaining the spray and hiring an aviation company to apply it. Patton, with the approval of Burr, engaged defendant Rankin Aviation Industries to do the spraying. The cooperative delivered to Rankin at the airport five new sealed, 30-gallon, nonreturnable steel drums of "DDTOL, 25 per cent Emulsifiable," which had been manufactured by defendant Sherwin Williams Company and delivered to the cooperative on consignment. An employee of the Rankin company opened the drums at the airport, mixed the insecticide with water and placed it in the airplane which was used to spray plaintiffs' cotton. Crop damage was noticed shortly thereafter, the plants grew abnormally, and production was adversely affected.

Three experts who examined the field testified that the cotton was damaged by a plant hormone known as 2,4–D which is used as a weed killer and has an adverse effect on cotton, even in extremely small quantities. An inspector for the Department of Agriculture of the State of California took samples from the five open drums used in the spraying operation and from two unopened drums of the same product at the warehouse of the cooperative. The samples were sent to Sacramento for testing, and officials for the department reported that several tests showed "some evidence" of the presence of a small amount of 2,4–D or 2, 4,5–T, a similar substance, in the five open drums and in the two unopened ones. The entomologist of the Bureau of Chemistry of the department stated that the weed killer was present in an amount toxic to bean sprouts, and another expert testified that cotton is more sensitive to this substance than bean sprouts.

Sherwin Williams, the cooperative, the Rankin company and various individuals employed by these companies were joined in a single action charging negligence in the manufacturing, selling and using of the Sherwin Williams' solution. The complaint also alleged breach of warranty by Sherwin Williams and the cooperative. The jury found against Sherwin Williams and in favor of the other defendants. Sherwin Williams alone appeals from the judgment and contends that no instructions should have been given on res ipsa loquitur and that those given on that doctrine and on implied warranties were erroneous.

I. Res Ipsa Loquitur Instructions

[1, 2] The evidence is clearly sufficient to satisfy the requirement of the doctrine of res ipsa loquitur that the accident must be of such a nature that it probably was the result of negligence by someone, since it may be assumed that an insecticide such as the product involved here, which is designed for use on plants, will not ordinarily damage cotton crops if it is properly manufactured and applied. The evidence also meets the requirement that it must appear that the defendant is probably the one who is responsible. The fact that an accident occurs after the defendant relinquishes control of the instrumentality which causes the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled or its condition otherwise changed after control was relinquished by the defendant. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 444, 247 P.2d 344. In the present case the co-defendants are the only persons likely to have been responsible for any alteration of the insecticide after the sealed drums were delivered by Sherwin Williams to the cooperative, and these defendants gave explanations of their activities which would indicate that they had not mishandled or improperly changed the condition of the spray which damaged plaintiffs' crop. Moreover, as we have seen, there is evidence that unopened drums of the insecticide in the warehouse of the cooperative also contained sufficient 2,4–D to injure cotton plants. Under all the circumstances the evidence warrants the conclusion that the damage to the crop was probably due to some negligent conduct on the part of Sherwin Williams in allowing its product to become contaminated or in failing to discover the contamination before it relinquished control of the product. The trial court, therefore, was justified in giving instructions on the doctrine.

[3, 4] The procedural effect of res ipsa loquitur is presented by the contention that the court erred in telling the jurors that the inference of negligence based upon the doctrine is mandatory rather than permissive. They were instructed that from the occurrence of the damage involved in this case, as established by the evidence, "there arises an inference" of negligence by the defendants and that it is "incumbent upon the defendants to rebut the inference." It is settled, of course, that res ipsa loquitur raises an inference, not a presumption, and the general rule is that whether a particular inference shall be drawn is a question of fact for the jury, even in the absence of evidence to the contrary. See Code Civ. Proc., § 1958[1]; Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868; Hamilton v. Pacific Elec. R. Co., 12 Cal.2d 598, 602–603, 86 P.2d 829. This, however, does not preclude the conclusion that res ipsa loquitur may give rise to a special kind of inference which the defendant must rebut, although the effect of the inference is somewhat akin to that of a presumption. Hardin v. San Jose City Lines, 41 Cal.2d 432, 260 P.2d 63, and cases there cited; see Code Civ.Proc., § 1959.[2]

The Hardin case held that an instruction similar to the one involved here was properly given in an action against a common carrier for injuries received by a passenger and that the carrier was obliged to meet the res ipsa loquitur inference by evidence sufficient to offset or balance it. 41 Cal.2d at page 432, 260 P.2d 63. A similar burden has been placed upon defendants in other cases where there were special relationships between the parties. Dierman v. Providence Hospital, 31 Cal.2d 290, 295–296, 188 P.2d 12 [medical patient]; Ales v. Ryan, 8 Cal.2d 82, 106, 64 P.2d 409 [medical patient]; see Ybarra v. Spangard, 25 Cal.2d 486, 490, 492, 494, 154 P.2d 687, 162 A.L.R. 1258

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[1] Section 1958 of the Code of Civil Procedure provides, "An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect."

[2] Section 1959 of the Code of Civil Procedure provides, "A presumption is a deduction which the law expressly directs to be made from particular facts."

[medical patient]; cf. George v. Bekins Van & Storage Co., 33 Cal.2d 834, 839–841, 205 P.2d 1037 [bailment]. It has also been held that the defendant must show that he was not at fault where the plaintiff was injured as a result of a dangerous activity in which the defendant was engaged and as to which the defendant was required to exercise great care. See Chutuk v. Southern California Gas Co., 218 Cal. 395, 398–400, 23 P.2d 285 [furnishing gas]; Damgaard v. Oakland High School Dist., 212 Cal. 316, 318–324, 298 P. 983 [dangerous chemical experiment]; Bergen v. Tulare County Power Co., 173 Cal. 709, 719–721, 161 P. 269 [furnishing electricity]; Diller v. Northern Cal. Power Co., 162 Cal. 531, 536–537, 123 P. 359 [furnishing electricity]; Ficken v. Jones [1865], 28 Cal. 618, 625–628 [driving cattle through city]; Junge v. Midland Counties, etc., Corp., 38 Cal.App.2d 154, 157, 159, 100 P.2d 1073 [furnishing electricity]; Harmon v. San Joaquin Light & Power Corp., 37 Cal.App.2d 169, 175, 98 P.2d 1064 [furnishing electricity].

In some types of situations, because of the nature of the particular accident, an inference of negligence upon the part of the defendant may be so strong that no reasonable man could fail to accept it in the absence of explanatory evidence. See Alabama & V. R. Co. v. Groome, 97 Miss. 201, 52 So. 703, 704; Angerman Co. v. Edgemon, 76 Utah 394, 290 P. 169, 171, 79 A.L.R. 40; Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365, 366; Prosser on Torts [1941], 304. Facts of this character appear to have been presented in Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409, where there was evidence that the defendant surgeon closed an incision without having removed a sponge. (See also cases collected in Prosser, Res Ipsa Loquitur in California [1949], 37 Cal.L.Rev. 183, 220–221.) Another basis for imposing the burden of explanation on the defendant in res ipsa loquitur cases has been that the facts are peculiarly within his knowledge. Dierman v. Providence Hospital, 31 Cal.2d 290, 295–296, 188 P.2d 12 [failure to produce in evidence a tank of anesthetizing gas where possible cause of injury to plaintiff was that the gas was contaminated]; Druzanich v. Criley, 19 Cal.2d 439, 444–445, 122 P.2d 53 [failure of driver to explain what happened in automobile accident which occurred when automobile left road while plaintiff passenger was dozing].

In a number of cases, which are difficult to classify, the courts, without discussion of the problem involved here, have either sustained instructions similar to the one given in the present case or have stated as a part of the rule that it is incumbent upon the defendant to show that he was not negligent. See Hinds v. Wheadon, 19 Cal.2d 458, 461, 121 P.2d 724 [explosion of tank]; Hinds v. Wheadon, 67 Cal.App.2d 456, 460–464, 154 P.2d 720 [same case, subsequent opinion]; Kenney v. Antonetti, 211 Cal. 336, 339–340, 295 P. 341 [straying horse]; Michener v. Hutton, 203 Cal. 604, 606, 609–611, 265 P. 238, 59 A.L.R. 480 [falling object]; Sherrillo v. Stone & Webster Eng. Corp., 110 Cal.App.2d 785, 790–791, 244 P.2d 70 [defective scaffold]; Meyers v. G. W. Thomas Drayage etc. Co., 108 Cal.App.2d 529, 532–533, 239 P.2d 118 [falling object]; Welch v. Sears, Roebuck & Co., 96 Cal.App.2d 553, 558–561, 215 P.2d 796 [falling object]; Radisich v. Franco-Italian Packing Co., 68 Cal.App.2d 825, 840–841, 158 P.2d 435 [defective winch].

A few decisions have criticized instructions to the effect that res ipsa loquitur imposes a mandatory burden upon the defendant to rebut the inference of negligence and have apparently proceeded on the theory that the doctrine creates an inference which is enough to avoid a nonsuit but which the trier of fact may accept or reject as it sees fit, even though the defendant offers no evidence. Pruett v. Burr, 118 Cal.App.2d 188, 195–196, 257 P.2d 690 [action arising from the same spraying operation involved in the present case but as a result of damage to cotton belonging to plaintiffs' neighbor]; Black v. Partridge, 115 Cal.App.2d 639, 648–650, 252 P.2d 760; Bazzoli v. Nance's Sanitarium, Inc., 109 Cal.App.2d 232, 239–241, 240 P.2d 672; Albert v. McKay & Co., 53 Cal.App. 325, 329–330, 200 P. 83; cf. Anderson v. I. M. Jameson Corp., 7 Cal.2d 60, 66–67, 59 P.2d 962. This view, which is inconsistent with most of the California decisions, is very difficult to apply, and there are substantial reasons why we should hold that in every type of res ipsa loquitur case the defendant should have the burden of meeting the inference of negligence.

It must now be regarded as settled that the requirement that the defendant rebut the inference of negligence is the rule with regard to the specific groups of cases noted above, which represent the great majority of the decisions in California relating to the question. Moreover, as a practical matter it will be much simpler, for both trial and appellate courts, to apply this rule uniformly to all situations where an inference of negligence is based upon res ipsa loquitur. Another result will be the elimination of much difficulty in the drawing of instructions which will adequately inform the jury of its duties. In the absence of such a uniform rule, the nature and extent of the burden of proof imposed upon the defendant might frequently depend upon how conflicting testimony is resolved, particularly in cases where there is a dispute as to which of the parties had a superior knowledge. The doctrine, of course, does not apply at all unless it appears that there is a probability of negligence, and writers who support the view that the defendant should be required to rebut the inference of negligence point out that in res ipsa loquitur cases the defendant is almost always in a better position to explain what occurred. (See Harper on Torts [1933], 185; Cal. Jury Instructions, Civil, 1952 Pocket Part, 92; Carpenter, The Doctrine of Res Ipsa Loquitur in California, 10 So.Cal.L.Rev. 166, 181; Carpenter, A Rejoinder to Professor Prosser, 10 So.Cal.L.Rev. 467, 470.) Accordingly, it is not unfair to require him to explain his conduct.

[5] It is our conclusion that in all res ipsa loquitur situations the defendant must present evidence sufficient to meet or balance the inference of negligence, and that the jurors should be instructed that, if the defendant fails to do so, they should find for the plaintiff. The trial court, therefore, did not err in giving instuctions that it was incumbent upon Sherwin Williams to rebut the inference of negligence.

[6, 7] The instructions given, however, were erroneous in that, while they purported to state all the conditions under which res ipsa loquitur would be applicable, they did not inform the jury that plaintiffs must show that the instrumentality which caused the damage was not mishandled or its condition otherwise changed after control was relinquished by the person against whom the doctrine is to be applied. In giving instructions which define res ipsa loquitur it is ordinarily necessary to cover this problem where, as here, there is evidence that several persons had control of the instrumentality at different times before the accident. Black v. Partridge, 115 Cal.App.2d 639, 650, 252 P.2d 760; Zentz v. Coca Cola Bottling Co., 92 Cal.App.2d 130, 133, 206 P.2d 653; see Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 519–520, 203 P.2d 522. Under the circumstances of the present case it was error to give the instructions which set forth the doctrine without mentioning plaintiffs' burden regarding the possibility that third persons may have been responsible for what happened.

II. Warranty Instructions

The trial court instructed the jury in the language of subdivisions (1) and (2) of section 1735 of the Civil Code[3] relating to the implied warranties of fitness of purpose and merchantable quality. The jurors were also told that, if there was an implied warranty under this section, there was no requirement of privity of contract between the manufacturer and the ultimate consumer, and the manufacturer would be liable, regardless of negligence, for the damage caused by any breach of this warranty.[4] Sherwin Williams contends that the instructions are erroneous because, it asserts, (1) it is not liable for breach of warranty in view of the fact that it had made a disclaimer of warranty in labels which were placed on the drums of insecticide, and (2) privity of contract is essential to liability for breach of warranty.

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[3] Section 1735 of the Civil Code reads in part as follows: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

"(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality. * * *"

The labels which contained the disclaimer stated, "DDTOL 25% Emulsifiable is a solution of DDT in xylene which can be used on plants when it is mixed according to directions * * *." After giving mixing directions and recommendations for use on various products, such as potatoes, seed alfalfa and clover, onions, and other truck crops, but without mentioning cotton plants, the labels set forth the following chemical analysis:

"Active Ingredients:

Dichloro diphenyl trichloroethane (DDT setting point 89° C. Minimum)	25.0%
Xylene	65.0%
Inert Ingredients:	10.0%
Total	100.0%"

Certain cautionary instructions were given, and the label concluded with the statement, "Seller makes no warranty of any kind, express or implied, concerning the use of this product. Buyer assumes all risk in use or handling, whether in accordance with directions or not."

[8-10] The statutory implied warranties of quality can, of course, be disclaimed by the seller, provided the buyer has knowledge or is chargeable with notice of the disclaimer before the bargain is complete. Civ.Code, § 1791; Miller v. Germain Seed etc. Co., 193 Cal. 62, 222 P. 817, 32 A.L.R. 1215; Sutter v. Associated Seed Growers, Inc., 31 Cal.App.2d 543-547, 88 P.2d 144; Couts v. Sperry Flour Co., 85 Cal.App. 156, 259 P. 108; see Prosser, Warranty of Merchantable Quality, 27 Minn.L.Rev. 117, 157-160. Notice of disclaimer can be conveyed to the buyer by means of printed notices on letterheads, labels and the like. C. Lomori and Son v. Globe Laboratories, 35 Cal.App.2d 248, 256, 95 P.2d 173; William A. Davis Co. v. Bertrand Seed Co., 94 Cal.App. 281, 271 P. 123; see I Williston on Sales [Rev.Ed.1948] 631. Although plaintiffs themselves did not see the drums prior to the time their cotton crop was sprayed, they are chargeable with notice of the contents of the labels because the persons to whom the insecticide was delivered were obviously their agents for purposes of the spraying operation.

[11, 12] In determining whether an effective disclaimer of the statutory warranties has been made, we must look to the label as a whole, and the general rule is that a disclaimer is to be strictly construed against the seller. See Prosser, Warranty of Merchantable Quality, 27 Minn.L.Rev. 117, 160; 77 C.J.S., Sales, § 312, p. 1151. The language of the Sherwin Williams disclaimer, when so construed, is sufficient to exclude the implied warranty contained in subdivision (1) of section 1735 of the Civil Code that the goods shall be reasonably fit for the purchaser's particular purpose. Plaintiffs' particular purpose was to use the spray as an insecticide on cotton plants, but the disclaimer expressly negatives any warranty concerning "use," and nowhere does the label state that the product was suitable for cotton plants. Although there is evidence that the cooperative acted as consignee-agent of Sherwin Williams for the

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[4] The instruction read: "If you decide that any of the provisions of the code section which I have just read to you are applicable, and further decide that an implied warranty was made by the manufacturer, that warranty runs with the goods to the ultimate consumer, there being no requirement of privity of contract between the ultimate consumer and the manufacturer. And if you further find that the manufacturer breached such warranty, then it is liable for the damage caused by such breach, regardless of negligence."

purpose of selling the spray and might therefore have authority to make representations which would counteract the disclaimer, there is no contention that any such representations were made. It follows that instructing the jury in the terms of this subdivision of section 1735 was error.

[13, 14] The next question is whether the label excludes the implied warranty of "merchantable quality" which arises under subdivision (2) of section 1735 of the Civil Code where goods are bought by description. Many definitions of "merchantable quality" have been given, but all of them include the basic proposition that the quoted words refer to goods which are reasonably suitable for the ordinary uses and purposes of goods of the general type described by the terms of the sale and which are capable of passing in the market under the name or description by which they were sold. See Kenney v. Grogan, 17 Cal.App. 527, 533, 120 P. 433; 1 Williston on Sales [Rev.Ed. 1948], § 243, pp. 641–643; Prosser, Warranty of Merchantable Quality, 27 Minn.L. Rev. 117, 125–139; 46 Am.Jur. 526–527; 77 C.J.S., Sales, § 327, pp. 1184–1185. Hence it seems clear that the statutory warranty is sufficiently broad to impose liability, in the absence of disclaimer, if the goods contain an impurity of such a nature as to render them unusable, and therefore unsalable, for the general uses and purposes of goods of the kind described. The parties do not discuss, but apparently assume, that the presence of 2,4–D weed killer in the DDT spray ordered by plaintiffs would, without the asserted disclaimer, amount to a breach of the implied warranty of merchantable quality.

[15] Keeping in mind the rule noted above that a disclaimer is to be strictly construed against the seller, we conclude that the Sherwin Williams disclaimer is insufficient to exclude the implied warranty of merchantable quality. The label, after describing the product and listing the ingredients, states merely that there is no warranty as to "the use of this product" and that the buyer "assumes all risk in use." The description of the product on the label is in accord with the description of the spray which was ordered by plaintiffs, and the language of the disclaimer, when properly interpreted, is limited to a denial of any warranty that a substance which meets this description is an effective or safe insecticide. The language does not purport to disclaim the implied warranty that the substance in the drums actually meets the description of the product ordered by plaintiffs so as to be generally salable in the same manner as other products of the type described. More specifically, there is nothing in the disclaimer which suggests that Sherwin Williams was refusing to warrant that the liquid in the drums was compounded so as to conform with the description and was free from any impurity which would make it unsalable for the general purposes of a product of the kind ordered by plaintiffs. Accordingly, the trial court did not err in giving an instruction upon the implied warranty of merchantable quality.

[16–19] We shall now consider whether the court erred in instructing the jury that an implied warranty under subdivision (1) or (2) of section 1735 of the Civil Code "runs with the goods to the ultimate consumer, there being no requirement of privity of contract between the ultimate consumer and the manufacturer." The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale. See Lewis v. Terry, 111 Cal. 39, 44, 43 P. 398, 31 L.R.A. 220; Cliff v. California Spray Chemical Co., 83 Cal.App. 424, 430, 257 P. 99; 1 Williston on Sales [Rev.Ed.1948], § 244, pp. 645–648; 46 Am.Jur. 489–490; 17 A.L.R. 672, 709; 140 A.L.R. 192, 249–250. In this state an exception to the requirement of privity has been made in cases involving foodstuffs, where it is held that an implied warranty of fitness for human consumption runs from the manufacturer to the ultimate consumer regardless of privity of contract. Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 93 P.2d 799; Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 689, 163 P.2d 470. Another possible exception to the general rule is found in a few cases where the purchaser of a product relied on representations made by the manufacturer in labels or advertising material, and recovery from the manufacturer was allowed on the theory of express warranty without a showing of privity. See Free v. Sluss, 87 Cal.App.2d Supp. 933, 936–937, 197 P.2d 854 [soap package contained printed guarantee of quality]; Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309, 312–313 [automobile manufacturer represented top of car to be made of seamless steel]; Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118, 88 A.L.R. 521 [automobile manufacturer represented windshield to be non-shatterable glass]; Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813, 815–816 [representation on label that insecticide was non-poisonous to humans]; Prosser on Torts [1941], 688–693; 1 Williston on Sales [Rev.Ed.1948], 648–650; Feezer, "Manufacturer's Liability for Injuries Caused by His Product," 37 Mich.L.Rev. 1; Jeanblanc, "Manufacturer's Liability to Persons Other than Their Immediate Vendees," 24 Va.L.Rev. 134, 146–155. Neither exception is applicable here. The facts of the present case do not come within the exception relating to foodstuffs, and the other exception, where representations are made by means of labels or advertisements, is applicable only to express warranties. As we have seen, the instruction involved here dealt only with implied warranties. Accordingly, it was error for the trial court to instruct that privity was not required.

[20–22] The question whether plaintiffs could recover because of breach of an express warranty was apparently not presented to the jury, but, since there may be a new trial, it is appropriate to point out that the record contains sufficient evidence to show that there were representations which could form the basis of an express warranty. The principal elements of an express warranty are an affirmation of fact or promise by the seller and reliance thereon by the buyer. Civ.Code, § 1732.[5] As we have seen, the labels on the drums gave a chemical analysis of the contents which purported to list all of the active ingredients, totalling 90 per cent, and designated the remaining 10 per cent as "inert ingredients." This analysis is in effect a representation that the ingredients listed were the only active ones contained in the spray, and, if the other necessary requirements were established, the label would amount to an express warranty which would be breached by the presence of the unlisted 2, 4-D weed killer. (Cf. 1 Williston on Sales [Rev.Ed.1948], 527–533.) An express warranty of the chemical content of the spray, of course, is not excluded by the disclaimer, which relates only to use. We need not consider at this time whether plaintiffs can show reliance by themselves or their agents upon the statements on the label or whether they can establish that there was privity between themselves and Sherwin Williams or that they come within some exception to the rule.

Conclusion

The trial court erred in its instructions (1) by purporting to define res ipsa loquitur without including an essential condition, (2) by stating that privity was not required in order to find that Sherwin Williams was bound by the statutory implied warranties, and (3) by stating that recovery might be based upon an implied warranty of fitness for a particular purpose. The errors in the instructions relate to essential matters, and it is our conclusion that under all the circumstances there has been a miscarriage of justice.

The judgment is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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[5] Section 1732 of the Civil Code defines express warranty as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. * * *"

42 Cal.2d 698

MELANCON
v.
SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 22883.

Supreme Court of California.
In Bank.
April 16, 1954.

Petition for writs of mandate and prohibition to compel Superior Court to enforce claimed right to take depositions of individual defendants and officers of corporate defendants in connection with stockholder's derivative actions filed by petitioner and to restrain court from proceeding with a hearing on defendants' motion to require petitioner to furnish security for defendants' expenses. The Supreme Court, Schauer, J., held that remedy by appeal from judgment of dismissal which presumably would follow failure to furnish required security afforded adequate and more appropriate remedy than writs of mandate and prohibition and that Superior Court properly refused to proceed further with respect to depositions until petitioner should comply with order for security.

Peremptory writs denied and alternative writs discharged.

Carter, J., dissented.

1. Corporations 🔑214

In stockholder's derivative action, seeking inter alia cancellation of contracts between corporation in which plaintiff held stock and another defendant corporation and an accounting for moneys received thereunder by such other corporation, court did not lack constitutional authority to grant motion of such other corporation to require plaintiff to furnish security for reasonable expenses which such corporation might incur in defending action. Corporations Code, § 834.

2. Prohibition 🔑10(2)

Where there is no other adequate remedy, as by appeal, the constitutionality of a statute or ordinance may be tested by prohibition on ground that invalidity of the legislation goes to the jurisdiction of the court to proceed to try the case. Code Civ. Proc. §§ 1102, 1103.

3. Mandamus 🔑4(3)
Prohibition 🔑3(3)

Where order requiring plaintiff to furnish security for reasonable expenses which defendants might incur in defending stockholder's derivative action had been made before issuance of alternative writs of mandate and prohibition, appeal from judgment of dismissal which presumably would follow failure to furnish ordered security afforded an adequate and more appropriate remedy than petition to Supreme Court for writs of mandate and prohibition. Code Civ.Proc. § 2021; Corporations Code, § 834.

4. Prohibition 🔑5(1)

Ordinarily prohibition issues only to prevent future judicial acts and not to undo acts already performed, except where the act is a continuing one and circumstances are so aggravated as to justify immediate relief or where delay would result in consequential damages.

5. Prohibition 🔑3(5)

Expense of appeal is insufficient to justify issuance of writ of prohibition.

6. Mandamus 🔑172
Prohibition 🔑28

Complaints that superior court erred in ruling on evidence offered by plaintiff at hearing on defendants' motions to require plaintiff to furnish security for expenses which they might incur in defending stockholder's derivative action, excusing a defendant subpoenaed by plaintiff as a witness from testifying at hearing, refusing a further continuance to enable plaintiff to serve subpoenas, and allowing one defendant more security than he requested did not go to court's jurisdiction and could properly be considered only upon appeal and a record of hearing and not on application for writs of mandate and prohibition. Corporations Code, § 834.

7. Constitutional Law 🔑311

Where plaintiff was given full opportunity to subpoena and produce witnesses and to elicit evidence, both oral and by affidavit, at hearing on defendants' motions to require plaintiff to furnish security for expenses which defendants might incur in defending stockholder's derivative action, refusal to order completion of depositions of individual defendants and officers of corporate defendants prior to hearing on motions for security did not deprive plaintiff of "due process of law" or violate his rights in a constitutional or jurisdictional sense. Code Civ.Proc. § 2021; Corporations Code, § 834.

See publication Words and Phrases, for other judicial constructions and definitions of "Due Process of Law".

8. Constitutional Law ⚷305

According party a hearing before judgment with full opportunity to present all the evidence and arguments which he deems important meets requirements of "due process of law".

9. Constitutional Law ⚷311

Opportunity to take depositions of witnesses prior to a trial or hearing is not a requirement of due process of law.

10. Constitutional Law ⚷253

Mere erroneous construction of statutes does not constitute a denial of due process of law.

11. Discovery ⚷49

Under perpetuation of evidence statutes, a stockholder, on proper showing, may take depositions of defendants before filing stockholder's derivative action in order to determine whether there is sufficient probability of benefit to corporation to justify bringing the action. Code Civ. Proc. §§ 2083–2089; Corporations Code, § 834.

12. Corporations ⚷214

Statute requiring plaintiff in stockholder's derivative action to furnish security for defendants' expenses upon showing by defendants that there is no reasonable probability that corporation will benefit from action applies only to actions already commenced. Corporations Code, § 834.

13. Corporations ⚷214

Taking of depositions by plaintiff in preparation for trial of stockholder's derivative action would constitute a step in "prosecution of action" within stay provisions of statute requiring plaintiff to furnish security for defendants' expenses upon showing of absence of any probability that corporation will benefit from action, and hence superior court properly refused to proceed further with respect to such depositions until plaintiff should comply with order requiring security. Code Civ.Proc. § 2021; Corporations Code, § 834.

See publication Words and Phrases, for other judicial constructions and definitions of "Prosecution of Action".

14. Constitutional Law ⚷311

That taking of depositions by plaintiff in preparation for trial of stockholder's derivative action may be stayed pending compliance with order requiring him to furnish security for defendants' expenses does not deprive plaintiff of constitutional right to "equal protection of the law", though defendants may in the meantime take such depositions. Code Civ.Proc. § 2021; Corporations Code, § 834.

See publication Words and Phrases, for other judicial constructions and definitions of "Equal Protection of the Law".

15. Corporations ⚷202

In stockholder's derivative action, any cause of action belongs to corporation and not to plaintiff.

16. Corporations ⚷203

As applied only to actions instituted since its enactment, statute requiring plaintiff in stockholder's derivative action to furnish security for defendants' expenses upon showing of absence of any reasonable probability that corporation will benefit from action, merely prescribes conditions on which a volunteer plaintiff may maintain a suit on corporation's cause of action and is wholly procedural in its effect. Corporations Code, § 834.

* * *

Guy E. Ward, Beverly Hills, and David B. Heyler, Jr., Beverly Hills, for petitioner.

Kenneth N. Chantry and David Mellinkoff, Beverly Hills, amici curiæ on behalf of petitioner.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

O'Melveny & Myers, William W. Alsup, Philip F. Westbrook, Jr., Wright, Wright, Green & Wright, Loyd Wright, Charles A. Loring, Loeb & Loeb, Herman F. Selvin, Allen E. Susman and John L. Cole, Los Angeles, for real parties in interest.

SCHAUER, Justice.

Petitioner seeks mandate to compel the superior court to enforce his claimed right to take the depositions of certain of the individual defendants, and officers of corporate defendants, in connection with a derivative stockholders' suit filed by petitioner, a stockholder in and as plaintiff on behalf of, defendant corporation Walt Disney Productions. The other defendants named are another corporation and seven individuals. Petitioner[1] also asks for a writ of prohibition restraining the lower court from proceeding with a hearing (pending when the petition was filed but concluded before the alternative writs issued) on defendants' motions to require petitioner to furnish security, under the provisions of section 834 of the Corporations Code, for the reasonable expenses, including attorney's fees, which defendants may incur in defending the derivative stockholders' suit. The alternative writs issued, but for reasons hereinafter stated we have concluded that the peremptory writs should be denied and the alternative writs discharged.

Prior to our consideration of the petition for the writs the lower court heard the motions for security, granted them as to all except one defendant, and on September 4, 1953, made and signed written findings and conclusions and an order that plaintiff furnish a total of $65,500 as security within 30 days after service upon plaintiff of written notice of the signing of the order, that plaintiff serve written notice on defendants' counsel of the deposit of the security within 10 days "after plaintiff has complied with this order," and that further prosecution of the action by plaintiff "is hereby stayed, and said defendants need not file any pleadings herein" until 30 days after plaintiff shall have served the notice of his compliance with the order for security, with a further stay until 20 days after plaintiff's sureties have justified in case defendants except to such sureties. Thereafter, on September 10, we ordered issuance of the alternative writs; at that time we had not been informed of the hearing held and order made by the lower court. The writs issued commanding respondent court to show cause why the depositions should not be ordered and prohibiting "any further proceedings with reference to a hearing on said Motions to require security, except as directed hereby, until the further order of this Court thereon." Thereafter, on September 16, petitioner filed a supplemental petition for the two writs, alleging the hearing in the lower court on the security motions and the written order of September 4 granting them, and asking that such order be set aside and petitioner "be permitted to take the depositions of all party defendants," or, alternatively, that that court be restrained from dismissing the action if plaintiff fails to furnish the security ordered.

From the petition (as supplemented) for the writs and the return and answer thereto it appears that since 1947 plaintiff has been a shareholder of Walt Disney Productions,[2] a corporation. He filed his derivative action against that corporation, certain of its alleged officers and directors, and Walt Disney, Incorporated,[3] a corporation. He asked that certain contracts between Disney Productions and defendant Walter E. Disney, and between Disney Productions and Disney, Inc., be declared invalid; that Walter E. Disney and Disney, Inc., account for all moneys received by virtue of such contracts; that Walter E. Disney account for sums paid him by Disney

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[1] Sometimes hereinafter referred to as plaintiff.

[2] Hereinafter sometimes referred to as Disney Productions.

[3] Hereinafter sometimes referred to as Disney, Inc.

Productions as compensation for services rendered since 1940; and that Disney Productions and its officers and directors be enjoined from making further payments under the contracts attacked by plaintiff.

[1] After filing the derivative action, plaintiff gave notices and had served subpoenas duces tecum for the taking of depositions of certain of the defendants and corporate officers; upon their refusals either to be sworn or to answer various questions they were directed to appear for court rulings thereon. Meanwhile all defendants filed motions to require plaintiff to furnish security for expenses, including attorney's fees, under section 834 of the Corporations Code. Also, the court stayed further proceedings on the depositions until after the hearing and order on the motions for security. This petition (as supplemented) for mandamus and prohibition followed. As above noted, we acted on the petition without having been informed that the lower court had theretofore heard and granted the motions for security[4] and had stayed further prosecution of the action until the security was furnished.[5]

In support of the order requiring such security the court found, among other things (in the language of section 834), "That there is no reasonable probability that the prosecution of the cause of action alleged * * * will benefit the corporation or its security holders."

[2] Petitioner in support of his contention that this case is a proper one for the issuance of the jurisdictional writ of prohibition, attacks, on grounds for the most part substantially the same as those recently discussed in Beyerbach v. Juno Oil Co., (1954), 42 Cal.2d 11, 265 P.2d 1, the constitutionality of the security provisions here involved. It is now established in this state that where there is no other adequate remedy, such as by appeal, "The constitutionality of a statute or ordinance may be tested by prohibition on the ground that invalidity of the legislation goes to the jurisdiction of the court to proceed to try the case." (Rescue Army v. Municipal Court (1946), 28 Cal.2d 460, 462–467, 171 P.2d 8; see also Code of Civ. Proc. §§ 1102, 1103; Hunter v. Justice's Court (1950), 36 Cal.2d 315, 323, 223 P.2d 465.) By our opinion in the Beyerbach case petitioner's attacks on the statute have been answered adversely to him in most respects.

His remaining contentions concern the depositions he sought to take. He urges that by refusing to compel completion of the depositions the trial court deprived him of the means of effectively obtaining evidence to oppose the motions for security, particularly with respect to whether there is a "reasonable probability that the prosecution of the cause of action alleged * * * will benefit the corporation or its security holders" (Corp.Code, § 834), and that he was thereby denied equal protection of the law. In this respect, petitioner relies upon section 2021 of the Code of Civil

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4. Except the motion of defendant Disney, Inc., which the court held was "a third party defendant" as to which the court "has no constitutional authority to grant the motion" to require plaintiff to furnish security. For that reason only, the motion of such defendant was denied. In this view the court erred under our holding in Beyerbach v. Juno Oil Co. (42 Cal.2d 11, 265 P.2d 1), filed January 5, 1954, subsequent to the trial court's ruling herein.

5. From supplemental briefs now on file herein, it further appears that plaintiff has not yet posted the security ordered by the court, but instead, on October 2, 1953, moved the court for an extension of time within which to furnish it. That motion "was heard on the 7th day of October, 1953, and because of the alternative writs having been issued," the trial court continued the hearing on the motion until January 18, 1954. Meanwhile, plaintiff has served and filed a notice of appeal from the order requiring the security, and defendant Disney, Inc., whose motion for security was denied in the same order, has done likewise. The supplemental briefs also make mention of an "intervener" whom the trial court, "after the security motions had been made," permitted to appear on the plaintiff's side; defendants then moved to subject the intervener to the security order and hearing on the motion "was postponed by the trial court."

Procedure[6] and upon cases in which mandamus has issued to compel the lower court to enforce the right to take depositions or to perpetuate testimony. (See McClatchy Newspapers v. Superior Court (1945), 26 Cal.2d 386, 159 P.2d 944; Brown v. Superior Court (1949), 34 Cal.2d 559, 212 P.2d 878; Superior Ins. Co. v. Superior Court (1951), 37 Cal.2d 749, 235 P.2d 833.)

[3] In none of the cited cases, however, had the hearing or trial in connection with which the testimony or deposition was sought been held and the order or judgment of the trial court been rendered prior to the issuance of an alternative writ or writs by the appellate court. By contrast, in the matter now before us, as already noted, the hearing on the motions for security had been held, over a period of three days, and the order for the furnishing of the security by plaintiff had been made prior to the consideration by this court of the petition for the writs. Under such circumstances it appears that the remedy by appeal from the judgment of dismissal which presumably will follow if the ordered security is not furnished is not only an adequate, but is clearly a more appropriate remedy than the writs here sought.

[4, 5] In the first place, the rule is that prohibition ordinarily issues only to prevent future judicial acts rather than to undo acts already performed. (See State Bd. of Equalization v. Superior Ct. (1937), 9 Cal.2d 252, 254, 70 P.2d 482; 21 Cal.Jur. 581–582, and cases there cited.) Although exceptions to this rule have been made and the writ has been allowed where the act in question is a continuing one and the circumstances are so aggravated as to justify immediate relief, such as where a receiver has been appointed, an injunction has issued, or property has been seized under a void order (see Evans v. Superior Court (1939), 14 Cal.2d 563, 580–581, 96 P.2d 107, and cases there cited), and "where, because of delay, there would be consequential damages" (Golden State Glass Corp. v. Superior Court (1939), 13 Cal.2d 384, 389, 90 P.2d 75), no such aggravated circumstances or consequential damages would appear to flow from the order requiring the furnishing of security by plaintiff in the derivative stockholders' action, or from the entry of an appealable judgment of dismissal which would follow plaintiff's failure to comply with the security order. As recently reaffirmed in Jollie v. Superior Court (1951), 38 Cal.2d 52, 56, 237 P.2d 641, the expense of an appeal is insufficient to justify issuance of the writ of prohibition.

[6] In the second place, petitioner in his third supplemental petition for the writs, complains of rulings by the court on evidence offered by him as plaintiff at the three-day hearing on the security motions, complains that one of the defendants subpoenaed by plaintiff as a witness was excused from testifying at such hearing because of illness, complains that although one eight-day continuance of such hearing was granted plaintiff in order to permit subpoena by him of certain witnesses he was refused a further continuance although he had been unable to serve the subpoenas, and complains that one defendant was allowed more security than he requested. It seems apparent from a mere statement of these various complaints that they do not go to the court's jurisdiction and may not properly be considered on this application for mandamus and for prohibition but only upon an appeal and a record of the hearing.

[7, 8] Finally, refusal by the court to order completion of the depositions prior to the hearing, even if we assume (we do not so hold) that such refusal was erroneous, would likewise appear not to have violated petitioner's rights in a constitutional or jurisdictional sense. He was given a full opportunity to subpoena and pro-

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[6] Section 2021: "The testimony of a witness in this State may be taken by deposition in any action at any time after the service of the summons or the appearance of the defendant. * * *

"1. When the witness is a party to the action or proceeding or an officer, member, agent, or employee of a corporation. * * *"

duce witnesses, and to elicit evidence, both oral and by affidavit, and he did so, at the hearing on the security motions.[7] As declared in Whitley v. Superior Court (1941), 18 Cal.2d 75, 81, 113 P.2d 449, quoting from 12 American Jurisprudence, Constitutional Law, section 637, page 327, "A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital under the guaranty of due process of law * * *." (See also Wood v. Pendola (1934), 1 Cal.2d 435, 444, 35 P.2d 526; Dohany v. Rogers (1929), 281 U.S. 362, 369, 50 S.Ct. 299, 74 L.Ed. 904.)

[9, 10] Petitioner cites no authority and we are aware of none which declares opportunity to take depositions of witnesses prior to a trial or hearing to be a requirement of due process. Mere erroneous construction of statutes does not constitute a denial of due process. (Neblett v. Carpenter (1938), 305 U.S. 297, 302, 59 S.Ct. 170, 83 L.Ed. 182.)

[11, 12] Moreover, as pointed out by respondent, under our perpetuation of evidence statutes (Code Civ.Proc. §§ 2083–2089; see also MacLeod v. Superior Court (1952), 115 Cal.App.2d 180, 251 P.2d 728) it would seem that plaintiff-petitioner, on proper showing, could have taken the depositions of defendants prior to filing his stockholder's derivative action, and have thereby discovered whether there was sufficient probability of benefit to the corporation to justify bringing the action at all. Section 834, which provides for the security motions, by its terms appears to apply only to actions already commenced.

In addition, it may be noted that under the New Jersey statute upheld by the United States Supreme Court in Cohen v. Beneficial Indus. Loan Corp.[8] (1949), 337 U.S.

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[7] We do not have before us and we do not here consider the effect of the security statute with respect to denial of the right to take the deposition of a nonresident witness whose testimony material to the motion is not otherwise available.

[8] The ultimate question in that case, as stated by the court (at page 543 of 337 U.S., at page 1224 of 69 S.Ct.) "is whether a federal court, having jurisdiction of a stockholders' derivative action only because the parties are of diverse citizenship, must apply a statute of the forum state which makes the plaintiff, if unsuccessful, liable for the reasonable expenses, including attorney's fees, of the defense and entitles the corporation to require security for their payment." The act expressly provided that it should "take effect immediately and shall apply to all such actions [stockholders' derivative suits by stockholders holding less than five per centum in value (or $50,000.00 market value) of the corporation's aggregate shares] * * * now pending * * * and to all future actions * * *."

In relation to constitutionality, the court held that such statute appeared to be substantially prospective in application: "Its terms do not appear to require an interpretation that it creates new liability against the plaintiff for expenses incurred by the defense previous to its enactment. The statute would admit of a construction that plaintiff's liability begins only from the time when the Act was passed or perhaps when the corporation's application for security is granted and that security for expenses and counsel fees which 'may be incurred' does not include those which have been incurred before one or the other of these periods."

As to the ultimate question—whether the statute (which as emphasized by Justices Douglas and Frankfurter is inherently procedural in effect) was so narrowly and exclusively state-court procedural in character as to not be properly enforceable in actions maintained in federal courts because of diversity of citizenship—the court pointed out that (at pages 555–556 of 337 U.S., at pages 1229–1230 of 69 S.Ct.) "Rules which lawyers call procedural do not always exhaust their effect by regulating procedure. But this statute is not merely a regulation of procedure. * * * [I]t creates a new liability where none existed before, for it makes a stockholder who institutes a derivative action liable for the expense to which he puts the corporation and other defendants, if he does not make good his claims * * *. If all the Act did was to create this liability, it would clearly be substantive * * *. We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device."

541, 69 S.Ct. 1221, 93 L.Ed. 1528, the right of the corporation to require plaintiff to "give security for the reasonable expenses, including counsel fees," is absolute (when it arises at all, under the terms of the act) and, unlike the California statute, does not depend upon a showing of non-probability of benefit to the corporation from prosecution of the derivative action. Consequently it is apparent that in the invoked constitutional aspect it is not necessary to the sustaining of the statute now before us that such a showing be made or that plaintiff be accorded the right he claims of taking depositions in order to support his claim of probable benefit.

[13–16] Petitioner further urges that he is entitled to proceed with the depositions he seeks, in the course of preparing for the eventual trial of the derivative action, even though he has not as yet complied with the order for the posting of security. It seems clear, however, that the taking of depositions for such purpose would constitute a step in the "prosecution" of the action and therefore falls within the stay provisions of section 834.[9] (See Ray Wong v. Earle C. Anthony, Inc. (1926), 199 Cal. 15, 18, 247 P. 894, in which it is stated that "The term 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination.") It therefore appears that the court has properly refused to proceed further with respect to the depositions until such time as petitioner may comply with the order respecting security. The fact that defendants may take such depositions in the meantime, if they be so advised, does not deprive petitioner of equal protection of the law. As declared in the Hogan and Beyerbach cases the power of the Legislature in this type of litigation is plenary, and it is no more a denial of equal protection to suspend petitioner's right to take depositions until he deposits the security ordered than it is to require that he furnish such security while not making a reciprocal requirement of defendants. Also, as emphasized in both the Hogan and Beyerbach cases, the cause of action, if any, does not belong to plaintiff. It belongs to the corporation. The statute neither adds one iota to nor substracts one iota from the cause of action. Such statute, therefore, applied as we have applied it, only to actions instituted since its enactment, is wholly procedural in its effect in a state court; it merely prescribes the conditions on which a volunteer plaintiff may maintain a suit on the corporation's cause of action. No personal right of plaintiff's is to be litigated; if he becomes liable for the reasonable expenses of others which he has caused them to incur in successfully defending against his unsuccessful action for the corporation, it is a result of his own volunteer act in subjecting himself and the persons he names as defendants to the procedures of the court.

It may further be noted that if plaintiff does post the security ordered by the court and then proceeds with the securing of evidence by way of depositions he may thereafter, as an incident of the procedural scheme set up by section 834, apply to the trial court for a decrease in the amount of security "upon showing that the security provided * * * is excessive."

The peremptory writs are denied and the alternative writs discharged.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

It is my considered opinion that a full and substantial compliance with the laws of this state requires this court to issue a writ of mandate compelling the superior court to enforce petitioner's right to take certain depositions. The right to take depositions is an essential element in the process of discovery and nowhere in the law is discovery more important than in stockholder derivative actions; since in this type of action the plaintiff shareholder must usually obtain his facts from the records of the corporation or from the corporate officers. To deny the right of discovery in such a case is in effect a denial of the right to maintain a shareholder's derivative action.

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[9] Section 834, subd. (c): "If any such motion [for security] is filed, no pleadings need be filed by the corporation or any other defendant, and the prosecution of such action shall be stayed, until 10 days after such motion shall have been disposed of."

In the case at bar, petitioner filed a shareholder's derivative action against the corporation and certain of its officers and directors. Thereafter the trial court issued subpoenas duces tecum re depositions which were duly served upon Mr. Lessing and Mr. Johnson individually and upon Mr. Johnson as secretary of the defendant corporation. Petitioner was unable to perfect service upon Mr. Walt Disney and Mr. Roy Disney. On July 6, 1953, and pursuant to said subpoena, Mr. Lessing delivered copies of certain corporate records to petitioner and was sworn as a witness. When Mr. Lessing refused to answer forty-seven of the questions, he was ordered to appear in the superior court on July 13, 1953, to show cause why he should not answer the questions propounded by counsel for petitioner.

Meanwhile all of the defendants filed a motion, pursuant to section 834 of the Corporations Code, to require plaintiff to furnish security for expenses and attorney's fees. At the time this motion was filed no depositions, except the incompleted one of Mr. Lessing, had been taken; nevertheless the trial court stayed further proceedings on the depositions until after the hearing and order on the motions for security. In so doing the court committed a grave error based upon a complete misconception of section 834 of the Corporations Code.

Under the provisions of said section 834, the motion for security may be supported on either of two grounds: "(1) That there is no reasonable probability that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its security holders; (2) That the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity." In order to determine if either of these two elements are present and whether the motion for security should be granted, the trial court conducts a hearing, at which time, under the provisions of section 834, the court considers "such evidence, written or oral, by witnesses or affidavit, as may be material: (a) to the ground or grounds upon which the motion is based, or (b) to a determination of the probable reasonable expenses, * * *."

It thus becomes apparent that the hearing on the motion for security is in effect a "little trial" of the case in chief at which the plaintiff must make his showing of merit or risk complete defeat. In order to show that his case has merit, it is usually necessary for the shareholder plaintiff to subpoena certain corporate records and take the depositions of various corporate officers in advance of the hearing. Without these essential elements in the process of discovery the shareholder may have a valid cause of action which will benefit the corporation but he may be unable to produce the necessary evidence at the hearing on the motion for security. No impediment should be placed in the way of a shareholder plaintiff which would prevent the securing of this necessary evidence.

When the trial court stayed further proceedings on the depositions, until after the hearing on the motion for security, petitioner was in effect forced into the hearing without the necessary depositions and evidence. Such a situation could not have been contemplated by the Legislature when it enacted section 834. It is true that section 834 provides that after the motion for security has been filed "no pleadings need be filed by the corporation or any other defendant, and the prosecution of such action shall be stayed, until 10 days after such motion shall have been disposed of." But this does not mean that the shareholder cannot continue to secure evidence which is necessary for the hearing. Nor does it mean that the avenues of discovery should be closed to the shareholder plaintiff. The mere fact that the plaintiff must show the merits of his case at the hearing on the motion for security, requires by necessary implication that he be permitted to continue his quest for the necessary evidence.

Section 2021 of the Code of Civil Procedure provides that "The testimony of a witness in this State may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant * * *." In McClatchy Newspapers v. Superior Court, 26 Cal. 2d 386, 393, 159 P.2d 944, 948, this court stated that: "Ordinarily the trial court has no discretion to refuse to exercise its powers so far as necessary to secure to a litigant the right to a deposition in the cases defined by the code. [Citations.] The language of section 2021 of the Code of Civil Procedure providing that 'The testimony of a witness * * * may be taken by deposition' confers upon litigants the *right* to take depositions. See [my dissent in] Hays v. Superior Court, 16 Cal.2d 260, 264, 105 P.2d 975." It is well recognized that "Statutes authorizing the taking of depositions should be liberally construed with a view to effecting their objects and promoting justice, and to the end that a litigant in a pending action may be afforded a reasonable opportunity to procure available testimony in support of his cause." 26 C.J.S., Depositions, § 4, p. 810; citing Pollak v. Superior Court, 197 Cal. 389, 240 P. 1006; Moran v. Superior Court, 38 Cal. App.2d 328, 100 P.2d 1096; and Zellerbach v. Superior Court, 3 Cal.App.2d 49, 39 P.2d 252.

In support of his position petitioner relies upon section 2021 of the Code of Civil Procedure and upon cases in which mandamus has issued to compel the lower court to enforce the right to take depositions or to perpetuate testimony. McClatchy Newspapers v. Superior Court, supra, 26 Cal.2d 386, 159 P.2d 944; Brown v. Superior Court, 34 Cal.2d 559, 212 P.2d 878; Superior Ins. Co. v. Superior Court, 37 Cal.2d 749, 235 P.2d 833. In an attempt to distinguish these cases, the majority has stated in effect that in the instant case the hearing on the motions for security has already been held and there is thus no adequate reason why petitioner should be permitted to proceed with the taking of depositions. The majority argues that under such circumstances "it appears that the remedy by appeal from the judgment of dismissal which presumably will follow if the ordered security is not furnished is not only an adequate, but is clearly a more appropriate remedy than the writs here sought." Such reasoning loses sight of the fact that "Mandamus is the appropriate remedy to secure the enforcement of a litigant's statutory right to take depositions, and an appeal from a final judgment is neither speedy nor adequate where a trial court improperly refuses to order that a deposition be taken." McClatchy Newspapers v. Superior Court, supra, 26 Cal.2d 386, 392, 159 P.2d 944, 948. In Brown v. Superior Court, supra, 34 Cal.2d 559, 562, 212 P.2d 878, 880, this court stated, after citing several cases, that "Three situations are presented by the above cases: (1) where a party seeks to perpetuate testimony under section 2083 et seq. of the Code of Civil Procedure prior to the bringing of an action; (2) where the deposition is sought under section 2021 after commencement of the action and pending trial; and (3) where the deposition is sought under section 2021 pending appeal and retrial upon a possible reversal of the judgment. We see no good reason for differentiating between these three situations insofar as appealability is concerned, or for departing from the cases which hold that the order is not appealable. Although such orders are, of course, reviewable by appeal from the final judgment, a party should not be required to proceed to trial without the benefits afforded by a deposition to which he is entitled, and it is well settled that under such circumstances the burden, expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy."

In the instant case plaintiff desired to take certain depositions before the hearing on the motion for security was had, but the trial court stayed further proceedings on the depositions until after the hearing and order on the motions for security. Such arbitrary action on the part of the trial court forced petitioner to appear at the hearing without the benefit of the depositions. In its attempt to justify the trial court's refusal to enforce petitioner's right to take depositions prior to the hearing on security, the majority takes the position that petitioner's rights were not violated since "He was given a full opportunity to subpoena and produce witnesses, and to elicit evidence, both oral and by affidavit, and he did so, at the hearing on the security motions." Such fallacious reasoning is similar to saying that where a person is given a trial and allowed to produce witnesses it is permissible to deny him the right to take depositions. It must be remembered that "The statutory right to take depositions may not be withheld or curtailed in the discretion of the court. The cases have consistently so held. 'Insofar as the propriety of the use of the writ for this purpose is concerned, it is well settled that there is a clear duty on the trial court to enforce the statutory right to a deposition and compel a witness to testify.' Brown v. Superior Court, 34 Cal.2d 559, 212 P.2d 878, 879." Carnation Co. v. Superior Court, 96 Cal.App.2d 138, 141, 214 P.2d 552, 553.

The case at bar presents the unique situation wherein the shareholder plaintiff was denied the right to take depositions once the defendants had filed their motions for security. He was thus denied certain essential rights of discovery which have become a part of our law. Thereafter petitioner was forced into the hearing on the motion for security without the benefit of the desired depositions and the trial court required more than $65,000 in security because it found among other things "That there is no reasonable probability that the prosecution of the cause of action alleged * * * will benefit the corporation or its security holders." In granting the motions for security the trial court did, however, refuse to require security for the "third party defendant" on the ground that it had no constitutional authority to grant such a motion. With this I am in full accord. For the reasons outlined in my dissent in Beyerbach v. Juno Oil Co., 42 Cal.2d 11, 265 P.2d 1, it is my considered opinion that section 834 of the Corporations Code is unconstitutional and a denial of equal protection of the law insofar as it requires a plaintiff shareholder to post security for third party defendants who are neither directors, officers, nor employees of the defendant corporation.

As part of its order requiring security the court stayed further prosecution of the action by plaintiff. The majority attempts to interpret this stay of prosecution as being sufficient to deny petitioner the right to proceed with the taking of depositions. In support of this position they rely on the case of Ray Wong v. Earle C. Anthony, Inc., 199 Cal. 15, 18, 247 P. 894, 895, in which it is stated that "The term 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination." The Wong case involved an action for malicious prosecution wherein it was essential to the cause of action that the prosecution had begun. In such a case a comprehensive definition of this nature may have been proper. However, it is clear that the Legislature did not intend the word prosecution as used in section 834 of the Corporations Code to have such an extensive connotation. It is true that section 834(c) provides that "If any such motion is filed, no pleadings need be filed by the corporation or any other defendant, and the prosecution of such action shall be stayed, until 10 days after such motion shall have been disposed of"; however, there is no indication anywhere in the section that the plaintiff shareholder is to stop all activity. The mere fact that a hearing on the motion for security is required illustrates the need for plaintiff's continued activity. Such activity must necessarily involve the gathering of evidence, the preparation of affidavits, the subpoenaing of witnesses, and the pursuit of various avenues of discovery, including the taking of depositions. Section 834 requires that all prosecution be stayed, but there is nothing to indicate that the word prosecution, as used, was meant to include every step in an action, since by its very terms, section 834 requires a hearing following the motion for security at which time the court "shall consider such evidence, written or oral, by witnesses or affidavit, as may be material: * * *." Therefore if further proceedings are required after the motion for security has been filed the term prosecution could not have been used in such a way as to include "every step in an action from its commencement to its final determination."

In view of the fact that section 834 requires the shareholder plaintiff to produce evidence, at the hearing, which will substantiate his claim, it is not reasonable to say that the same section also prohibits him from proceeding to take the depositions through which such required evidence can be obtained. Such an interpretation would have the same effect as saying that a plaintiff cannot take his depositions until after the trial of his case. In shareholder derivative actions, the hearing on the motion for security is actually a "little trial" of the case and in many cases it is the deciding factor. If a shareholder is unable to secure the necessary depositions he may be unable to secure the evidence needed to oppose the motion for security. If the necessary evidence is not available at the security hearing plaintiff may be required to post security for the expenses and attorney's fees of all the defendants. Such expenses are frequently quite extensive, especially where a great many directors and officers are involved as defendants. The higher the security requirement the more insurmountable the barrier to continuing the derivative action. In the instant case the trial court required petitioner to post more than $65,000 in security before proceeding. How many small shareholders are in a position to raise $65,000? How many could raise even one half that amount? It thus becomes apparent that the outcome of the hearing on the motion for security may be the deciding factor of the entire derivative action.

Recognizing the crucial nature of the security requirement, what brand of justice would prohibit the taking of depositions preceding a hearing on the motion for security? On the contrary, the courts of this state have consistently upheld the right to take depositions and have frequently stated that it would not be proper to compel a party to proceed to trial without the depositions for which he had made proper request. In the case of McClatchy Newspapers v. Superior Court, supra, 26 Cal.2d 386, 393, 159 P.2d 944, 948, this court discussed Hays v. Superior Court, 16 Cal.2d 260, 105 P.2d 975, and Patrick Farms, Inc., v. Superior Court, 13 Cal.App.2d 424, 56 P.2d 1283, and then stated that although in those cases "the deferment of the time of taking the deposition was deemed justified by reason of special circumstances, there is no suggestion in those cases that it would be proper to compel a party to proceed to trial without a deposition for which a proper request had been made." By the same reasoning it is not proper to compel a party to proceed to a hearing, which may be the turning point of the case, without depositions for which a proper request had been made.

It is true that petitioner may have the amount of the security reduced upon a proper showing that such amount is excessive; however such a showing requires additional evidence which may not be available to petitioner unless he is permitted to take certain depositions. In the instant case the trial court stayed further proceedings on the depositions both before and after the order for security had been rendered. This placed the shareholder petitioner in the unique position of not only being prevented from taking depositions in order to oppose the motion for security but of also being prohibited from taking depositions which could uncover the evidence needed to reduce the security requirement. Thus petitioner could not secure the depositions needed to oppose the motion for security nor could he secure the depositions needed to show why such security should be reduced.

If this court sustains such action on the part of the trial court, it will merely be *tying another knot in the cord which is gradually snuffing out the rights of corporate shareholders to maintain derivative actions.* For these reasons I would grant the writ of mandate to compel the superior court to enforce petitioner's right to take the requested depositions.

42 Cal.2d 716

WILLIAMS et al.
v.
CITY OF LONG BEACH.
L.A. 22888.

Supreme Court of California.
In Bank.
April 16, 1954.

Action against city by property owners who alleged that defendant had negligently allowed gas to escape from its mains, thereby causing plaintiffs' property to sustain severe fire damage. The Superior Court, Los Angeles County, Paul Nourse, J., entered judgment for defendant, and plaintiffs appealed. The Supreme Court, Gibson, C. J., held that evidence produced by city was sufficient to balance the inference of negligence arising from res ipsa loquitur.

Judgment affirmed.

Prior opinion, 258 P.2d 564.

1. Negligence ⚿121(2)

Defendant in res ipsa loquitur case has burden of producing evidence sufficient to meet the inference of negligence by offsetting or balancing it, but he is not required to prove himself free from negligence by preponderance of evidence.

2. Gas ⚿20(2)

In action against city by property owners who alleged that city had negligently allowed gas to escape from its mains, thereby causing plaintiffs' property to sustain severe fire damage, evidence produced by city was sufficient to balance the inference of negligence arising from res ipsa loquitur.

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Thomas P. Menzies, James O. White, Jr., Los Angeles, and J. Merrill Lilley, Long Beach, for appellants.

Irving M. Smith, City Atty., Alfred D. Williams and John R. Nimocks, Deputy City Attys., Long Beach, for respondent.

GIBSON, Chief Justice.

This action was brought to recover for damage caused by an explosion and fire alleged to have been the result of negligence on the part of defendant city in allowing gas to escape from one of its mains. The trial court, sitting without a jury, found in favor of the city, and plaintiffs have appealed from the judgment.

The city's gas main was located in an alley at the rear of property owned by plaintiffs husband and wife on which there was a building used partly for business purposes and partly as their home. An explosion occurred and the building caught fire in the early morning when the husband lit a cigarette in the living quarters. Subsequently, when excavations were made in the street, a gas leak in the pipe was discovered about fifty-five feet from the point at which the fire started. The pipe was bent slightly downward, and a weld was broken. A captain of the fire department testified that in his opinion the explosion was caused by the leak in the main. The trial court found that, while the damage resulted from the escaping gas, it was not proximately caused by any negligence of the city.

[1] It is not disputed that plaintiffs were entitled to the benefit of res ipsa loquitur, and the sole question on this appeal is whether the evidence on behalf of defendant was sufficient to meet or balance the inference of negligence which arose from the application of the doctrine. See Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041; see also Hardin v. San Jose City Lines, 41 Cal.2d 432, 260 P.2d 63; Chutuk v. Southern Calif. Gas Co., 218 Cal. 395, 398–400, 23 P.2d 285; Bergen v. Tulare County Power Co., 173 Cal. 709, 719–721, 161 P. 269; Junge v. Midland Counties, etc., Corp., 38 Cal.App.2d 154, 157, 159, 100 P.2d 1073; Harmon v. San Joaquin L. & P. Corp., 37 Cal.App.2d 169, 175, 98 P.2d 1064. The defendant has the burden of going forward with the evidence, that is, the burden of producing evidence sufficient to meet the inference of negligence by offsetting or balancing it, but he is not required to prove himself free from negligence by a preponderance of evidence. See Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63, and cases there cited.

[2] The main, which was laid about 27 years before the accident, was in "fair con-

dition" when it was uncovered, although it was "naturally rusted" with a coat of approximately one-half inch. The pipe was in sandy soil, and there was evidence that this is one of the better kinds for compacting and that pipe leaks are no more prevalent in such soil than in other types of ground. There was testimony that no practical method was available to test the amount of strain on the pipe without taking it completely out of service and that there was no known practice of testing such pipes for strain while they were still in place. One expert expressed the opinion that the break in the pipe was due to a "settling condition," and another expert testified that in his opinion the cause of the break was a "slight compression in the main" due to an "earth movement of some nature." It appears that although no earthquakes in Southern California had been recorded by the seismological instruments of the California Institute of Technology near the time involved, this did not exclude the possibility of the occurrence of an earth tremor due to some cause such as an earth slide or a detonation which might be perceptible at Long Beach without recording on the instruments. Accordingly, the trial court could properly find that the leak in the pipe was due to natural causes and that it could not reasonably have been anticipated.

The showing made by the city also warranted the conclusion that it was not negligent in failing to discover the leak during the period between the breaking of the pipe and the explosion of the gas. While there was evidence that neighbors had smelled gas in the area for some days or weeks prior to the explosion, there was expert testimony, based on the size of the break and the condition of the soil, that the leak could not have existed for more than ten hours prior to its discovery, which was approximately five and a half hours after the fire. This evidence tends to show that the city was not negligent in failing to discover the leak during the brief period before the fire started. It also indicates that the break was not the source of the gas which neighbors assertedly smelled in the area prior to the fire. Moreover, no report of escaping gas was made to the city before the explosion, and it was for the trier of fact to determine whether the leak had existed for a sufficient time to charge the city with knowledge of the break in the pipe. Under all the circumstances it is our opinion that the evidence produced by the city was sufficient to balance the inference of negligence arising from res ipsa loquitur.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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42 Cal.2d 675

WILSON v. SHARP et al.

L. A. 22980.

Supreme Court of California.
In Bank.
April 13, 1954.

Action by a taxpayer, on behalf of Los Angeles County, to recover the amount of salary payments to one alleged to have been unlawfully appointed to fill a vacancy in a county civil service position and enjoin further salary payments to him, and for a judgment declaring the parties' rights and duties. From an order of the Superior Court, Los Angeles County, Ellsworth Meyer, J., granting a motion to strike a count of plaintiff's second amended complaint purporting to state a cause of action against the county counsel for failure to institute an action against such employee for the amount of alleged illegal payments to him before recovery thereof was barred by the statute of limitations, plaintiff appealed. The Supreme Court, Gibson, C. J., held that the statute providing that if the county board of supervisors, without authority of law, orders payment of money which is actually paid, or any county officer, without authorization by the board or the law, draws a warrant which is paid, the district attorney shall institute a suit in the county's name to recover the money paid, imposes no mandatory duty on the county counsel, who has the functions and duties of a district attorney under such statute, to institute proceedings for recovery of such unauthorized payments, but vests him with discretion to determine the questions of law and fact involved in deciding whether the circumstances of a particular case warrant institution of such proceedings.

Order affirmed.

Carter, J., dissented.

Prior opinion, Cal.App., 260 P.2d 623.

1. Appeal and Error ⚿78(3)

An order of Superior Court granting motion to strike count of second amended complaint alleging cause of action against county counsel for failure to institute action against one alleged to have been unlawfully appointed to fill vacancy in county civil service position for amount of salary payments to him before action therefor was barred by statute of limitations, was appealable as a "final judgment," since it removed from case only cause of action alleged against such counsel and left no issues to be determined between him and plaintiff. Code Civ. Prov. § 963, subd. 1.

2. Appeal and Error ⚿843(4)

On appeal from order granting motion to strike count of plaintiff's second amended complaint alleging cause of action against county counsel for failure to institute action within limitation period against unlawfully appointed civil service employee for amount of salary payments to him, Supreme Court need not consider whether trial court should have granted motion on stated grounds that specified allegations in such count were irrelevant and that it set up by amendment wholly different cause of action based on wholly different legal liability than that alleged in original and first amended complaint against such employee and other county officers, where stricken matter failed to state cause of action, so that plaintiff was not prejudiced by ruling. Government Code, § 26525.

3. Pleading ⚿408

The objection that complaint does not state cause of action is not waived by failure to demur thereto and may be raised at any time, Code Civ. Proc. § 434.

4. District and Prosecuting Attorneys ⚿9

The statute providing that if county board of supervisors, without authority of law, orders payment of money which is actually paid, or any county officer, without authorization by board or law, draws warrant which is paid, district attorney shall institute suit in county's name to recover money paid, imposes no mandatory duty on county counsel, who has functions and duties of district attorney under such statute, to institute proceeding to recover from one alleged to have been unlawfully appointed to fill vacancy in county civil service position alleged unauthorized salary payments to him, but vests such counsel with discretion to determine questions of law and fact involved in deciding whether circumstances of particular case warrant institution of proceedings thereunder. Government Code, § 26525.

5. Officers ⚿114

Officials directly connected with judicial processes are immune from civil liability while acting within scope of their authority.

6. District and Prosecuting Attorneys ⚿10

The county counsel is immune from civil liability for refraining from acting in matter within scope of his authority, where his decision to act or refrain from acting necessarily involves exercise of discretion, as in determining whether to institute proceedings against one alleged to have been unlawfully appointed to fill vacancy in county civil service position to recover amount of alleged unauthorized salary payments to him. Government Code, § 26525.

7. District and Prosecuting Attorneys ⚿10

A count of second amended complaint, alleging that county counsel, made party defendant thereby, failed, after demand, to institute action within limitation period against one alleged to have been unlawfully appointed to fill vacancy in county civil service position for amount of alleged unauthorized salary payments to him, stated no cause of action, so that plaintiff was not prejudiced by Superior Court's order granting motion to strike such count. Government Code, § 26525.

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John J. Guerin, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, John B. Anson and Arvo Van Alstyne, Deputy County Counsel, Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiff, a taxpayer, seeks by this action on behalf of Los Angeles County to recover from defendant Sharp and several officers of the county the salary paid by the county to Sharp, to enjoin further payment of salary to him, and to obtain a judgment declaring the rights and duties of the parties. Defendant Harold W. Kennedy, County Counsel, was not named as a defendant in the original or the first amended complaint but was made a defendant for the first time in the second amended complaint. The sole basis for recovery alleged as to him appears in the second count of the complaint, which purports to state a cause of action only against him. The trial court granted a motion to strike the second count, and plaintiff has appealed from the order granting the motion.

The original complaint and the two amended complaints allege as follows: The Los Angeles County Civil Service Commission called a promotional examination to fill a vacancy in the classified services and knowingly fixed the requirements so that only Sharp could qualify. The commission made an eligible list showing that Sharp was the only applicant and determined his rating by investigation rather than by competitive examination. After certification by the commission, the county clerk appointed Sharp to the position, and he was paid for his services out of public funds. It was further averred that the eligible list and Sharp's appointment were void and that the payment of public money to him was unauthorized.

In the second cause of action of the second amended complaint, which is the one involved here, it is alleged that Kennedy, as County Counsel, was given written notice of the assertedly illegal payments and that he failed, after demand, to institute an action against Sharp. Plaintiff seeks to recover the portion of the salary paid to Sharp which was barred by the statute of limitations at the time this action was commenced. He claims that the barred payments could have been recovered if timely suit had been brought by the county counsel.

[1] The order granting the motion to strike operated to remove from the case the only cause of action alleged against the county counsel and to leave no issues to be determined between him and plaintiff, and it was appealable as a "final judgment" within the meaning of section 963 of the Code of Civil Procedure.[1] Young v. Superior Court, 16 Cal.2d 211, 214–215, 105 P.2d 363; Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39; People ex rel. Dept. of Public Works v. Buellton Development Co., 58 Cal.App.2d 178, 181, 136 P.2d 793; County of Humboldt v. Kay, 57 Cal.App.2d 115, 119, 134 P.2d 501; see Herrscher v. Herrscher, 41 Cal.2d 300, 259 P.2d 901.

[2, 3] The motion to strike was made on the ground that specified allegations were irrelevant, and it was argued that the second cause of action attempted to set up, by way of amendment, a wholly different cause of action based upon a wholly different legal liability. It is un-

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1. Section 963 of the Code of Civil Procedure reads in part, "An appeal may be taken from a superior court in the following cases:

"1. From a final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court; * * *."

necessary to consider whether the trial court should have granted the motion on the grounds stated because, as we shall see, the stricken matter fails to state a cause of action, and plaintiff was not prejudiced by the ruling. See Wilson v. Shea, 194 Cal. 653, 659, 229 P. 945; Barr Lumber Co. v. Shaffer, 108 Cal.App.2d 14, 23, 238 P.2d 99; Neal v. Bank of America, 93 Cal.App.2d 678, 683, 209 P.2d 825. The objection that a complaint does not state a cause of action is not waived by a failure to demur and may be raised at any time. Code Civ. Proc. § 434; Horacek v. Smith, 33 Cal.2d 186, 191, 199 P.2d 929; Ryan **v.** Holliday, 110 Cal. 335, 337, 42 P. 891.

[4] The stricken cause of action seeks relief on the theory that section 26525 of the Government Code imposed on the county counsel a mandatory duty to institute proceedings to recover assertedly unauthorized payments to Sharp. Section 26525 provides in part: "If the board of supervisors without authority of law orders any amount paid * * * and the money is actually paid, or if any county officer draws any warrant * * * without authorization by the board or law and the warrant is paid, the district attorney shall institute suit in the name of the county to recover the money paid, and 20 percent damages for the use thereof." It is conceded that the County Counsel of Los Angeles County has the functions and duties of a district attorney under this statute, and we will discuss the problem as if the statute expressly mentioned the county counsel.

Section 26525 creates a cause of action against the recipients of illegal payments. Miller v. McKinnon, 20 Cal.2d 83, 95–96, 124 P.2d 34, 140 A.L.R. 570; County of Santa Barbara v. Janssens, 177 Cal. 114, 118, 169 P. 1025, L.R.A. 1918c, 558; see Galli v. Brown, 110 Cal.App.2d 764, 778–779, 243 P.2d 920. It does not, however, purport to create a cause of action against a district attorney or county counsel, and we must consider whether, under general principles of law, an action will lie for failure to institute suit against the recipient of illegal payments. The references in the statute to payments ordered and made "without authority of law" or "without authorization by the board or law" show that the decision as to whether the circumstances of a particular case warrant the institution of proceedings is a matter involving the determination of questions of law and fact. Such a determination necessarily requires the exercise of discretion, and it would seem obvious that the legal officer of the county is the proper person to exercise this discretion. See Boyne v. Ryan, 100 Cal. 265, 267, 34 P. 707. Compare Board of Supervisors v. Simpson, 36 Cal. 2d 671, 227 P.2d 14 (mandate granted where statute imposed non-discretionary duty upon district attorney to bring abatement action when so directed by board of supervisors). The Boyne case was decided when the statute on which section 26525 is based provided, in somewhat stronger language, that it was the "duty" of the district attorney to institute suit to recover illegal payments. It was nevertheless held that he was vested with discretion and could not be compelled by mandamus to bring suit. The same discretion is vested under the present statute.

[5–7] In exercising his discretion, the county counsel must determine not only whether there has been a violation of law but also whether action is justified under all the facts, and the public welfare requires that the decision should be made free from fear of civil liability. A clear analogy is to be found in the cases holding that officials who are directly connected with the judicial processes are immune from civil liability while acting within the scope of their authority. White v. Towers, 37 Cal.2d 727, 729 et seq., 235 P.2d 209, 28 A.L.R.2d 636 (malicious prosecution, fish and game investigator); Coverstone v. Davies, 38 Cal.2d 315, 322, 239 P.2d 876 (malicious prosecution, sheriff); Turpen v. Booth, 56 Cal. 65, 68 (grand juror); Downer v. Lent, 6 Cal. 94 (pilot commissioners, revocation of pilot's license); Norton **v.** Hoffmann, 34 Cal.App.2d 189, 198–199, 93 P.2d 250 (malicious prosecution, city attorney); White v. Brinkman, 23 Cal.App.2d 307, 311, 73 P.2d 254 (malicious prosecu-

tion, district attorney); Pearson v. Reed, 6 Cal.App.2d 277, 280 et seq., 44 P.2d 592 (prosecuting attorney). While the cases cited above concerned the question of liability for affirmative action, it would seem clear that the same rule of immunity should apply where, as here, the county counsel refrains from acting in a matter coming within the scope of his authority and where his decision to act or refrain from acting necessarily involves the exercise of discretion. It follows that the second count of the second amended complaint fails to state a cause of action, hence plaintiff was not prejudiced by the order granting the motion to strike.

The order is affirmed.

CARTER, Justice.

I dissent.

The majority opinion holds that a county counsel (the same rule would apply to the district attorney if there were no county counsel) is not liable to the county for failure to take action for the recovery of county funds allegedly illegally paid to a third person, a county employee in this case. I assume, for the purpose of this dissent, as does the majority opinion, that the funds were illegally expended. The majority bases its conclusion on two grounds: (1) That it rests wholly within the discretion of the county counsel as to whether he will prosecute an action for the recovery of such funds, and hence, he cannot be liable under any circumstances; (2) "public welfare" requires that he be not liable by analogy to the cases, White v. Towers, 37 Cal.2d 727, 235 P.2d 209; Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876; Turpen v. Booth, 56 Cal. 65; Downer v. Lent, 6 Cal. 94; Norton v. Hoffmann, 34 Cal.App.2d 189, 93 P.2d 250; White v. Brinkman, 23 Cal.App.2d 307, 73 P.2d 254, holding that public welfare requires freedom on the part of certain officers in the performance of their duties from possible liability to third persons who are injured by their action or nonaction; and that the public's interest in having them fearlessly perform their duties outweighs the injury to third persons.

The first ground is contrary to the holding of this court in Board of Supervisors v. Simpson, 36 Cal.2d 671, 227 P.2d 14, 17. In that case the question was whether the district attorney could be compelled by mandamus to prosecute an action to abate a public nuisance. We held that while ordinarily a district attorney could not be compelled to prosecute a criminal case, because, whether or not he prosecuted it rested in his discretion, but that a mandatory duty was imposed upon him to abate a nuisance and he had no discretion in the matter. We said: "As pointed out above, the district attorney *must* or *shall* bring an action to abate a public nuisance when so directed by the board of supervisors. Code Civ.Proc., § 731, supra; Govt.Code, § 26528. *'Shall' is mandatory,* Govt.Code, § 14, and certainly 'must' is also. The writ of mandamus issues '* * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office * * *.' Code Civ.Proc. § 1085. The statutes, Code Civ.Proc. § 731; Govt.Code, § 26528, *specifically 'enjoin' upon the district attorney 'as a duty resulting from (his) office' the bringing of actions to abate* public nuisances when directed by the board of supervisors." (Emphasis added.) Similarly, in the case at bar, section 26525 of the Government Code provides that if county money is illegally expended the district attorney *"shall"* (emphasis added) institute suit to recover it. The duty is mandatory. He has no discretion in the matter. Even if there is some discretion it would be only in respect to the facts of the case—whether they were such as to show an illegal expenditure. The plaintiff in this action alleged that he gave all the facts to the county counsel, and as far as appears, the county counsel arbitrarily refused to bring an action to recover the illegal payments; his refusal was not an exercise by him of his discretion on the facts, but a failure to perform his official duty.

Reliance is placed upon Boyne v. Ryan, 100 Cal. 265, 34 P. 707, as showing the county counsel had disrcetion in the matter. It is not in harmony with the Simpson case and moreover the court said that if the district attorney "wilfully" refused to prosecute the action he could be proceeded against for malfeasance or non-feasance in office. If that is true, certainly he should be liable to the county for his conduct.

I cannot agree with the second ground. I reiterate the position I took in my dissents in White v. Towers, supra, 37 Cal.2d 727, 235 P.2d 209, and Coverstone v. Davies, supra, 38 Cal.2d 315, 239 P.2d 876, that public office holding should not be a cloak immunizing the officer from liability for his wrongful acts. In addition to that, however, the rule of those cases cannot apply to the case at bar. In those cases, according to the majority, the public welfare was preserved by enabling the officers to perform more effectively their public functions, and to achieve that purpose they should be free from liability to third persons injured in the course of the performance of official duty; that the public welfare so preserved was of such superior importance that the rights of the injured persons must give way. In the case at bar, however, no such situation exists. Here it is obvious that the *public interest* would be preserved by recovering the county funds illegally spent, as opposed, at the most, to the public interest achieved in *fearless failure* of the county counsel to perform his official duty by refusing to take the necessary action to protect the public interest. In fact there *is no public interest* achieved in having official duty performed when such performance consists of a refusal or failure to bring an action to recover such funds. The only way to preserve the public interest here is by the prosecution of such an action. In short, it cannot logically be said that the public interest is preserved by the failure of public officials to perform their official duty. Therefore, the analogy between this case and the cited cases completely fails. Indeed, under the facts here alleged, the public interest requirs that the county counsel be held liable for failure to perform his official duty in prosecuting an action for the recovery of the funds allegedly illegally expended.

I would reverse the judgment.

124 Cal.App.2d 777

PEOPLE v. BARTGES.

Cr. 5126.

District Court of Appeal, Second District.
Division 1, California.
April 27, 1954.

Application for admission to bail pending appeal. The District Court of Appeal held that the trial court had not abused its discretion in denying bail pending appeal.

Application denied.

Bail ⟾44

Where jury found prisoner guilty of forgery and grand theft and found prisoner had served terms of imprisonment for arson in 1932, larceny and larceny by bailee in 1941, and grand theft in 1949, trial court did not abuse its discretion in denying bail pending appeal.

◆

Lowell Lyons, Los Angeles, for appellant-petitioner.

PER CURIAM.

This is an application for admission to bail pending an appeal from petitioner's conviction on charges of forgery and grand theft.

The two informations filed against petitioner were amended to charge that he had previously been convicted of the crimes of arson in 1932, larceny and larceny by bailee in 1941, and grand theft in 1949, and had served a term of imprisonment for each prior conviction.

The jury which found petitioner guilty as charged in each of the two informations also found the allegations of each previous conviction to be true.

An application made in the trial court for admission to bail was denied.

On April 16, 1954, petitioner filed in this court a petition for a writ of habeas corpus by which he sought release on bail pending appeal. The petition for a writ of habeas corpus was predicated on substantially the same grounds advanced in the application now before us. The petition was denied by Division Two of this court.

We are in accord with the conclusion reached by Division Two that the trial court did not abuse the discretion vested in it when bail pending appeal was denied.

The application is therefore denied.

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124 Cal.App.2d 675

PEOPLE v. GEBRON.

Cr. 2957.

District Court of Appeal, First District
Division 1, California.
April 23, 1954.

Defendant was convicted of furnishing and selling marijuana. The Superior Court of the County of Alameda, James R. Agee, J., entered judgment on the conviction and also entered an order denying motion of defendant for new trial, and defendant appealed from the judgment and order. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. **Poisons** 🔑**9**

Evidence sustained conviction for furnishing and for selling marijuana. Health and Safety Code, § 11500 et seq.

2. **Poisons** 🔑**9**

In prosecution for furnishing and selling marijuana, testimony of police officer, who allegedly purchased marijuana from defendant, was not required to be corroborated. Health and Safety Code, § 11500 et seq.

3. **Criminal Law** 🔑**254**

Record in prosecution for furnishing and selling marijuana did not support contention of defendant that trial judge shifted burden of proof from the state to the defendant. Health and Safety Code, § 11500.

Leo A. Sullivan, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Dep. Atty. Gen., J. F. Coakley, Dist. Atty. of Alameda County, Thomas J. Buckley, Dep. Dist. Atty., Oakland, for respondent.

FRED B. WOOD, Justice.

The defendant has appealed from the judgment rendered against him upon conviction of three violations of section 11500 of the Health and Safety Code; one for furnishing marijuana and two for selling marijuana. He has also appealed from an order denying his motion for new trial. The trial was before the court without a jury.

Defendant claims (1) the evidence is insufficient to support the judgment and (2) the trial court erroneously shifted the burden of proof to the defendant.

[1] (1) The evidence amply supports the judgment. It consists chiefly of the testimony of the police officer, Douglas Hall, who as an undercover agent contacted defendant and made the purchases. Defendant took the witness stand, admitted that Hall contacted him on some of the occasions narrated by Hall but denied furnishing or selling or having possession of any marijuana.

As defendant's counsel aptly remarked upon motion for new trial, "the case turns upon whether or not the Defendant is to be believed or whether or not the arresting officer is to be believed." That was an issue of fact for determination of the trier of the facts. In the absence of anything inherently improbable in the testimony of Hall, a reviewing court must accept that determination. Defendant points to no such improbability in Hall's testimony, and we have found none.

[2] Defendant says the plaintiff called no corroborating witness even though some eyewitnesses were known to Hall. This is not the type of case in which the law requires corroboration. Some of those witnesses were known to defendant and were friends of his, yet he did not call them to corroborate his testimony.

Defendant directs attention to the fact that Hall was serving a probationary period as a new appointee to the city police force and therefore had a motive to prosecute and procure convictions to demonstrate to his superiors his ability and efficiency. We can not indulge in any such speculation. His ambition, if he was ambitious, could as well stimulate him to do an honest job as undercover agent.

In the course of his undercover work, Hall was furnished cash by the head of the morals squad for use in making purchases. Defendant says, in effect, that Hall was not businesslike in accounting for those moneys and did not recall how much marijuana he purchased during a particular 24-hour period. That is not a compelling reason for disbelief of the officer's testimony. Moreover the record does not bear out the contention. It was really but a matter of an indistinct recollection of the details of transactions which occurred some eight months before the date of the trial. Concerning marijuana purchases, Hall said he would have to consult his notes at home before he could speak with accuracy as to those details. That was quite natural and does not suggest prevarication or a motive to prevaricate.

It appeared, also that Hall's service with the police department ended April 10, 1953, some seven months after purchasing the marijuana from the defendant. He had, in the interim, failed in some phase of a qualifying civil service examination given by Dr. Douglas M. Kelley of the faculty of the University of California. Defendant's counsel in argument ascribed that fact as a reason for discounting Hall's testimony and said he would be willing to stake the outcome of the case on Dr. Kelley's findings on Hall. After some discussion concerning the availability of Kelley as a witness, defendant's counsel said he would just as soon have the doctor's written report as his testimony, if that were agreeable to the other side and the court. It was so stipulated. Dr. Kelley made and signed a written report which was introduced in evidence. In that report the doctor said, concerning Hall's veracity, there was in his opinion "nothing in the examination to indicate any lack of veracity, and insofar as I could determine, his statements during the examination were all truthful." He added that none of the characteristics which persuaded him that Hall was not adequately equipped to undertake law enforcement work, indicated that Hall "was a pathological liar, and none of these characteristics would tend to invalidate statements made by him from a point of view of their veracity. My feeling is that any testimony he might give as to matters of fact could be weighed equally with that of other witnesses." The doctor's report tended to dispel the inference concerning Hall's veracity which defendant sought to draw from his failure to pass a portion of the civil service qualifying examination.

We need not draw this discussion out any further. Enough has been given to show the nature of defendant's challenge of the sufficiency of the evidence, a type of challenge quite proper for consideration by the trier of the facts, whether prior to conviction or upon motion for new trial, but not appropriate for consideration by a reviewing court.

[3] (2) The record does not support the contention that the trial judge shifted the burden of proof from the state to the defendant.

At the close of the trial, during oral argument, defendant's counsel, contending that Hall's testimony was not worthy of belief, urged that Dr. Kelley be brought in as a witness. The court said: "Let me think that over. I will be very frank about the situation. It is hard for me to conceive that an officer will say 'I gave the man $18; he gave me a tin of marijuana. On the second occasion I gave the man $18.'—he said $20 but he got $2 change back—'and he gave me a tin of marijuana.' It is hard for me to conceive of why that officer would deliberately frame a man and that is just what you are down to. Now if there is some light to be thrown on the officer that would help me in determining whether I should or should not believe the officer, I can see no harm in it," and "I want to think about it. It is a novel point; I haven't had it come up yet. I have had Hall before me; he testified at length. I had a chance to observe him and see him. I will be very frank about it; as far as I could see from my observation of him, he was a truthful witness. Now I had no reason in my own mind from my observation of him, from hearing what he had to say, having heard everybody that has testified here—I had no reason at the end of this case, from my own thinking, to doubt Hall. But I do want to think about this one thing. Let's put it over until Tuesday at 9:15, and I am going to think about this particular phase of it."

We find in that statement no basis for an inference that the trial judge, in deciding the facts, put the burden of proof upon the defendant. This was a court case, not a jury case. The judge, as trier of the facts, was in all fairness indicating to counsel his tentative appraisal of Hall's testimony.

Later, at the request of defendant's counsel, Dr. Kelley's report concerning Hall was obtained and stipulated into evidence. Upon motion for new trial, defendant's counsel said, "Now Your Honor's position is as you stated it, that why would the officer make the arrest unless it were true? That would be a complete reversal of our entire theory of law. It would place upon the defendant—" The court interrupted saying: "That is not a fair statement at all. I said in weighing the testimony of the Defendant Gebron against the testimony of the witness Hall, one of the things that was in my mind was: What motive would Hall have in framing this Defendant? Now you argued before and you brought out on cross examination that he had money to spend on narcotics; he wasn't held to strict account for it; he was ambitious to get a permanent assignment to the Oakland Police Department; that those were motives that he might have had in framing the Defendant. I considered those along with other elements of the case."

The mere reading of these remarks of the trial judge demonstrates the unsoundness of defendant's contention.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

124 Cal.App.2d 667

DAVIS v. WASHBURN et al.

Civ. 20046.

District Court of Appeal, Second District, Division 2, California.

April 22, 1954.

Rehearing Denied May 10, 1954.

Action for personal injuries resulting from an automobile collision. From an order of the Superior Court, Los Angeles County, Joseph M. Maltby, J., granting defendant's motion for a new trial on the issue of damages only after entry of a judgment on a jury's verdict for plaintiff, plaintiff appealed. The District Court of Appeal, Moore, P. J., held that the trial court did not abuse its discretion in granting the motion, in view of substantial conflict in evidence as to the extent of injuries suffered by plaintiff as the result of the collision and the portion of her disorders due to toxic and infectious conditions of constitutional origin.

Order affirmed.

1. Appeal and Error 🔑933(1)

On appeal from order granting defendant a new trial on issue of damages only after entry of judgment on jury's verdict for plaintiff in personal injury suit, all presumptions are in favor of order and against verdict.

2. New Trial 🔑70

A new trial should be granted whenever evidence is insufficient, in trial court's opinion, to justify judgment on jury's verdict.

3. Appeal and Error ⚷979(2)

Granting of new trial on ground of insufficiency of evidence to justify judgment on jury's verdict is discretionary to extent that order will not be disturbed on appeal if any appreciable conflict exists in evidence.

4. New Trial ⚷9

In action for injuries sustained in automobile collision, trial court did not abuse its discretion in granting defendant's motion for new trial on issue of damages only after entry of judgment on jury's verdict for plaintiff, in view of substantial conflict in evidence as to extent of injuries suffered by her as result of collision and portion of her disorders due to toxic and infectious conditions of constitutional origin.

5. New Trial ⚷9

On hearing of defendant's motion for new trial on issue of damages after entry of judgment on jury's verdict for plaintiff in personal injury suit, it was trial court's duty to weigh evidence and determine in its discretion whether motion should be granted.

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James C. Webb, Long Beach, for appellant.

Zahradka, Glines & Bentley, by Joseph Zahradka, Los Angeles, for respondent Hal B. Washburn, Jr.

MOORE, Presiding Justice.

In her [appellant's] action for damages for personal injuries resulting from the collision of her automobile with that of respondent on November 26, 1948, a verdict was returned for the sum of $19,000. Judgment having been entered thereon, the trial court granted respondent's motion for a new trial limited to the issue of damages only, on the grounds of excessive damages and the insufficiency of the evidence to justify the amount of the verdict unless appellant should accept $5,831.36 in full satisfaction of the judgment.

A reversal of the order is demanded on the ground that the trial court abused its discretion in granting the motion for a new trial.

[1-3] All presumptions are in favor of the order and against the verdict. A new trial should be granted whenever, in the trial court's opinion, the evidence is insufficient to justify the judgment. Granting a new trial on the ground of insufficiency of the evidence is discretionary to the extent that if any appreciable conflict exists in the evidence, such action will not be disturbed on appeal. Lopez v. Capiti, 114 Cal.App.2d 544, 548, 250 P.2d 616; Tice v. Kaiser Company, Inc., 102 Cal.App.2d 44, 45, 226 P.2d 624; Ewing v. Otokichi Hamada, 59 Cal.App.2d 679, 681, 139 P.2d 655.

[4, 5] Appellant points out the following testimony which tends to support the jury's verdict: After receiving injuries in the collision, appellant suffered pain internally, in the abdominal area and back, groin, legs and shoulder; was under the care of her physician from the time of the accident to the time of trial in April 1953; was confined to bed for about five months, after which she was able to work "off and on"; had worked steadily as a waitress on one job from July 1943 until the time of the accident averaging $50 a week; worked about five weeks at her former place of employment in November 1949, but had to give it up on account of pain; had not worked a year previous to trial due to extreme pain aggravated by moving about. Her medical bills aggregated $585.34.

Such proof might have been deemed sufficient if respondent were now attacking the judgment on the verdict for the insufficiency of the evidence. But here a far different situation prevails. The trial court has already resolved the nature and amount of appellant's evidence by concluding that it was not sufficient to support the amount of the verdict. Therefore, the conclusion of that court is now on trial.

Respondent's evidence does not contradict the facts proved by appellant. However, it does enlarge and explain them and creates a substantial conflict as to what portion of the disorders suffered by appellant was the result of respondent's negligence. Appellant's physician examined her shortly after the accident, found bruises on shin and knee and left groin, and she complained of pain in the left shoulder, back, and occipital region. But it was shown by his records that she had suffered pain in her abdomen in 1943, "can't get arm up" in 1944, and received diathermal treatments for the pain in her shoulders; that she had a urinary infection in 1945, and a mass behind the uterus and hemorrhoids, and in 1947, boils. At the request of defendants, a physician examined her in December 1952 when she complained of pain in her neck and back, soreness and limitation of motion; pain between her shoulder blades, lower back, in both shoulders, and tenderness in the neck. She had eighty per cent normal movement in her neck and back. Leg raising tests were within ten degrees of normal. The findings of this physician were that most of appellant's symptoms were due to toxic and infectious conditions which did not result from the accident. Not only pyorrhea, but the case of pneumonia in 1952 served to cause inflammation and irritation of the muscles and ligaments of the mouth and shoulders; there is no connection between her pains and the accident; her arthritis existed years before her collision with respondent.

Appellant suffered a vaginal hemorrhaging which continued intermittently from the time of the accident until curettement in March 1949 by her physician. In his opinion, it would not have been necessary except for the accident. But appellant had had two previous miscarriages. Her physician also testified to chorea movements, "purposeless movements which are characteristic of brain injury" witnessed on December 7, twelve days after the accident.

Appellant held several positions during the period here involved, and operated her own business for four and one-half months in 1951, during which time she was open for business twelve hours a day, but she has not worked since.

The trial court evidently concluded that a great majority of her symptoms were due to toxic and infectious conditions which were constitutional in origin and not the continuing results of any effects of her injuries. By reason of the substantial conflict in the evidence with regard to the extent of the injuries suffered by appellant as a result of the automobile collision, it cannot be said that the trial court abused its discretion in granting respondent's motion for a new trial limited to the issue of damages alone. Tice v. Kaiser Company, supra; Lopez v. Capiti, supra. It was the duty of the trial court at the hearing of the motion for a new trial to weigh the evidence and to determine in its discretion whether the motion should be granted. Woods v. Walker, 57 Cal.App.2d 968, 971, 136 P.2d 72.

Order affirmed.

McCOMB and FOX, JJ., concur.

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124 Cal.App.2d 659

PEOPLE v. BECHTEL.

Cr. 883.

District Court of Appeal,
Fourth District,
California.
April 21, 1954.

Defendant was convicted, on a plea of guilty, of feloniously issuing a check on a bank without sufficient funds or credit with the bank. The Superior Court, Fresno County, Strother P. Walton, J., entered judgment, and defendant appealed. The District Court of Appeal, Griffin, J., held that mere fact that defendant, knowing his rights and the consequences of his act, entered plea of guilty under hope of leniency, presented no ground for exercise of discretion by District Court of Appeal.

Judgment affirmed.

1. Criminal Law 🔑273

A plea of guilty includes an admission of every element entering into offense charged and does not raise any issue of fact.

2. Criminal Law ⚷1149

Mere fact that defendant, who was charged with feloniously issuing a check on a bank without sufficient funds or credit with bank, knowing his rights and consequences of his act, entered plea of guilty under hope of leniency, presented no ground for exercise of discretion by District Court of Appeal on appeal.

◆

Roy H. Bechtel, in pro. per.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged with the offense of feloniously issuing a check upon a bank in favor of Lloyd Miller, without sufficient funds or credit with said bank to meet the check.

At the preliminary hearing counsel was appointed to represent the defendant. After a preliminary examination defendant was held to answer and the same counsel then represented him in the Superior Court. On arraignment on the information, defendant, both in person and through his counsel, entered a plea of guilty to the charge. Time was set for hearing defendant's application for probation and to pronounce sentence. A full hearing was had on the probation officer's report. It showed that defendant had been previously "picked up on suspicion of forgery" and later discharged, that he was convicted of drunk driving, and was given two years probation in that same court a short time before committing the offense here charged. Defendant's counsel conceded the report to be factually correct. Defendant was committed to State's prison. In propria persona, he filed a notice of appeal. Thereafter he filed in this court a document entitled: "Facts Supporting Appeal", reciting that he had a previous "working agreement" with the store where the check was cashed, to hold it until some funds were placed in the bank to meet it; that because defendant was arrested before he had a chance to "pick up" the check, he had no opportunity to place money in the account to meet the check when presented for payment; that since he signed his right name and address on the check, that fact, in itself, indicated there was no evidence of intent on his part to defraud; that he entered a plea of guilty because he was informed by someone that he would not "do over 30 days or 60 days at the most"; and accordingly he wishes this court to reconsider the case and let him know "shortly how I made out."

We have thoroughly examined and studied the files lodged with this court in connection with defendant's plea of guilty, and it appears that the trial judge fully considered defendant's application for probation and the facts there presented. Nothing has been here presented that was not before the trial judge for his consideration at the time.

[1] A plea of guilty includes an admission of every element entering into the offense charged and does not raise any issue of fact. Ex parte Hayden, 12 Cal.App. 145, 106 P. 893; People v. Tucker, 115 Cal. 337, 47 P. 111.

The defendant was represented by able counsel at the hearing and if defendant had satisfied his counsel or the court that his plea of guilty should have been withdrawn and a plea of not guilty entered, for the reasons now indicated, no doubt the court would have granted his request. People v. Bostic, 167 Cal. 754, 141 P. 380.

[2] The mere fact that the defendant, knowing his rights and the consequences of his act, entered a plea of guilty under the hope of leniency presents no ground for the exercise of discretion by this court. People v. Dabner, 153 Cal. 398, 95 P. 880.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

124 Cal.App.2d 679

BEELER v. BEELER et al.

Civ. 8387.

District Court of Appeal, Third District,
California.
April 23, 1954.

Hearing Denied June 16, 1954.

Action by wife for divorce wherein husband filed cross-complaint. After entry of interlocutory decree in favor of wife, wife filed affidavit alleging a reconciliation and cohabitation. Shortly after expiration of year following entry of interlocutory decree husband filed affidavit denying wife's allegations. The Superior Court, Shasta County, Albert F. Ross, J., entered final decree of divorce in favor of husband and denied wife's motion to vacate final decree and she appealed. The District Court of Appeal, Peek, J., held, inter alia, that it was not necessary that a hearing be held on question of reconciliation raised by affidavits and that entry of final decree in favor of husband was not an abuse of discretion.

Judgment and order affirmed.

1. Divorce 🔑156

Where a party seeking a final decree of divorce cannot negative cohabitation during the year following entry of interlocutory decree, it is not mandatory that a hearing be held on question of cohabitation. Superior Court Rules, rule 20; Civ. Code, § 132.

2. Divorce 🔑156

Where wife during the year following entry of interlocutory decree of divorce filed an affidavit alleging a reconciliation and cohabitation and husband shortly after expiration of one year period filed affidavit denying allegations of wife's affidavit, it was not necessary that a hearing be held on questions raised by affidavits. Superior Court Rules, rule 20; Civ.Code, § 132.

3. Divorce 🔑4

Marriage 🔑2

The regulation of marriage and divorce is solely within province of the legislature, except as restricted by the Constitution.

4. Divorce 🔑156

When statutory requirements and rules of court have been complied with, the right to have a final decree of divorce entered accrues. Superior Court Rules, rule 20; Civ.Code, § 132.

5. Divorce 🔑156

Where wife during the year following entry of interlocutory decree of divorce in her favor filed affidavit alleging reconciliation and cohabitation and husband shortly after expiration of one year period filed affidavit denying wife's allegations, entry of final decree of divorce for husband was not an abuse of discretion. Superior Court Rules, rule 20; Civ.Code, § 132.

6. Divorce 🔑184(10)

Where affidavits filed by husband and wife after entry of interlocutory decree of divorce raised a factual conflict as to whether there was an unconditional or conditional agreement of reconciliation, court's determination of such factual conflict was conclusive on District Court of Appeal. Superior Court Rules, rule 20; Civ.Code, § 132.

7. Divorce 🔑184(1)

Where notice of appeal included both final decree of divorce and order denying wife's motion to set aside final decree and wife's counsel made no mention of motion to set aside final decree in either his opening or closing brief, the appeal from order denying that motion had been waived.

Christin & Davis, Charles A. Christin, Leonard J. R. Davis, San Francisco, for appellant.

Price & Morony, by Grayson Price, Chico, for respondents.

PEEK, Justice.

This is an appeal by plaintiff from the final decree of divorce granted defendant, and from the subsequent order of the court denying plaintiff's motion to vacate said decree.

The record shows that on August 27, 1951, following a contested hearing, an interlocutory decree of divorce was entered in favor of plaintiff dissolving the marriage between plaintiff and defendant. Additionally the decree affirmed the property settlement agreement of the parties. On August 6, 1952, counsel for plaintiff filed with the court an affidavit signed by her wherein it was averred that she and defendant had effected a reconciliation and had continuously cohabited since the entry of the interlocutory decree. Following a rather lengthy statement of the facts in support of such allegation, the affidavit concluded with the request that the court deny and refuse to grant defendant a final decree upon the grounds set forth therein. However, no affirmative action by motion or otherwise was taken by plaintiff. On August 11, 1952, counsel for plaintiff wrote to the court calling attention to the affidavit which had been filed and asserting his understanding of the law to be that should defendant file the necessary affidavit required by Rule 20 of the Rules of the Superior Court, showing no cohabitation, "you, as Judge, cannot grant a final decree of divorce until a hearing has been had on the merits of the issues presented by the two affidavits." Thereafter on August 29, 1952, more than one year after entry of the interlocutory decree, the defendant filed two affidavits with the court. The first was in accordance with the requirement of Rule 20; the other denied specifically the allegations of plaintiff's prior affidavit and concluded with a prayer that the final decree be entered. Also filed at that time was a letter addressed to the court stating that said affidavit was designed to present defendant's opposition to the prior affidavit of plaintiff and her request for a hearing. It is admitted that although copies of this letter and the affidavits were mailed to counsel for plaintiff, such papers could not have reached him in time to answer thereto. The court, upon the conflicting affidavits before it, considered the matter and entered the final decree. In its order the court noted that it had considered all of the affidavits and the case generally as disclosed by record and proceedings. Shortly thereafter plaintiff filed notice of motion to vacate the final decree, and after a formal hearing thereon in open court said motion was denied. At that hearing the court again noted that it had before it the previously mentioned affidavits as well as additional affidavits filed by plaintiff in support of said motion to vacate. It should be noted that at no time subsequent to the entry of the interlocutory decree was there any motion to vacate or otherwise set aside said decree.

Plaintiff's counsel, in support of his contention that the entry of the final decree should be set aside and vacated, does not attack the sufficiency of the showing by defendant, nor contend that the order of the court otherwise lacks evidentiary support. The attack upon the decree appears to be that since the court at the time the final decree was entered had before it conflicting affidavits, it was thereby presented with a judicial question rather than a ministerial one, and hence it was the duty of the court to set the same for formal hearing. Secondly, it is contended that since the counter-affidavit of defendant was not served on counsel for plaintiff, plaintiff was thereby denied due process.

The pertinent portions of Section 132 of the Civil Code provide that one year after the entry of the interlocutory decree the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce. But if an appeal has been taken from the interlocutory decree or a motion for new trial made, then the final judgment shall not be entered until the same has been disposed of. Rule 20 of the Rules of the Superior Court requires the petitioning party to support his or her application for a final decree with an affidavit setting forth certain facts: (1) That the parties have not become reconciled; (2) that they have not lived or cohabited together; (3) that both parties are then living; and (4) that the moving party has complied with all requirements and is not in default thereof.

[1, 2] Plaintiff, in support of her first contention that the court had a duty to hear on notice the question raised by the affidavits of the parties, relies entirely upon the case of Angell v. Angell, 84 Cal.App.2d 339, 191 P.2d 54, 57. The apparent reason therefor is the comment by the court there-

in that in cases where the petitioning party cannot aver that there has been no cohabitation during the year "the proper procedure is to proceed by motion supported by an affidavit in explanation of the cohabitation." While that may well be a proper procedure in such cases, neither the applicable code provisions nor the Rules of the Superior Court make such a proceeding mandatory. The very fact that Section 132 of the Civil Code provides that the court, on its own motion, may enter the final decree "would seem to exclude the idea that a trial was contemplated at the time of entering this last judgment." John v. Superior Court, 5 Cal.App. 262, 90 P. 53. See also Reed v. Reed, 9 Cal.App. 748, 100 P. 897. Furthermore it should be observed that the situation mentioned in the Angell case does not apply in the present case since the defendant was able to comply with such provisions.

[3, 4] The regulation of marriage and divorce is solely within the province of the legislature except as the same may be restricted by the constitution. Thus when compliance has been had with the statutory requirements and rules of the court, the "right to have the final decree entered accrues." Helbush v. Helbush, 209 Cal. 758 at page 764, 290 P. 18 at page 21. But nowhere in the statutory law is there any mandatory provision for a formal hearing upon application for entry of a final decree.

[5, 6] The sole question presented to the trial court herein was identical to the question posed to the trial court in the Helbush case—a question of fact as to whether there was an unconditional agreement of reconciliation which justified a denial of the final decree, or whether the reconciliation was conditional and therefore warranted the granting of the final decree. Both here as in the Helbush case the evidence was conflicting. Again in both cases the trial court, in the exercise of its discretion, chose to resolve the factual conflict so presented in favor of defendant. Since the evidence was in conflict, and since it cannot be said that the court abused its discretion in resolving that conflict as it did, it necessarily follows in accordance with elementary principles the determination by the court under those circumstances is conclusive on this court and will not be disturbed on appeal. Helbush v. Helbush, supra.

What has heretofore been said is equally applicable to the two contentions made by plaintiff, and hence for the reasons stated both contentions are without merit.

[7] We further note that while counsel for plaintiff in his notice of appeal included both the final decree and the order denying plaintiff's motion to set aside said decree, no mention of the latter was made in either his opening or closing brief. We therefore conclude that the appeal from that order has been waived.

The judgment and order are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., not participating.

McDONALD v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 16025.

District Court of Appeal, First District, Division 1, California.

April 22, 1954.

Hearing Granted June 16, 1954.

Petition for writ of prohibition. The District Court of Appeal, Peters, P. J., held that nonresident owner of truck was not subject to substituted service of process under Vehicle Code, § 404(a), in action for injuries sustained by one to whom truck had been rented, while unloading parked truck, allegedly as a result of latent defect in body of truck, since such action did not grow out of accident resulting from operation of truck upon public highways of state by nonresident owner or his agent.

Peremptory writ of prohibition issued.

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* Subsequent opinion 275 P.2d 464.

1. Automobiles 🔑235

The terms "operate", "operation" and "operator" as used in Vehicle Code are broadly interpreted so as to include more than the mere physical movement of vehicle and others than those in physical control of vehicle, but the proper meaning of any of such terms as used in a particular section of Code depends upon the context in which it appears and the purpose of the particular section. Vehicle Code, § 404(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Operate", "Operation", and "Operator".

2. Automobiles 🔑235

Action against nonresident owner of truck, rented to plaintiff or his son-in-law, for injuries sustained by plaintiff while unloading parked truck, allegedly as a result of latent defect in body of truck, did not grow out of an accident resulting from "operation" of truck upon highways of state, within meaning of statute providing for substituted service of process on nonresident owners. Vehicle Code, § 404(a).

3. Automobiles 🔑235

Deletion of quoted words from statute providing for substituted service of process on nonresident owner of motor vehicle in any action growing out of accident or collision in which such owner or his agent "or any other person operating with the express or implied permission of a nonresident owner" may be involved limited substituted service on nonresident owner to actions growing out of accidents resulting from operation of motor vehicle by owner himself or his agent and excluded cases arising out of operation of vehicle by another, though with consent of owner. Vehicle Code, § 404(a).

4. Automobiles 🔑235

Those to whom truck was rented for purpose of moving furniture were not "agents" of nonresident owner in operating truck within meaning of statute providing for substituted service of process on nonresident owner in action growing out of accident resulting from operation of motor vehicle upon highways of state by owner or his agent. Vehicle Code, § 404(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Agent".

5. Automobiles 🔑235

Nonresident owner of truck was not subject to substituted service of process in action for injuries sustained by one to whom truck had been rented, while unloading parked truck, allegedly as a result of latent defect in body of truck, since such action did not grow out of accident resulting from operation of truck upon highways of state by owner or his agent. Vehicle Code, § 404(a).

◆

Keith, Creede & Sedgwick, San Francisco, for petitioner.

Fitz-Gerald Ames, Sr., San Francisco, for respondent.

PETERS, Presiding Justice.

This is a petition for a writ of prohibition predicated upon the theory that the Superior Court did not secure jurisdiction over Thornton McDonald, a nonresident, by service on the Director of Motor Vehicles or by personal service outside the state, made in a personal injury action brought by Christopher Miesen and his wife against petitioner and others.

So far as pertinent here, the complaint in the personal injury action alleges that Christopher Miesen and/or his son-in-law, Richard Fetters, in Redwood City, rented a truck from Bill Bolich and Chuck Lundegard, doing business as the B & C Texaco Service, for the express purpose of moving some furniture from Redwood City to San Francisco. The particular truck rented to plaintiff by Bolich and Lundegard, was owned by petitioner Thornton McDonald, who does business as the Golden Gate Truck Rental Co. and the West Coast Truck Rental Co., and who is a resident of Oregon. McDonald owns a large fleet of trucks, many of which he rents to persons or companies in California.

Bolich and Lundegard regularly rent to the public trucks owned by McDonald.

The truck here involved was loaded with furniture by Miesen and Fetters in Redwood City and then driven by them to San Francisco, where it was parked in front of Miesen's residence, half on the sidewalk and half on the street, preparatory to unloading. While untying a rope affixed to a rack on a stake attached to the bed of the truck, the rack gave way and Miesen fell backwards off the truck, hitting his head on the pavement and receiving the serious injuries alleged in the complaint. The negligence alleged is that there existed a latent defect in the body of the rented truck in that the "upper rack affixed to stakes on the right-hand side of the bed of said truck was rotten, deteriorated, weak, and not securely or firmly bolted or fastened in position" that was "inherently dangerous and reasonably certain to place life and limb in peril"; that all defendants, including petitioner, "knew of the existence of said structural defect" and did not repair or replace it or notify plaintiff of its existence; that this defect was the proximate cause of the accident.

Named as defendants in the complaint are the Texas Company, Texaco Stations, Bill Bolich and Chuck Lundegard, doing business as B & C Texaco Service, and Thornton McDonald, individually and doing business as the Golden Gate Truck Rental Co., and/or West Coast Truck Rental Co. The only defendant involved in the present proceeding is Thornton McDonald, a resident of Oregon. Service was attempted on him by serving the Director of Motor Vehicles as provided in section 404(a) of the Vehicle Code. McDonald was also personally served in Oregon. All procedural steps required by the code section were followed. McDonald appeared specially in the trial court to challenge the jurisdiction of that court over him. The trial court determined that the service was valid, whereupon McDonald filed this petition for a writ of prohibition.

The sole question presented is whether section 404(a) is applicable to McDonald. That section provides: "The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any use of the highways of this State as evidenced by the operation by himself or agent of a motor vehicle upon the highways of this State or in the event such nonresident is the owner of a motor vehicle then by the operation of such vehicle upon the highways of this State by any person with his express or implied permission, is equivalent to an appointment by such nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against said nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle upon the highways of this State by himself or agent."

McDonald undoubtedly accepted "the rights and privileges conferred upon him by this code," and equally clear is the fact that the vehicle was operated in the state "with his express or implied permission" within the meaning of the first part of the section. But by the express language of the last clause of the section such acceptance of rights and such operation amounts to the appointment of the Director for service only "in any action * * * growing out of any accident * * * resulting from the operation of any motor vehicle upon the highways of this State by himself or agent." The two basic questions are whether the injuries here alleged grew out of an accident "resulting from the operation" of the truck "upon the highways of this State", and whether the truck was then being operated by an "agent" of McDonald within the meaning of section 404(a).

[1] Did the accident result from the "operation" of the vehicle "upon the highways of this State"? The terms "operate," "operator" and "operation" appear frequently in the Motor Vehicle Act. Obviously, the proper meaning of any of these terms depends upon the context in which it appears, and the purpose of the particular section. Generally speaking, the terms have been broadly interpreted so as to in-

clude more than the mere physical movement of the vehicle, and to include others than those in physical control of the vehicle. See, generally, Bosse v. Marye, 80 Cal.App. 109, 250 P. 693; Pontius v. McLain, 113 Cal.App. 452, 298 P. 541; Union Tank Line Co. v. Richardson, 183 Cal. 409, 191 P. 697. The terms should be broadly interpreted. But no matter how broadly the term "operation" be interpreted, it does not include an accident occurring because of a defective bracket while unloading the truck and while the truck is parked. No case interpreting section 404(a) in this respect has been called to our attention. But statutes similar to that section have been adopted in several states. Whenever the problem has arisen the courts, without exception, have held that such statutes do not apply to such a factual situation. In Brown v. Hertz Drivurself Stations, 203 Misc. 728, 116 N.Y.S.2d 412, 413, a truck was rented in Philadelphia for the purpose of hauling furniture into New York City. The truck was defective in that a metal ledge in its body was so constructed as to create a trap. While plaintiff in New York was parked and engaged in the act of shifting the furniture already loaded in order to place more furniture in the truck, or while unloading, he was injured. The pertinent New York statute, Vehicle and Traffic Law, McKinney's Consol.Laws, c. 71, § 52, provided that "the operation" in New York of an out-of-state vehicle is equivalent to the appointment of the Secretary of State for service in any action "growing out of any accident" in which the vehicle is involved "while being operated" in New York. The court held that the vehicle was not being "operated" within the meaning of this statute. The court stated that in enacting the statute, 116 N.Y.S.2d at page 414:

> "it was intended by the legislature to restrict its application to those instances involving the *use* of the public highways. In fact the constitutionality of the statute is predicated on such use. * * *
>
> "The facts presented in the instant case indicate that the accident complained of has no relation to the use of the public highway."

See, also, Finn v. Schreiber, D.C., 35 F.Supp. 638, also interpreting the New York statute in a similar fashion.

The Supreme Court of Tennessee also concluded that such statutes must be limited to injuries in some way connected with the use of the highways of the state. Ellis v. Georgia Marble Co., 191 Tenn. 229, 232 S.W.2d 45, 47. That case involved a statute providing for such service in any action " 'arising out of any accident or injury occurring in this state in which such vehicle is involved'." Code, § 8671. The defendant, a resident of Georgia, shipped marble slabs by truck to plaintiff's employer in Tennessee. Plaintiff was assisting in unloading the truck in Tennessee when a slab of marble, which had been negligently stacked by defendant and his employees, fell and injured him. The court held that the negligent act was in no way connected with the use of the highways of Tennessee, or with the operation of the truck in that state, and that the statute had no application.

In coming to this conclusion the Tennessee Supreme Court quoted and relied upon Brauer Machine & Supply Co. v. Parkhill Truck Co., 383 Ill. 569, 50 N.E.2d 836, 842, 148 A.L.R. 1208, a case also in point, involving an Illinois statute providing that " 'the use and operation' " by a nonresident of a motor vehicle in Illinois was equivalent to appointing the Secretary of State as agent for service " 'in any action or proceeding against him, growing out of such use or resulting in damage or loss to person or property.' " S.H.A. ch. 95½, § 23. The statute was held inapplicable to a situation where a nonresident was delivering goods in Illinois by truck, and the plaintiff was injured while helping to unload the truck as a result of the negligence of defendant's nonresident employee. It was held that the accident did not arise out of the use and operation of a motor vehicle upon the highways of Illinois, and for that reason the statute was not applicable.

[2] These cases, and none is cited to the contrary, indicate that the accident here involved did not grow out of or result from the "operation" of the truck "upon the

highways of this State". As alleged, it occurred by reason of the negligence of the nonresident petitioner or of his resident agents. All of the claimed negligent acts of misfeasance or nonfeasance occurred before the truck was rented.

[3] It should also be noted that the statute only applies to actions growing out of accidents resulting from the operation of the vehicle in this state by the nonresident or his "agent." The history of this section indicates that this limitation to actions involving the "agent" of the nonresident excludes cases, such as the instant one, where the vehicle is being operated with the consent of the nonresident but not by his "agent."

The principle involved in section 404(a) of the Vehicle Code first came into our law in 1931 by the addition of section 47½ to the then California Vehicle Act. Stats. of 1931, Chap. 1026, p. 2099, at p. 2107. As then enacted, the statute provided that: "The acceptance by a nonresident of the rights and privileges" conferred by certain sections of the then existing act "as evidenced by the operation by himself or agent of a motor vehicle thereunder, or the operation by such person, by himself or his agent, of a motor vehicle on a public highway in this state otherwise" than as permitted by certain sections of then existing law "or in the event the nonresident is the owner of a motor vehicle then the operation of such vehicle by such nonresident by himself or by any other person with the express or implied permission of the owner" shall be deemed the equivalent of the appointment of the head of the motor vehicle department as his agent for service in any action "growing out of an accident or any collision in which such person or his agent or any other person operating with the express or implied permission of a nonresident owner of a motor vehicle may be involved, while operating a motor vehicle on any said public highway * *." It will be noted that this section, by its express terms, included not only the agent of the owner, but also included a person operating the vehicle with the express or implied permission of the owner.

The vehicle laws were codified in 1935, and section 47½ became section 404(a) of the Vehicle Code. Stats. of 1935, Chap. 27, p. 93, at p. 154. This transfer was accomplished with only one substantial change in the wording of the old section. In the last portion of the section the words "or any other person operating with the express or implied permission of a nonresident owner of a motor vehicle" were deleted and the present language adopted. The present language, it will be remembered, is that such substituted service is permitted in any action "growing out of any accident * * resulting from the operation of any motor vehicle upon the highways of this State by himself or agent." This deletion was made although as originally drafted by the Code Commission the deleted portion was in the proposed bill. The section, although amended several times in other respects since 1935, has not been amended in the portions of the section here involved.

[4] This deletion would appear to be of some significance. Now the nonresident owner may be so served only where the accident occurs while the nonresident owner is himself operating the vehicle or does so through an agent. Under the original statute not only were agents included, but such service was permitted when the vehicle was being operated by any person operating "with the express or implied permission" of the nonresident. In the instant case while it is alleged that Bill Bolich and Chuck Lundegard were the agents of McDonald in renting the truck, obviously Miesen or his son-in-law were not agents of McDonald in operating it.

[5] Because this accident did not result "from the operation" of the truck "upon the highways of this State", or did not result from such operation by an "agent" of petitioner, the service here was not permitted by section 404(a). It was, therefore, ineffective, and should have been quashed.

Let the peremptory writ of prohibition issue as prayed.

BRAY and FRED B. WOOD, JJ., concur.

124 Cal.App.2d 671

TEIPEL et al.
v.
SOUTHERN NEVADA VENDING CO. et al.
Civ. 20051.

District Court of Appeal, Second District,
Division 3, California.
April 22, 1954.

Suit for rescission, on ground of fraud, of a contract to purchase slot machine, pinball game, and phonograph recording route business in Las Vegas, Nevada. The Superior Court, Los Angeles County, H. S. Farrell, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that evidence sustained findings that plaintiffs had purchased only after a full and complete investigation, and that there had been no fraud.

Affirmed.

1. Fraud ⚷22(1)

When one undertakes an investigation and proceeds with it without hindrance, it will be assumed that he continued until he had acquired all the knowledge he desired and was satisfied with what he learned, and he will not be heard to say that he relied upon representations of the other party.

2. Sales ⚷52(7)

In suit for rescission, on ground of fraud, of contract to purchase a slot machine, pinball game, and phonograph recording route business in Las Vegas, Nevada, evidence sustained findings that plaintiffs had purchased only after a full and complete investigation, and that there had been no fraud.

◆

Spencer & Harris and E. O. Berry, Englewood, for appellants.

D. Chase Rich, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from an adverse judgment in a suit for rescission of a contract to purchase a slot machine, pinball game, and phonograph recording route business in Las Vegas, Nevada, on the ground of fraud.

The court found that plaintiffs had purchased only after a full and complete investigation and that there had been no fraud. The only question is whether the findings are supported by the evidence.

The evidence and the reasonable inferences therefrom will be stated in the light most favorable to defendants-respondents, disregarding conflicting evidence and inferences.

On October 14, 1951, plaintiffs read an advertisement in the Los Angeles Examiner offering for sale a slot machine route located in Las Vegas, which stated, "Income $1,000. Week. Price $28,500." The next day they contacted defendants' agent, one Powers. Powers described the route to them. The following day he showed them a memorandum signed by defendant Wherrit which stated that the gross was $850 to $1,250 a week. He told them the net was around $300 a week. Plaintiffs then deposited $1,500 with Powers with the written understanding the money was to be returned if the route was not satisfactory. Plaintiff Wayne H. Teipel testified he knew the $1,500 would be returned to him if, after he investigated the transaction, he did not like it. Arrangements were then made to meet Wherrit in Las Vegas.

On October 22, plaintiffs, Powers, and Wherrit met at defendants' place of business in Las Vegas. After introductions, plaintiffs asked to see evidence of defendants' income; they asked Wherrit what he had to show to prove the income "on the route." Wherrit told plaintiffs he had been doing well; he had the records and all the receipts; they could look at them for themselves. Wherrit then showed plaintiffs books containing all of defendants' collections from every location since they had been in business. Plaintiffs examined them. They were also shown what are called "route books" in which were recorded collections and taxes due from all locations over a period of time preceding the meeting. Plaintiffs made "mathematical compilations" from them.

Plaintiffs, Wherrit, and Powers then drove around Las Vegas and visited locations where slot machines and phonographs were located. They returned to Wherrit's place of business and "he put out everything"—all the records including the bank books—"on the desk." Wayne H. Teipel went through the "collection books and the bank books and the deposits, and he seemed to like very much what he had seen."

Plaintiffs left and later called Powers and told him "it was what they wanted, and they would buy it." That evening plaintiffs signed three agreements by which defendants assigned their interest in conditional sales contracts for the purchase of phonographs to plaintiffs, and plaintiffs assumed the obligations; plaintiffs gave Powers a check for $13,682.

On October 23, plaintiffs and Wherrit drove around the route. At each location Wherrit gave plaintiffs the city, county, and federal tax figures with respect to that location. On returning to Wherrit's place of business, plaintiffs assisted Powers in making an inventory. They again referred to the "route books." All of the records of the business were made available to them Powers testified: "Everything was laid out to them [plaintiffs] that was there, to my knowledge, and it satisfied them."

In the late afternoon of October 23, the parties executed a conditional sales contract by which defendants agreed to sell and plaintiffs agreed to buy the route and machines. The contract fixed the balance of the purchase price as $10,383.48, payable in monthly instalments of $432.64. Wherrit signed a document stating he would not engage in a similar business within 50 miles of Las Vegas for five years.

Wherrit, who lived in San Luis Obispo, California, stayed in Las Vegas several days assisting plaintiffs in taking over the business. About a week after he left Las Vegas, Congress passed a measure increasing the federal tax on each slot machine from $150 to $250 a year. Plaintiffs then called Powers and complained about the tax and the volume of money coming in from the machines. There was evidence that defendants' bank deposits from July 2, 1951, to October 17, 1951, were less than $1,000 a week. On November 5th plaintiffs abandoned the machines and the business, left the keys with an employee, and moved to Los Angeles. On November 15 they served a notice of rescission. They did not return to Las Vegas. At the trial they did not know what had happened to the route or the machines, and were not in a position to restore any of the machines. During the time they operated the business they did not correctly record in their books the money collected.

[1] When one undertakes an investigation and proceeds with it without hindrance, it will be assumed that he continued until he had acquired all the knowledge he desired and was satisfied with what he learned. He will not be heard to say that he relied on the representations of the other party. Carpenter v. Hamilton, 18 Cal.App.2d 69, 71–72, 62 P.2d 1397; Cameron v. Cameron, 88 Cal.App.2d 585, 593–594, 199 P.2d 443; 12 Cal.Jur. 759, § 35; 37 C.J.S., Fraud, § 37, page 284.

[2] The evidence we have related amply supports the findings that plaintiffs investigated all of the records and assets of defendants "to their fullest satisfaction" and no effort was made by anyone "to hide or cover up any matter whatsoever," and that there was no fraud. The court was warranted in concluding—notwithstanding payment of part of the purchase price on October 22, 1951—that the parties did not intend the transaction should be binding until the conditional sale contract was executed, that the sale was not concluded until the contract was signed on October 23, and that prior thereto plaintiffs made a full and complete investigation and were satisfied to make the purchase on what they learned. The fact that there was evidence from which the trial judge could have reached a different conclusion does not impeach his findings.

Since these findings support the judgment, it is unnecessary to consider plaintiffs' attack on other findings.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

124 Cal.App.2d 656

PEOPLE
v.
ALLEN et al.
Cr. 795.

District Court of Appeal, Fourth District,
California.
April 20, 1954.

Defendant pleaded guilty to two counts of burglary. The Superior Court, Imperial County, L. J. Mouser, J., entered judgment of second-degree burglary and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

Burglary ⟹41(1)

Evidence was sufficient to sustain conviction for second-degree burglary for entering oil stations with intent to commit theft.

◆

Russell Yeager, El Centro, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with burglary in that on April 18, 1953, he entered a building in El Centro with intent to commit theft. In a second count, he was charged with another burglary in that on the same day he entered another building in that city with the same intent. The public defender was appointed to represent him. He pleaded guilty to both counts of the information. After finding that the offense was second-degree burglary, in each instance, the court sentenced him to prison, the sentences to run concurrently. He has appealed from the judgment, and this court appointed the same attorney to represent him on this appeal.

The appellant contends that his confession and plea of guilty were false; that he did not participate in any manner in the alleged offenses; and that, in fact, he was not in the county of Imperial at the time the offenses were committed. Aside from other considerations, these contentions are not supported by the record.

The offenses here charged involved the burglary of two oil stations in El Centro on the night of April 18. The appellant told the attorney, when the appointment was first made, that he was not guilty of the charges; that he was in Los Angeles at the time these offenses were committed; and that he had spent that day and night with certain friends there. Two or three days later he informed this attorney that his previous statements were not true, that he was guilty of the offenses charged, and that he had made a full and complete statement to the officers. About that time he signed a statement he had made to the officers in which he admitted that he had been in El Centro that night with two other men, naming them; that they had talked about where they could get some money; that the other two men left him and were gone about an hour; that when they came back they were disappointed in the amount of money they had gotten; that the other two men then went into one of these buildings while the appellant was "looking out for them"; that he heard a disturbance and they all ran; that they each took "a handful of change"; and that they then drove to San Diego.

In a statement to the probation officer the appellant said he was with these two men in El Centro that night; that he sat in the car while the others went away for about 45 minutes; that after they returned they drove on to a place where the other two men broke into a gas station; that he went to the door and told them they had better come out; and that he then saw a car light and they all ran. At the probation hearing the appellant told the judge that on that night he was with these men in El Centro, that they picked him up to go back to Los Angeles, and that "that is when they pulled their dirty work and I had nothing to do with it." The judge explained why he was unable to believe the appellant, in view of his own statements, and pronounced judgment. After the attorney was appointed by this court, the appellant made another written statement in which he went back to his original claim that he had been in Los Angeles at all times material here, and had had nothing to do with committing these offenses. His only other contention is that he had expected to get a jail sentence because he had cooperated with the officers and given them full information concerning the activities of the two men who were with him on this occasion, and that he would not have pleaded guilty had he known he would be sentenced to prison.

Nothing is presented, in the record or otherwise, which would justify a reversal.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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124 Cal.App.2d 608

SEYMOUR
v.
SETZER FOREST PRODUCTS, Inc., et al.

Civ. 8354.

District Court of Appeal,
Third District,
California.
April 19, 1954.

Action for death of plaintiff's intestate on premises of defendant corporation, when an employee negligently operated a lumber carrier vehicle. The Superior Court, Sacramento County, James O. Moncur, J., sustained demurrer to complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Peek, J., held that allegations disclosing that decedent was in plant of corporate employer on his own time several minutes before reporting for work, that he was not in place of accident on mission for employer, nor as part of his employment, disclosed that the injury was occasioned while employee was at place and doing something not reasonably contemplated by his employment, and that right in plaintiff to recover for his death was not exclusively under the Workmen's Compensation Act.

Judgment reversed.

1. Workmen's Compensation 🔑719, 2090

As a general rule, injuries sustained by an employee while going to or coming from his place of employment do not come within the provisions of the Workmen's Compensation Act, although in a broad sense they may be incidental to his employment, but exception exists where an employee is going to or from his place of employment on some substantial mission for his employer growing out of his employment, and in such instance the injuries come within the act, and preclude employee from maintaining negligence action against employer. Labor Code, § 3600.

2. Pleading 🔑214(1)

For the purposes of passing on a demurrer, the allegations of a complaint must be taken as true.

3. Workmen's Compensation 🔑2132

Allegation, taken as true on demurrer, showing that an employee was in employer's plant on his own time several minutes before reporting for work, and that he was negligently killed, disclosed that employee was not in the place of the accident on a mission for his employer, or as a part of his employment, or while doing an act reasonably contemplated by his employment, with result that Workmen's Compensation Act was not applicable, and recovery for employee's death was not limited to compensation benefits. Labor Code, § 3600.

◆

Thomas O'Hara, Robert A. Zarick, Sacramento, for appellant.

Russell A. Harris, Sacramento, Partridge, O'Connell & Whitney, San Francisco, for respondents.

PEEK, Justice.

This is an appeal by plaintiff from a judgment entered in favor of defendants following the order of the trial court sustaining defendants' demurrer to plaintiff's complaint without leave to amend.

The complaint alleged that defendant corporation operates an industrial plant, and in the course thereof, owns and operates a mechanical lumber carrier vehicle; that the defendant Dunn, while in the course of his employment by defendant corporation, so carelessly and negligently operated the same as to cause fatal injuries to plaintiff's husband, who was also an employee of the corporation; that the decedent was on the defendants' premises preparatory to going on duty for the afternoon shift; that it was a permitted practice for employees to enter the establishment and visit with one another during, before and after working hours; that decedent had so entered that portion of the plant where said lumber carrier was located prior to commencement of his afternoon shift, and at the time thereof was talking with other employees when the fatal accident occurred. The defendants' demurrer, among other things, charges that under the facts alleged plaintiff is limited to the recovery of compensation benefits under the provisions of the Labor Code of this state, and hence does not state a cause of action within the jurisdiction of the superior court.

[1–3] In support of the judgment, defendants argue that where the conditions of Section 3600 of the Labor Code are met, the Industrial Accident Commission has exclusive jurisdiction, and therefore as a matter of law, the superior court has no jurisdiction over the subject matter. We cannot agree with respondents' interpretation of the going and coming rule upon which it places principal reliance.

As stated in 27 Cal.Jur. 380 it is the general rule

> "* * * that injuries sustained by an employee while going to or coming from his place of employment do not come within the provisions of the Workmen's Compensation Act, although in a broad sense they may be said to be incidental to his employment. Exceptions to this general rule are made in cases where an employee, either in his employer's or his own time, is going to or from his place of employment *on some substantial mission for his employer growing out of his employment. But to come within this exception, the mission must be the major factor in the journey or movement and not merely incidental thereto.*" (Emphasis added.)

Here it is alleged, and for the purposes of passing on the demurrer must be taken as true, that the decedent was in the plant on his own time several minutes before reporting for work. He was not in the place of the accident on a mission for his employer, nor was he there as a part of his employment. Furthermore, it cannot be said that his act in being where he was was reasonably contemplated by his employment.

A similar situation was presented in Garcia v. Yedor, 67 Cal.App.2d 367, 154 P.2d 1. Hearing in Supreme Court denied. There the trial court rendered judgment on the pleadings on allegations showing that the plaintiff employee entered defendant's plant before it was time for him to go to work; that while visiting with another employee he was injured by the negligent act of such employee. There, as in this case, the action of the trial court was predicated upon its conclusion that the plaintiff employee's only remedy was before the Industrial Accident Commission. This, the court said "* * * would be true if the only inference which may be drawn from the complaint is that the plaintiff was injured in the course of his employment." After discussing the going and coming rule the court concluded—

> "In the present case, taking the complaint by its four corners, as we must, the inference may be drawn that the plaintiff was not injured while following a necessary route on his way to work, but was hurt when he was engaged upon a venture of his own. The fact that the accident was caused by a fellow employee, upon the employers' premises is not controlling. The test is whether or not the particular act involving accident and injury was reasonably contemplated by the employment. (Whiting-Mead Commercial Co. v. Industrial Accident Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518.

> Thus when a messenger deviated from his route for the purpose of going home to lunch, his injury did not arise out of and in the course of employment. Red Arrow Bonded Messenger Corp. v. Industrial Accident Comm., 39 Cal.App.2d 559, 103 P.2d 1004. And an employee who returns after work to the employer's premises and is injured is not entitled to recover under workmen's compensation. State Department of Institutions v. Industrial Accident Comm., 46 Cal.App.2d 439, 116 P.2d 79."

Here, as in that case, the plaintiff was injured while engaged upon a venture of his own. It necessarily follows that—

> "Under the facts alleged in the complaint the injury was occasioned while the employee was at a place and doing something not reasonably contemplated by his employment. The conditions of compensation do not occur, and the right in the plaintiff to recover is not exclusively under workmen's compensation."

The judgment is reversed.

VAN DYKE, P. J., and PAULSEN, J., pro tem., concur.

SKAGGS

v.

CITY OF LOS ANGELES et al.*

Civ. 19960.

District Court of Appeal, Second District, Division 2, California.

April 22, 1954.

Rehearing Denied May 10, 1954.

Hearing Granted June 16, 1954.

Action for writ of mandate to require city, and city's board of pension commissioners, to pay plaintiff a pension for services rendered as a policeman. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment for plaintiff, and defendants appealed. Plaintiff cross-appealed. The District Court of Appeal, McComb, J., held that where plaintiff's dismissal from police department for conduct unbecoming an officer became effective four days before his application for retirement was filed, plaintiff was not an employee of police department at time he filed application, and hence was not entitled to pension.

Judgment reversed with directions.

1. Municipal Corporations 🔑187(2)

Where police officer's dismissal from police department for conduct unbecoming an officer became effective four days before officer's application for retirement was filed, officer was not an employee of police department at time he filed his application, and hence was not entitled to pension.

2. Municipal Corporations 🔑187(2)

The filing of an application by a police officer for retirement on pension does not ipso facto retire the applicant, and where order of retirement has not been made prior to filing of charges in proceedings subsequently commenced, officer's dismissal defeats his right to a pension.

Roger Arnebergh, City Atty., Bourke Jones and John J. Tully, Jr., Asst. City Attys., Los Angeles, for defendants, appellants and respondents.

Morris Lavine, Los Angeles, for plaintiff, respondent and appellant.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiff in an action for a writ of mandate to require defendants to pay plaintiff a pension for services rendered as a policeman. There is also a cross-appeal by plaintiff whereby he seeks to have it declared that he was entitled to a pension from July 9, 1945 instead of from February 16, 1951, the date fixed by the trial court.

The stipulated facts are these:

(1) On April 1, 1925, plaintiff was duly and regularly sworn in as a police officer of the City of Los Angeles and commenced his duties on said date and was continuously employed as such officer until July 5, 1945.

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* Subsequent opinion 275 P.2d 9.

(2) On April 1, 1945, plaintiff completed 20 years of aggregate service in the police department, and on said date became eligible to retire on a service pension as a Sergeant of Police.

(3) On July 4, 1945, he was arrested on suspicion of having committed bribery on July 3, 1945.

(4) *On July 5, 1945, plaintiff was relieved from duty by the Chief of Police who on said date filed against him charges of conduct unbecoming an officer,* which was designated as Cause I and consisted of five counts, as follows:

"Count 1. In that you, on or about July 1, 1945, offered for a sum of money to influence your action and/or that to be taken by others with regard to charges against one Kelly Petillo.

"Count 2. In that you, on or about July 1, 1945, represented to one Kelly Petillo that you could, for a sum of money, influence favorably to Mr. Petillo the action to be taken in charges then pending against Mr. Petillo.

"Count 3. In that you, on or about July 2, 1945, offered, for a sum of money, to influence your action and/or that to be taken by others with regard to charges against one Kelly Petillo.

"Count 4. In that you, on or about July 2, 1945, represented to one Kelly Petillo that you could, for a sum of money, influence favorably to Mr. Petillo the action to be taken in charges then pending against Mr. Petillo.

"Count 5. In that you, on or about July 3, 1945, accepted the sum of Five Hundred Dollars from Kelly Petillo upon an agreement or an understanding that you would influence or attempt to influence the official action to be taken with regard to charges then pending against Mr. Petillo."

(5) July 9, 1945, plaintiff filed his application with the Chief of Police for a hearing before and decision by the Board of Rights on said charges.

(6) *July 9, 1945, plaintiff applied to the Board of Pension Commissioners for retirement upon service pension.*

(7) In the month of April, 1946, plaintiff was convicted of bribery by a jury in the superior court based upon the same matters set out in the charges filed by the Chief of Police as specified in paragraph (4), supra. He thereafter gave notice of appeal from such judgment.

(8) July 23, 1946, the Board of Rights having conducted a hearing on or about said date upon the charges filed against plaintiff, and having before it the conviction in the criminal case, found him guilty of Cause I, Count 2, Cause I, Count 4, and Cause I, Count 5, and prescribed as penalty that plaintiff be removed from his position in the Police department.

(9) *On July 24, 1946, pursuant to the certified order of the Board of Rights, the Chief of Police executed the order of removal of plaintiff from his position in the police department, declaring it effective as of July 5, 1945.*

(10) May 29, 1947, the District Court of Appeal, People v. Skaggs, 80 Cal.App.2d 83, 181 P.2d 390, reversed the conviction of plaintiff for bribery referred to in paragraph 7, supra, and ordered a new trial.

(11) August 12, 1947, plaintiff was, upon his new trial for bribery, acquitted in the superior court.

(12) September 30, 1947, the Chief of Police denied plaintiff's request to be reheard on the cause of his removal.

(13) January 6, 1948, the District Court of Appeal denied plaintiff a writ of mandate to compel his reinstatement as a police officer and the payment of salaries from the date of his dismissal and, on January 29, 1948, his petition for rehearing was denied, and on March 4, 1948, his petition for hearing in the Supreme Court was denied. (See Skaggs v. Horrall, 83 Cal.App.2d 424, 188 P.2d 774.)

(14) February 24, 1948, plaintiff's application to the Board of Pension Commissioners for retirement on service pension was denied.

(15) February 16, 1951, plaintiff filed with the City Clerk and with the Board of Pension Commissioners a claim for $8,167.-97, plus interest at the rate of 7 percent per

annum, and for such other sums as may be accumulated, and to have monthly payments in sums fixed by the City Charter continue during the life of plaintiff.

This is the sole question necessary for us to determine:

Was plaintiff an employee of the police department upon the date he filed his application for a service pension?

[1] *No.* Under the italicized portion of the stipulated facts it appears that on July 24, 1946, pursuant to the certified order of the Board of Rights, the Chief of Police executed an order of removal of plaintiff from his position as a police officer, declaring it to be effective as of July 5, 1945.

Section 202 of the City Charter, subdivision (14) which was applicable to plaintiff's application, reads: "In any case of penal suspension or removal prescribed by the Board of Rights (or by the Chief of Police in case no hearing is had before a Board of Rights) the time of such suspension shall be computed from the first day such officer or employee was so suspended or relieved from duty pending hearing before and decision by the Board of Rights, and such removal shall relate back to and be effective as of the date of such relief from duty pending hearing before and decision by the Board of Rights."

It thus appears that plaintiff ceased to be an employee of the police department as of July 5, 1945, which was four days before July 9, 1945, the date on which he filed an application with the Board of Pension Commissioners for retirement upon a service pension. Hence he was not an employee of the police department at the time he filed his application for a pension and the trial court improperly allowed him a pension.

[2] There is no merit in plaintiff's contention that he had a vested and indefeasible right to a pension on July 9, 1945, the date he applied to the Board of Pension Commissioners for retirement upon service pension. It is the law that the filing of an application by a police officer for retirement on a pension does not ipso facto retire the applicant, and where an order of retirement has not been made prior to the filing of charges in proceedings subsequently commenced, his dismissal defeats his right to a pension. The rule is accurately stated by Mr. Justice Ward in MacIntyre v. Retirement Board of City & County of San Francisco, (hearing denied by the Supreme Court) 42 Cal.App.2d 734, 736[1], 109 P.2d 962, 964, thus:

"Without regard to the time of the vesting of pension rights, it is an implied condition of employment, and hence a condition of such vesting that the duties of the employee shall have been faithfully performed; it is immaterial whether the proper authorities discover the misconduct and file charges before or after the application for a pension so long as the charges are filed before an order is made by the retirement board. The filing of the application does not ipso facto retire the applicant. It is necessary that an order of retirement be duly made. Up to that time the police officer, whether under suspension or in actual service, is under the control and jurisdiction of the police commission. If, prior to an order of the retirement board, he is dismissed upon charges of conduct unbecoming an officer, he is not entitled to 'a pension' as that term is used in the charter."

The foregoing rule is applicable to the facts in the instant case. Plaintiff's dismissal from the police department for conduct unbecoming an officer became effective four days before his application for retirement was filed, and several years before his application for a service pension was acted upon and denied by the Board of Pension Commissioners.

In view of our conclusion it is unnecessary to consider the point argued by counsel for plaintiff in his cross-appeal that plaintiff should have been allowed a pension from July 9, 1945, instead of February 16, 1951.

The judgment is reversed with directions to the trial court to enter a judgment denying plaintiff any relief.

MOORE, P. J., and FOX, J., concur.

KEELER
v.
GLENDON et al.
SHIFFMAN
v.
GLENDON et al.
Civ. 19987, 19988.

District Court of Appeal, Second District, Division 1, California.

April 20, 1954.

Rehearing Denied May 10, 1954.

Hearing Denied June 16, 1954.

Action by brokers against vendors to recover commissions. The Superior Court of Los Angeles County, John F. Aiso, J., entered judgments for the brokers, and the vendors appealed. The District Court of Appeal, Drapeau, J., held that where prospective purchaser, who had established escrow as part of negotiations for purchase of realty, terminated escrow before terms of sale had been agreed upon, brokers had not produced a person ready, able and willing to buy the vendors' property, in that the essential element of willingness to buy had disappeared, and brokers were not entitled to recover from vendors a commission, even though papers signed by vendor contained covenant to pay commissions if buyer should default.

Judgments reversed.

1. Brokers ⚷54

Where prospective purchaser, who had established escrow as part of negotiations for purchase of realty, terminated escrow before terms of sale had been agreed upon, brokers had not produced a person ready, able and willing to buy the vendors' property, in that the essential element of willingness to buy had disappeared, and brokers were not entitled to recover from vendors a commission, even though papers signed by vendors contained covenant to pay commissions if buyer should default.

2. Brokers ⚷52

A broker must bring a sale to a point where there is a valid and enforceable agreement between seller and buyer before he is entitled to a commission, and thus if the principal and customer are unable to come to terms, the broker cannot recover, if the failure of consummation is not attributable to wrongful act of the vendor.

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Spiegel, Turner & Wolfson, Albert A. Spiegel, Santa Monica, for appellants.

Blanche & Fueller, Pasadena, for respondent Keeler.

Bernard A. Neches, Beverly Hills, for respondent Shiffman.

DRAPEAU, Justice.

These cases involve a controversy over brokers' commissions claimed upon a sale of real estate that never was made, and a contract of sale that never was entered into.

Defendants, George L. Glendon and Perle E. Glendon, husband and wife, owned a 23-unit apartment house on San Vicente Boulevard in Santa Monica. They also owned the furniture in twenty-one of the units. They advertised the property for sale. Whereupon plaintiff Louis P. Shiffman, a real estate broker, contacted them. They told him they would sell for $210,000.

Later on another real estate broker, plaintiff W. E. Keeler, told Mr. Shiffman that he had a client, Mrs. Mabel C. Gross, who would buy the apartment house for $185,000.

On Thursday, October 11, 1951, Mr. Keeler and Mrs. Gross looked the property over. Mrs. Gross authorized Mr. Keeler to offer $185,000 for it, and gave him an order on an escrow company for $1,000, to use to bind the offer. On the evening of that day Mr. Keeler and Mr. Shiffman went to see Mr. and Mrs. Glendon at their home. Most of the time was spent convincing Mr. and Mrs. Glendon that they should cut down their asking price to the offered price.

Defendants finally said that they would sell for the offered price. Then the brokers presented to them a printed form, entitled "Deposit Receipt." Blanks in the form had been filled in in Mr. Shiffman's handwriting. It had theretofore been signed by Mabel C. Gross.

The handwriting described the property, "including all furniture and furnishings on premises." The handwriting also stated that the purchase price was to be $25,000 down, $25,000 secured by a first trust deed, and $135,000 secured by a second trust deed.

Mr. and Mrs. Glendon did not sign this document.

They said that some of the tenants owned some of the furnishings in the apartments, and they themselves had some personal furnishings there that they did not want to sell. And Mrs. Glendon told the brokers that she and her husband would have to have a chattel mortgage on the furniture, and that an inventory would have to be taken.

Then Mr. Shiffman filled out blank spaces in another printed form. The handwriting was different from that in the first instrument in the following particulars: The words "except personal furniture," "escrow to close Nov. 15th," and "2d T.D. becomes 1st T.D. when 1st T.D. is paid off" were written in. Also written in was a provision that $4,250 of the commission would go to Mr. Shiffman, and $5,000 to Mr. Keeler.

Mr. and Mrs. Glendon signed this document, but it never was signed by Mrs. Gross.

The next day, Friday, Mrs. Glendon, Mrs. Gross, and the two brokers proceeded to the apartment house, and started to take the inventory. But they did not complete it that day. Mr. Shiffman had made an appointment for all parties to meet with an escrow agent at 3 o'clock that afternoon. So, in the midst of taking the inventory, they adjourned for the purpose of opening an escrow.

In the escrow office Mrs. Glendon requested that there be included in the agreement that the escrow papers would express a provision that in the event Mrs. Gross should sell the property the amount secured by the second trust deed would be reduced to $100,000, and also that a chattel mortgage of the furniture be prepared during the course of the escrow, and be duly executed by Mrs. Gross. Mrs. Gross said that these requests were reasonable and to go ahead and do it. The escrow instructions prepared at the time provided that sellers were to "furnish a bill of sale for furniture and furnishings at 527 San Vicente Boulevard, Santa Monica, California, as per inventory to be furnished and approved prior to the close of escrow."

Mrs. Gross signed the escrow papers then and there. But Mrs. Glendon refused to sign until her husband looked over the instructions, and until the inventory was completed.

On Saturday morning Mrs. Glendon again refused to sign the escrow papers until the inventory was okayed by her and Mrs. Gross.

Testimony during the trial of the case indicates that the parties considered a completed inventory essential to the transaction. Mr. Keeler said that they planned to take the inventory first and then go to escrow.

> "Q. That was to get the matter of the furniture straightened out? A. Yes."

Mrs. Gross wanted to have an inventory; she insisted upon one; while it was incomplete she said she wanted to finish it.

And Mrs. Glendon had good reason to require an inventory approved by her tenants and by Mrs. Gross. She wanted no misunderstanding as to her right to keep certain articles, and she wanted to be sure that her furniture and furnishings were not confused with the personal belongings of her tenants, and the inventory was necessary to describe the items in the chattel mortgage.

On Monday morning Mrs. Gross notified the escrow agent that she withdrew her consent to decrease the second trust deed indebtedness if she should sell the property. When Mrs. Glendon and Mr. Shiffman arrived at the escrow office that afternoon and were informed of this action of Mrs. Gross, Mrs. Glendon again refused to sign the escrow papers. On this day Mr. Shiffman deposited the completed inventory in the escrow.

On the morning of the next day, Tuesday, Mrs. Gross by a letter from her attorney instructed the escrow agent to cancel the escrow and return her papers. Later, on the same day Mr. and Mrs. Glendon appeared with their executed deed, and the escrow papers signed by them. The escrow agent told them he had some bad news for them, that Mrs. Gross had cancelled the escrow.

The two brokers brought separate actions for their commissions. These actions were consolidated for trial. The judge who heard the evidence found for the brokers. Defendants appealed from the judgments that followed.

The appeals have been briefed, argued, and submitted together. They have, therefore, been considered and disposed of together.

Apparently plaintiffs' theory is that defendants are liable because they would not sign the escrow papers until the inventory was completed. But, as stated, there was no agreement of sale, and no sale was made.

Defendants' covenant to pay commissions is to be found in the document they signed, and is as follows: "I agree to sell said property on above terms and to pay a commission of 5% to broker named therein, or one-half of buyer's deposit, if buyer shall default, but not to exceed the full amount of his commission."

The mutual terms of the contract of sale were not agreed upon in either or both documents presented to defendants, one of which they signed. It follows then that the terms of sale were left for future determination. The parties attempted to negotiate the terms of the sale in the papers going into the escrow. But this effort was terminated by Mrs. Gross' abrupt cancellation of the escrow.

[1] When Mrs. Gross did that the essential element of her willingness to buy disappeared from the case, and plaintiffs' right of recovery under the theory that they produced a person ready, able and willing to buy defendants' property failed.

[2] Moreover, our law has always required a broker to bring a sale to a point where there is a valid and enforceable agreement between seller and buyer before he is entitled to a commission.

> "Before a broker is entitled to compensation, the negotiations which he is authorized to make must be concluded or conducted to the state where, as to all the material or essential terms of the sale, there is a meeting of the minds or an agreement between the principal and the customer produced by him; but if the principal and customer are unable to come to terms, the broker cannot recover." Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 307, 266 P.2d 856, 861; Love v. Gulyas, 87 Cal.App.2d 608, 618, 197 P.2d 405; Silva v. Goldman, 117 Cal. App. 423, 4 P.2d 191; 12 C.J.S., Brokers, § 84 et seq., page 184.
>
> "Plaintiff was entitled to a commission only if defendant and Neidorf came to a meeting of the minds as to the terms of sale and if the contract did not fail of consummation through the fault of defendant. Stanton v. Carnahan, 15 Cal.App. 527, 115 P. 339." Lawrence Block Co. v. Palston, supra, 123 Cal.App.2d 300, 307, 266 P.2d 856, 861.

In 9 Cal.Jur.2d, Sec. 80, p. 242 it is said: "The duty assumed by him (the broker) is to bring the principal and the customer to an agreement, and until this is done, his right to commissions does not accrue."

It follows therefore that in the cases at bar the brokers are not entitled to any commissions.

The judgments are and each is reversed.

WHITE, P. J., and DORAN, J., concur.

124 Cal.App.2d 661

LANE v. BRADLEY.

Civ. 15716.

District Court of Appeal, First District, Division 2, California.

April 22, 1954.

Rehearing Denied May 21, 1954.

Hearing Denied June 16, 1954.

Action by wife, who remarried, against her former husband for periodic payments provided for in property settlement incorporated in divorce decree. From adverse judgment of Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., husband appealed. The District Court of Appeal, Nourse, P. J., held that where by terms of property settlement husband, among other things, agreed to pay his wife 40 per cent of his net income exclusive of certain deductions, the property settlement was an integrated bargain and periodic payments did not terminate upon remarriage of wife.

Judgment affirmed.

1. Divorce ⟹245(1)

If provisions for support and maintenance have been made an integral or inseverable part of division of property of spouses, and court in a divorce action has approved the agreement, provisions of the agreement cannot thereafter be modified without consent of both parties.

2. Divorce ⟹245(1)

The fact that a wife has received more or less than her share of community property, and that fact has influenced the amount of periodic payments allowed her under property settlement approved by the court in divorce decree, will not alone make the periodic payments take on the nature of alimony and thereby become subject to modification by the court without consent of the parties.

3. Divorce ⟹247

If periodic payments to wife are part of integrated property settlement and the agreement does not provide expressly or implicitly for their termination on remarriage of wife, right of wife to such payments will continue after her remarriage. Civ.Code, § 139.

4. Divorce ⟹247

Where by terms of property settlement, husband, among other things, agreed to pay wife 40 per cent of his net income exclusive of certain deductions, the property settlement was an integrated bargain and periodic payments did not terminate upon remarriage of wife. Civ.Code, § 139.

5. Divorce ⟹245(1)

Any integrated, inseverable agreement of spouses made for purpose of amicable solution of dubious questions with respect to property, support and maintenance may deprive periodic payments contained therein of character of alimony, even though no community property is involved, and such payments are then immune from modification without consent of the parties.

◆

Sullivan, Roche, Johnson & Farraher, San Francisco, for appellant.

Aaron N. Cohen, Sidney Rudy and Allen M. Singer, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action by a former wife against her former husband for payment of 40% of his net income due her under the provisions of their Nevada final divorce decree of June 24, 1946 which approved and incorporated by reference a property settlement agreement of May 14, 1946. The percentage of income so claimed related to a period subsequent to the remarriage of the wife. The court sitting without a jury heard evidence as to the financial circumstances under which the property settlement was made and concluded: "That plaintiff's right to receive forty per cent of the net income of defendant as provided in said Decree has not terminated or been diminished by reason of the remarriage of plaintiff or for any other reason." Judgment was for plaintiff as prayed for and defendant appeals, urging, as he did in the trial court, that said payments, as a matter of law, were payments for the support of the wife, which under sec. 139, Civil Code, terminated on her remarriage.

The following is the substance of the most relevant recitals and provisions of the property settlement agreement:

The parties have property both community and separate; they desire to agree to a permanent separation and to determine their respective property rights, to adjust all rights and claims of each as against the separate property of the other and as against the community property of both and all claims against each other and to provide for the care and custody of their minor children. The agreement is intended as a property settlement agreement referring to property rights only and not to constitute any condonation or bar to a divorce action.

2. The husband grants to the wife certain real and personal property. 3. He agrees to pay the premiums on certain life insurance policies of which the wife is the beneficiary and not to change the beneficiary during her life time. 4. The wife shall have the right to occupy the Scott street home during her life time rent free, she to pay for maintenance and repair, the husband to pay taxes, insurance and installments and interest of a loan. The right of rent free occupation continues in case of remarriage of the wife, but she must then pay the taxes and insurance. If the wife gives up the occupation the home shall be sold and the net proceeds be divided equally between the parties.

5. The husband shall deposit in escrow as security for his obligations under the agreement certificates of 40,000 shares of Bradley Mining Company stock on the conditions, among others, that the stock and dividends remain his separate property, but that the wife has the right to have the shares in whole or in part sold at a price to be specified by her, the proceeds then to be hers. 6. Commencing January 1, 1947, the husband shall pay the wife 40% of his net income, exclusive of capital gains and losses and capital distributions, but before deduction of income taxes and charitable contributions, less one per cent for each 1000 shares of stock the wife will have had sold under the preceding provision. If the payments to be made to the wife shall be included in the husband's taxable income the wife will pay a proportional part of the husband's income tax. 8. Upon the death of the wife the escrow shall terminate and the property still on deposit shall vest in the husband as trustee, he to have the income during his lifetime and on his death the principal to vest in the children of the parties or their issue.

9. The wife shall have the custody of the children, the husband all reasonable right of visitation. The parties shall contribute to the support and maintenance of the children in proportion to their respective financial ability.

14. The husband agrees to make a will containing the following irrevocable dispositions:

(a) to bequeath to the wife the property still in escrow or the proceeds thereof, in full discharge of the husband's obligation to make further payments; (b) to devise and bequeath 50% of the rest of his estate to the wife as trustee, she to have the income during her lifetime and on her death the principal to vest in the children of the parties or their issue.

15. Except as hereinabove otherwise provided, all that is in the possession or in the name of each party shall be that party's separate property. Performance by the husband of this agreement shall constitute full satisfaction of all claims of the wife against him and against his separate property and the community property and of her right to support, maintenance or alimony. 18. This property settlement agreement shall be submitted for approval to the court in an action for divorce or separate maintenance and shall become binding only upon such approval. 19. The agreement shall bind the parties and their heirs, executors, administrators and assigns.

Appellant contends that the above agreement as incorporated in the Nevada decree, according to its contents and its description in the Nevada complaint and decree did not only provide for settlement of the property rights of the parties but also for the support of the plaintiff; that the decree does not segregate which provisions of the agreement relate to either of these subject matters; that it was the task of the trial court to decide whether or not the payments of 40% of the husband's income were solely for the support of the wife and therefore alimony, citing Hough v. Hough, 26 Cal.2d 605, 615, 160 P.2d 15; that the evidence showed that all property affected by the agreement was separate property of the husband which he had owned prior to his marriage or acquired thereafter by gift or reinvestment of his separate property; that no community property had been accumulated, the costs of the maintenance of the family having exceeded the husband's earnings; that the wife did not give up any of her separate property, of which she had received more than $100,000 from the husband during marriage, and that therefore the payments involved in these proceedings could serve no other purpose than support of the wife, the support of the children being treated separately in paragraph 9 of the agreement, supra.

[1-3] Whether periodic payments to a wife provided for in an agreement of the spouses approved by a divorce court have the character of maintenance and support has usually arisen in relation to the question whether the court has power to modify said provisions without the consent of both parties, but the same rules must apply to the termination of the right to such payments in case of remarriage of the wife, the decision of both questions being dependent on the character of the provisions as solely and severably for maintenance and support. The rule is well settled, that, if the provisions for support and maintenance have been made an integral or inseverable part of the division of the property of the spouses, and the court in a divorce action has approved the agreement, its provisions cannot thereafter be modified without the consent of both of the parties. Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873. To take from such periodic payments the character of modifiable alimony it is not essential that the wife has received more or less than her share of the community property and that that fact has influenced the amount of the periodic payments allowed her. "* * * at the time a property settlement is made, the parties may be uncertain as to which of their property is community rather than separate, and they will ordinarily not know how the court in the divorce action will find the facts or how it would, in the absence of an acceptable agreement, exercise its discretion in dividing the property and awarding alimony. The amicable adjustment of these doubtful questions with respect to the property and support and maintenance rights of the parties may alone supply sufficient consideration to support their entire agreement." Dexter v. Dexter, supra, 42 Cal.2d at page 43, 265 P.2d 877. If periodic payments to the wife are part of such an integrated bargain and the agreement does not provide expressly or implicitly for their termination on remarriage of the wife, sec. 139, C.C., will not apply to cause such termination.

[4] The recent opinions of the Supreme Court in Dexter v. Dexter, supra, and its companion cases Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881 and Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 865, leave no doubt that on its face the property settlement agreement in this case was such an integrated bargain. The recitals and provisions of said agreement stated in substance hereinbefore taken together demonstrate this so clearly that it is unnecessary to point to any of them in particular. The provisions for the periodic payments are themselves completely interlaced with the provisions for disposition of the 40,000 shares of Bradley Mining stock put in escrow, and these shares are a part only of all property disposed of in behalf of the wife, both during the life of the husband and upon his death.

The agreement does not contain any indication that the parties intended the payments in question to terminate on remarriage of the wife; it even contains strong indications to the contrary. In paragraph 4 her remarriage is considered and her right to rent free occupation of the family home then continued on somewhat more burdensome conditions. With respect to the periodic payments from income here involved there is no provision for the case of remarriage. The provision of paragraph 14(a) that the wife will receive by irrevocable testamentary disposition the property in escrow in full discharge of all of the husband's obligations to make further payments to the wife, shows that said payments were not intended as alimony payments automatically terminating on the death of the husband (and on the remarriage of the wife).

[5] The only doubt is caused by the evidence showing, contrary to the recitals of the agreement, that there was no community property involved. Even if we assume without so deciding that such evidence was admissible to clarify the actual financial circumstances to which the agreement related, which may be of importance in determining the character of the periodic payments, a showing that there was no community property did not exclude the possibility that the payments might be part of an integrated bargain so as to prevent them from having the character of alimony only. As we stated before, quoting from Dexter v. Dexter, supra, any integrated, inseverable agreement of the spouses made for the purpose of amicable solution of dubious questions with respect to property and support and maintenance may deprive the periodic payments contained therein of the character of mere alimony, and no existence or division of community property is essential in that respect. In Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540, there was an express statement in the property settlement agreement that there was no community property; nevertheless it was held that monthly payments to the wife contained as an integral part in said agreement were not subject to modification by the court.

We conclude that the decision of the trial court was correct, as we consider the payments here involved as an inseverable part of an integrated adjustment of all property relations of the parties and not as a severable provision for alimony. We therefore need not decide whether such payments should also have continued after remarriage if they had formed part of a similar arrangement lacking the characteristics of alimony, but which was made solely in lieu of alimony waived by the wife, a point not yet decided by our Supreme Court.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

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QUINTANA
v.
SOUTHERN CALIFORNIA EDISON CO.

Civ. A-17.

Appellate Department, Superior Court,
San Bernardino County, California.
April 12, 1954.

Action against electric power company for destruction of warehouse and contents by fire allegedly caused by short circuit, during windstorm, in power lines over roof of warehouse. The Municipal Court of San Bernardino Judicial District, C. O. Thompson, J., entered judgment for plaintiff and electric power company appealed. The Appellate Department of the Superior Court, County of San Bernardino, Hilliard, J., held that evidence sustained finding that fire was proximately caused by negligent maintenance of the electric power lines extending over warehouse.

Judgment affirmed.

1. Evidence 🔑570

A trial court as the trier ot facts is not bound to accept the conclusions or opinions of any expert.

2. Appeal and Error 🔑931(1)

Reviewing court will construe evidence and resolve every substantial conflict in support of findings of trial court.

3. Appeal and Error ⚷1010(1)

If there is competent evidence to support findings and judgment of trial court, reviewing court will not substitute its evaluation or interpretation of evidence in place of ultimate facts as determined by trial court.

4. Electricity ⚷19(5)

In action against electric power company for destruction of warehouse and contents by fire allegedly caused by short circuit, during windstorm, in power lines over roof of warehouse, evidence sustained finding that wires were negligently maintained and that fire was proximately caused by negligent maintenance of power lines lacking in insulation

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Bruce Renwick, Rollin E. Woodbury and David N. Barry III, Los Angeles, for appellant.

Esther Quintana, in pro. per.

HILLIARD, Justice.

This is an appeal from a judgment awarding plaintiff-respondent damages in the sum of $1553 and costs for loss sustained in the destruction by fire of certain personal property. The complaint alleges, and the trial court found, that the fire was proximately caused by the negligent maintenance on the part of defendant-appellant Southern California Edison Company of the electric power lines serving the property occupied by respondent as a dwelling house.

At the time of the fire, on March 7, 1953, and for some time prior to this date respondent and her children were the tenants of certain residential property in the city of Ontario. Electric service was provided to these premises by defendant-appellant through the medium of three service wires leading from the main line service pole to the house, and wires connected thereto leading to the garage. These wires were strung over the roof of the garage or warehouse located between the pole and the point where such wires were attached to respondent's house. The warehouse was an old wooden building and its roof covered by tar paper or asphalt which was in a state of deterioration due to the weather and the ravages of time. Respondent utilized this warehouse primarily for the storage of certain materials, equipment and tools incident to the conduct of her trade or business as an artist and textile processor. This personal property, stored in the warehouse, was destroyed by the fire and this action brought to recover damages for such loss.

It is the contention of respondent that the appellant failed to exercise proper care in the maintenance of these wires; that, as a result thereof, the insulation or weatherproofing on the wires was permitted to decay and deteriorate; that, during a windstorm on March 7, the wires rubbed together, sagged on the roof of the warehouse, and caused a short circuit which ignited the roofing material, resulting in the fire which destroyed the building and its contents.

Appellant contends that the fire started inside the building and did not originate on the roof. In support of this contention, appellant produced certain witnesses, including the Fire Chief and the Assistant Chief Distribution Engineer of the Southern California Edison Company. The latter two witnesses were permitted to give expert testimony and expressed their opinions as to the point of origin of the fire. The trial court found adversely to appellant and rejected its theory of the cause of the fire.

[1] The sole contention advanced by appellant is that the evidence fails to support the judgment. No legal authority is cited to this court to indicate that appellant, as a public utilities company, is not obligated to maintain its service lines in a safe condition with due regard to their location and any hazard in connection therewith. We must assume, then, that such duty is imposed upon appellant under the circumstances disclosed by the testimony. The trier of facts is not bound to accept the conclusions or opinions of any expert and, in this case, the trial court obviously gave little weight or credence thereto.

[2, 3] Under elementary principles of law, too well established to require citation

of authority, the appellate court will construe the evidence and resolve every substantial conflict in support of the findings of the trial court. If there is competent evidence to support the findings and judgment, then this court will not substitute its evaluation or interpretation of the evidence in place of the ultimate facts as determined by the lower court.

[4] The testimony of respondent herself supports a finding that the wires were "worn", lacking in insulation, and in contact with the roof. As a percipient witness, she observed the wires moving in the wind, saw the spark on top of the roof, and instantly noted the flash of fire on the roof. This evidence alone sufficiently sustains the findings and judgment of the lower court.

Judgment is affirmed.